



Gender Research and Advocacy Project  
LEGAL ASSISTANCE CENTRE

Namibia  
2010

# A FAMILY AFFAIR

## The Status of Cohabitation in Namibia and Recommendations for Law Reform

**T**his report examines cohabitation relationships in Namibia. The law currently provides little protection for people who are not married but live together as a couple. The primary purpose of the study is to inform recommendations for potential law reforms in this area.

Prior to this study, there was little information about the extent of cohabitation in Namibia, people's reasons for cohabiting, and problems arising from these informal relationships. The Legal Assistance Centre's research was designed to explore people's perceptions about cohabitation as it exists in Namibian society, to determine whether there is a need for any legal protections and to provide options and recommendations for appropriate legal reforms.

This study first presents a profile of cohabitation in Namibia based on a review of the relevant literature, including prevalence, motivations and attitudes about cohabitation. After examining constitutional protections afforded to the family in light of international and comparative law, the study then considers some of the theoretical issues involved. Next, it examines the current common law and statute law on cohabitating partners and their children. It then presents the findings of qualitative field research conducted in 2002 and 2009 in seven regions of Namibia by the Legal Assistance Centre, working in conjunction with Namibia's Law Reform and Development Commission. Lastly, the study presents potential options and recommendations for law reform, drawing on the experience of a range of other countries.

Because of the close historical and legal parallels between Namibia and South Africa, special emphasis is placed on South African judicial precedent and legislation throughout the report.

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# Chapter 1

## INTRODUCTION

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Recent Namibian law reforms and reforms in progress have focused on recognising and protecting family structures that exist in practice but do not conform to traditional notions of “family”, in order to cater for the realities of Namibian experience.

For example, many years ago, having a child outside of marriage could be a serious offence in some Namibian communities;<sup>1</sup> now the Children’s Status Act 6 of 2006 and the Maintenance Act 9 of 2003 protect children born outside of marriage against discrimination. These legal changes are important in light of the fact that so many Namibian children fall into this category.

As another example, the draft Child Care and Protection Bill (under discussion at the time of writing) would legally recognise, support and protect child-headed households in certain circumstances, in order to cater for the reality that the HIV pandemic has left some family groupings without adult supervision. This bill also makes provision for informal fostering of children by extended family members (referred to in the bill as “kinship care”), in recognition of the fact that such arrangements are a common practice in Namibia. A Recognition of Customary Marriages Bill which has been proposed by the Law Reform and Development Commission would recognise customary unions as marriages for all legal purposes. Namibian lawmakers and policymakers have recognised that the law must be altered to reflect reality if it is to serve people well. Thus, legal concepts of family in Namibia are in the process of evolving.

In the same vein, lawmakers should apply a similar approach to regulating cohabitation by considering what kind of legal framework would best suit family realities. In other countries, it has been suggested that family law should focus less on the formalities of family relationships, such as whether or not a marriage has taken place, and instead regulate family relationships on the basis of functions such as mutual economic dependence.<sup>2</sup>

Cohabitation is a type of intimate relationship which is relevant to significant numbers of Namibians. While it is difficult to gauge the precise prevalence of cohabitation relationships in Namibia, the practice is certainly common. National surveys indicate that at least one-fifth of Namibians in the prime of their adulthood are living together without being formally

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<sup>1</sup> See, for example, M McKittrick with F Shingenge, “Faithful Daughter, Murdering Mother: Transgression and Social Control in Colonial Namibia” in W Woodward, P Hayes and G Minkley, eds, *Deep Histories: Gender and Colonialism in Southern Africa*, Editions Rodopi BV, 2002 at 205-ff; M McKittrick (Georgetown University), “Faithful Daughter, Murdering Mother: Transgression and Social Control in Colonial Namibia”, *The Journal of African History* (1999), 40: 265-283 Cambridge University Press; Nahas A Angula, “Namibia’s Gender Challenge”, *The Namibian*, 1 April 1999, citing M McKittrick, *Conflict and Social Change in Northern Namibia, 1850-1954*, doctoral dissertation, Stanford University, 1995. The key concern in the case discussed in these sources was a pregnancy which occurred before the woman had been initiated.

<sup>2</sup> See, for example, M Fineman, “Our Sacred Institution: The Ideal of the Family in American Law and Society”, 1993 *Utah Law Review* 387 (1993).

married, and this is likely to be an underestimate.<sup>3</sup> The lowest figure of all the national surveys considered comes from the 2001 census, which found that 7% of the population age 15 and over was living together informally. Other surveys have produced much higher figures. Even if the relatively low estimate from the 2001 census is correct, this means that over 82 000 members of the Namibian population were cohabiting at the time of the census. The inescapable conclusion is that cohabitation, and thus the law on cohabitation, affects many people.

Cohabitation is on the increase worldwide<sup>4</sup> and there is hardly a country left in the world which does not provide some measure of recognition to cohabitation.<sup>5</sup>

*...worldwide, extramarital cohabitation has become an important constituent of modern family life.*

Brigitte Clark, "Families and domestic partnerships", 119 (3) SALJ 634 (2002) at 635

## 1.1 Definition of cohabitation

This study provisionally defined cohabitation as two adults living together in a relationship resembling a marriage in some key respects, without being married under civil or customary law.

This study provisionally defined cohabitation as the situation where two adults live together in a relationship resembling a marriage in some key respects, without being married under civil or customary law.

Other definitions used in Namibia and South Africa include the following:

- *"the situation where a man and a woman decide to live together as husband and wife without getting married under civil or customary law."*<sup>6</sup>
- *"the relationship of a man and a woman who live together ostensibly as man and wife without having gone through a legal ceremony of marriage";*<sup>7</sup>
- *"a stable, monogamous relationship where a couple who do not wish to (or are not permitted to) marry, live together and share an intimate relationship";*<sup>8</sup>

<sup>3</sup> As explained in detail below, this figure applies to women between the ages of 25 and 40 and men between the ages of 30 and 45. The highest percentages of cohabitation are found in these age groups, with the highest percentages of marriages being found in slightly older age groups for both men and women.

<sup>4</sup> South African Law Reform Commission (SALRC), *Project 118: Report on Domestic Partnerships*, Pretoria: SALRC, March 2006 at paragraph 2.1.7.

<sup>5</sup> Id at paragraph 3.1.5.

<sup>6</sup> Debie LeBeau, Eunice Iiping and Michael Conte, *Women's Property and Inheritance Rights in Namibia*, Windhoek: University of Namibia, 2004 at 17.

<sup>7</sup> HR Hahlo, *The South African Law of Husband and Wife*, 5<sup>th</sup> edition, Cape Town: Juta, 1985 at 36, as cited in June D Sinclair assisted by Jacqueline Heaton, *The Law of Marriage, Volume 1*, Kenwyn: Juta & Co, Ltd, 1996 at 268.

<sup>8</sup> Brigitte Clark, "Families and domestic partnerships", 119 (3) SALJ 634 (2002) at 637.

- “a stable, more or less permanent, relationship between two persons of the opposite sex who are not married to each other (though one or both may be married to someone else) and who share living facilities”.<sup>9</sup>

As another point of comparison, recent South African research into cohabitation defined cohabitation as “a permanent, intimate partnership between two adults who live together”. The intent was to capture stable and enduring relationships which produce a sense of commitment and responsibility, as well as dependence between the parties, without using marriage as the standard. This definition did not exclude the possibility that one or both partners might have other simultaneous relationships, and it covered both opposite-sex and same-sex couples.<sup>10</sup>

Some of the possible circumstances which could fit a definition of cohabitation include:

- where one or both partners have chosen not to marry;
- where one is already married to another: the cohabitation could be a ‘second house’ relationship (ie informal polygamy), or the married partner may be separated from the legal spouse without having gotten formally divorced;
- where the cohabitants are unable to marry for some reason, such as an unacceptably close blood relation, the absence of the required parental permission or the fact that they are of the same sex;
- where the form of marriage entered into by the parties is a customary or religious marriage (such as a Muslim or Hindu marriage) which is not fully recognised in law.

Attempting to define cohabitation raises almost as many questions as it answers, including whether or not a relationship must be monogamous and if a couple must live together for a certain amount of time in order to qualify as cohabitating partners.

The definition used for this study covered both opposite-sex and same-sex couples.<sup>11</sup> It included cohabitation relationships where the man (or woman) in the partnership was cohabiting with one partner whilst being married to another. Cohabiting couples were interviewed regardless of the amount of time they had lived together.

The study did not treat persons in customary marriages as cohabiting partners, even though Namibian law does not yet recognise customary marriage for all purposes, because a law on the recognition of customary marriages – which would give customary marriages a status equal to that of civil marriages – is already under discussion.<sup>12</sup>

Many definitions of cohabitation, like our provisional one, use marriage as a point of comparison. One question which should be considered is whether marriage should remain the standard, or whether it would be preferable to aim at a complete transformation of the legal

<sup>9</sup> MD Freeman and CM Lyon, *Cohabitation without Marriage*, Aldershot: Gower, 1983 at 4; see June D Sinclair assisted by Jacqueline Heaton, *The Law of Marriage, Volume 1*, Kenwyn: Juta & Co, Ltd, 1996 at 267-268.

<sup>10</sup> Beth Goldblatt, “Regulating domestic partnerships – a necessary step in the development of South African family law”, 120 *SALJ* 610 (2003) at 611.

<sup>11</sup> As discussed in Chapter 11 on recommendations at pages 207-208, the Legal Assistance Centre would recommend that any legal frameworks which gives protection to cohabitants should apply equally to same-sex and opposite-sex cohabitants. However, the law reforms discussed in this paper could also be applied to opposite-sex cohabitants only.

<sup>12</sup> See Law Reform and Development Commission (LRDC), *Report on Customary Law Marriages* (LRDC 12), Windhoek; LRDC, 2004.



framework governing intimate relations. Monogamous civil marriage is the only form of human pairing which is recognised comprehensively in the eyes of the law.

Yet the Constitutional requirement of respect for all cultures and religions would seem to mandate respect for other kinds of marriage and family – including giving full recognition to African customary marriages as well as Muslim, Jewish and Hindu marriages. Furthermore, there are many living arrangements which do not conform to the idea of the ‘nuclear family’ which are deserving of respect as valid family structures – including cohabiting partners and more diverse family groupings, such as single-parent families and families which incorporate extended family members.<sup>13</sup>

The Namibian Constitution protects “*the family*”, without specifying what “*family*” means – which allows for legal concepts of family to evolve to fit social realities. Providing new legal protections to cohabiting partners could be a first step towards giving legal protection to vulnerable persons in a wider range of family groupings.

***The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.***

**Namibian Constitution, Article 14(3) (emphasis added)**

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<sup>13</sup> See Pierre de Vos, “Same-sex Sexual Desire and the Re-Imagining of the South African Family”, 20 (2) *SAJHR* 179 (2004) at 199.



# Chapter 2

## COHABITATION IN NAMIBIA

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This chapter is a literature review. It summarises existing information on cohabitation in Namibia.

### 2.1 Incidence of cohabitation

Namibia has a low rate of marriage, a large number of children who are born outside marriage and a significant incidence of cohabitation.

Namibia has a low rate of marriage, a large number of children who are born outside marriage and a significant incidence of cohabitation.<sup>1</sup> In fact, it has been pointed out that “sexual unions in Namibia often range on a continuum from casual sex, temporary and intermittent cohabitation, semi-permanent and permanent informal unions to formal marriage” – which points to the wide degree of diversity in Namibian relationships.<sup>2</sup>

#### 2.1.1 National studies

The most recent national surveys indicate that 7% to 15% of Namibian adults are in cohabitation relationships.

According to the 1991 census, about 12% of Namibia’s population over the age of 15 were in a cohabitation relationship.<sup>3</sup> For reasons that are unclear, the 2001 census figures showed a reduction in this rate to 7%.<sup>4</sup> The more recent *Namibia Demographic and Health Survey*

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<sup>1</sup> See Julia Pauli, “‘We all have our own father!’: Reproduction, Marriage and Gender in Rural Northwest Namibia”, in Suzanne LaFont and Dianne Hubbard (eds), *Unravelling Taboos: Gender and Sexuality in Namibia*, Windhoek: Legal Assistance Centre, 2007 (hereinafter “**Pauli**”) at 202.

<sup>2</sup> Lucy Edwards-Jauch, *AIDS and Family Structures*, Windhoek: Department of Sociology, University of Namibia, 2010 at 7.

<sup>3</sup> Republic of Namibia, *2001 Population and Housing Census: Preliminary Report*, 2002 at 12. The census report uses the term “married consensually” for cohabitation. It explains this as “persons of the opposite sex living together as husband and wife without any legal or customary ceremony”. Id at 82.

<sup>4</sup> Central Statistics Bureau, *2001 Population and Housing Census*, Windhoek: National Planning Commission, 2003 (hereinafter “**2001 Population and Housing Census**”). Individuals were categorised by the census into six types of marital status: never married, married with certificate (by civil law), married traditionally or customarily, married consensually, divorced or separated, and widowed.

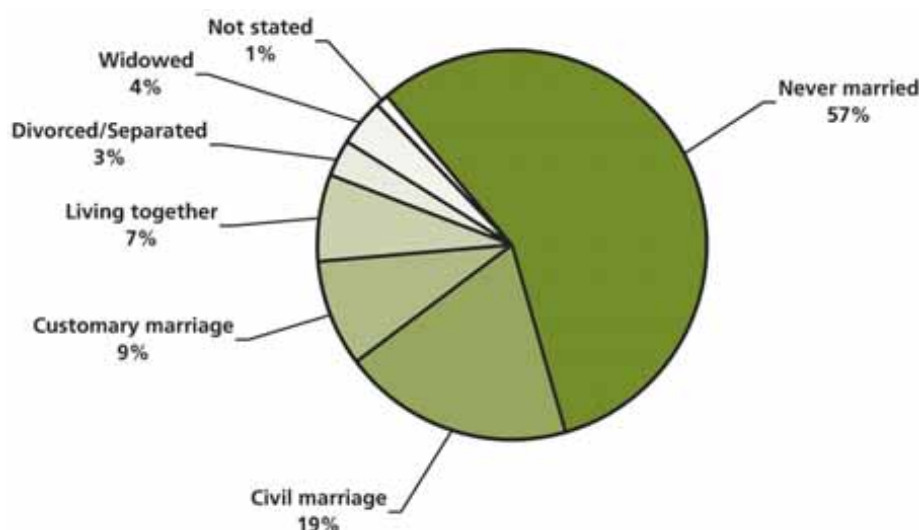
2006-2007, which is based on a national sample, found that about 15% percent of women and 13% of men between the ages of 15 and 49 were “living together” with a partner, without being formally married.<sup>5</sup> This is consistent with the findings of the *Namibia Demographic and Health Survey 2000*, which found that about 16% of women and 13% of men surveyed were informally cohabiting.<sup>6</sup>

#### MARITAL STATUS – Namibia National Census 2001, population age 15 and above by sex

| MARITAL STATUS           | NUMBER         |                |            |                  | PERCENT      |              |              |
|--------------------------|----------------|----------------|------------|------------------|--------------|--------------|--------------|
|                          | Female         | Male           | Not Stated | Total            | Female       | Male         | Total        |
| Never married            | 300 540        | 324 683        | 7          | 625 230          | 51.9         | 60.9         | 56.2         |
| Married with certificate | 109 889        | 103 258        | 5          | 213 152          | 19.0         | 19.4         | 19.2         |
| Married traditionally    | 58 138         | 46 437         |            | 104 575          | 10.0         | 8.7          | 9.4          |
| Consensual union         | 43 916         | 38 191         | 1          | 82 108           | 7.6          | 7.2          | 7.4          |
| Divorced/Separated       | 22 427         | 8 358          |            | 30 785           | 3.9          | 1.6          | 2.8          |
| Widowed                  | 38 873         | 5 654          | 1          | 44 528           | 6.7          | 1.1          | 4.0          |
| Not stated               | 5 219          | 6 230          | 20         | 11 469           | 0.9          | 1.2          | 1.0          |
| <b>Total</b>             | <b>579 002</b> | <b>532 811</b> | <b>34</b>  | <b>1 111 847</b> | <b>100.0</b> | <b>100.0</b> | <b>100.0</b> |

Source: Based on 2001 Population and Housing Census, Table 2.5, page 26.

#### MARITAL STATUS – Namibia National Census 2001, population age 15 and above by sex



#### MARITAL STATUS – Namibia Demographic and Health Survey 2006-07, national sample age 15-49 by sex

| BACKGROUND CHARACTERISTIC | WOMEN        |              | MEN          |              | WEIGHTED %   |              |
|---------------------------|--------------|--------------|--------------|--------------|--------------|--------------|
|                           | Weighted     | Unweighted   | Weighted     | Unweighted   | Women        | Men          |
| <b>Marital status</b>     |              |              |              |              |              |              |
| Never married             | 5 673        | 5 545        | 2 545        | 2 507        | 57.9         | 65.0         |
| Married                   | 1 949        | 2 003        | 708          | 699          | 19.9         | 18.1         |
| Living together           | 1 501        | 1 572        | 498          | 530          | 15.3         | 12.7         |
| Divorced/Separated        | 426          | 412          | 151          | 160          | 4.3          | 3.9          |
| Widowed                   | 252          | 269          | 12           | 18           | 2.6          | 0.3          |
| Missing                   | 3            | 3            | 1            | 1            | 0.0          | 0.0          |
| <b>Total</b>              | <b>9 804</b> | <b>9 804</b> | <b>3 915</b> | <b>3 915</b> | <b>100.0</b> | <b>100.0</b> |

Source: Based on Namibia Demographic and Health Survey 2006-07, Table 3.1, page 26.

<sup>5</sup> Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek: MoHSS, August 2008 (hereinafter “*Namibia Demographic and Health Survey 2006-07*”) at 25-26 and 75.

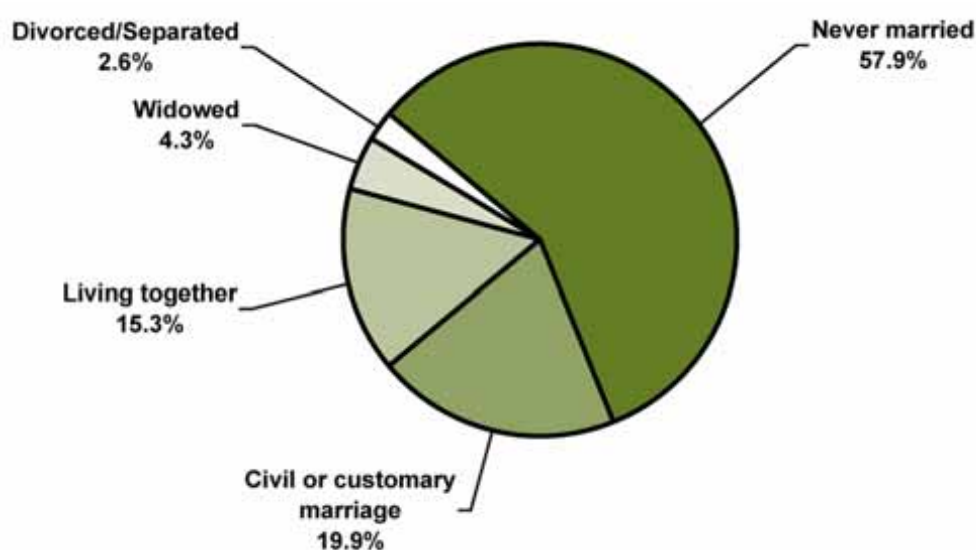
<sup>6</sup> Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2000*, Windhoek: MoHSS, October 2003 (hereinafter “*Namibia Demographic and Health Survey 2000*”) at 25-26 and 79. This survey referred to such arrangements as “consensual unions”.

**MARITAL STATUS – Namibia Demographic and Health Survey 2000,  
national sample age 15-49 by sex**

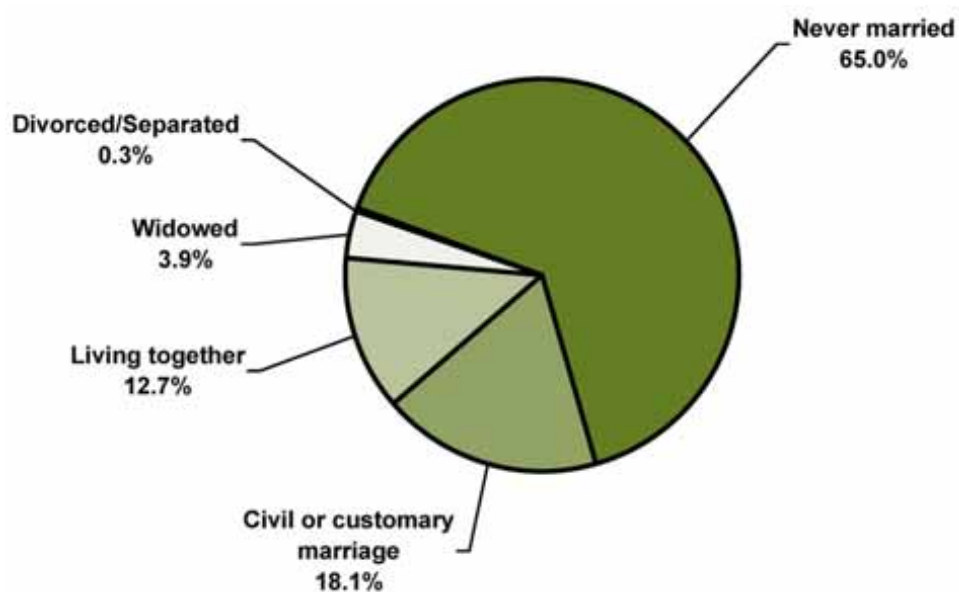
| BACKGROUND<br>CHARACTERISTIC   | NUMBER OF WOMEN |              | NUMBER OF MEN |              | WEIGHTED %   |             |
|--------------------------------|-----------------|--------------|---------------|--------------|--------------|-------------|
|                                | Weighted        | Unweighted   | Weighted      | Unweighted   | Women        | Men         |
| <b>Marital status</b>          |                 |              |               |              |              |             |
| Never married                  | 3 667           | 3 401        | 1 764         | 1 600        | 54.3         | 59.7        |
| Married                        | 1 532           | 1 582        | 669           | 697          | 22.7         | 22.6        |
| With certificate               | 1 096           | 1 156        | 462           | 520          | (16.2)       | (15.7)      |
| By custom                      | 436             | 426          | 207           | 177          | (6.5)        | (7.0)       |
| Consensual union               | 1 078           | 1 245        | 378           | 487          | 16.0         | 12.8        |
| Divorced/separated/<br>widowed | 478             | 527          | 143           | 170          | 7.1          | 4.8         |
| <b>Total</b>                   | <b>8 287</b>    | <b>8 337</b> | <b>3 623</b>  | <b>3 651</b> | <b>100.1</b> | <b>99.9</b> |

Source: Namibia Demographic and Health Survey 2000, Table 2.12, page 26.

**MARITAL STATUS OF WOMEN – Namibia Demographic and Health Survey 2006-07,  
national sample age 15-49**



**MARITAL STATUS OF MEN – Namibia Demographic and Health Survey 2006-07,  
national sample age 15-49**



The lowest national figures on the incidence of cohabitation come from a much smaller survey of the members of 1862 selected households in all 13 regions in 2000. This survey found the following with reference to both male and female household members:

- almost 36% had never married;
- 16% were married in either civil or customary marriages: 10% were in civil marriages and 6% were in customary marriages (with 0.6% of these being polygamous);
- 3% were informally cohabiting;
- 1.5% were divorced or separated;
- 3% were widowed; and
- the remaining 41% were recorded as being “too young to have married”.<sup>7</sup>

The distinctions between these findings and the other sets of statistics presented here is probably attributable to the different age range and the different sampling technique (which focused on households rather than individuals, and recorded the marital status of every person in the household). Thus, the findings of this study are difficult to compare with those from other national samples.

## 2.1.2 *Regional distinctions*

**There are dramatic regional differences in cohabitation and marital status, but it is difficult to discern clear patterns. According to the 2001 census, cohabitation is most popular in Otjozondjupa, Omaheke and Kunene Regions and least popular in Caprivi Region.**

**The gap between the percentage of people in any type of marriage and cohabitants is smallest in Omaheke (where only 8% more of the population is married than cohabiting) and largest in Oshikoto (where 60% more of the population is formally married than cohabiting).**

**The complex regional differences suggest that cultural preferences may be a relevant factor in the choice of conjugal relationship.**

The most recent census presents cohabitation data for the thirteen different regions. As discussed on page 5, approximately 7% of people in Namibia are in cohabiting relationships. However, this average sits within a broad range. The highest percentages of people in cohabiting relationships are found in the Otjozondjupa and Omaheke Regions (13% each), followed by the Kunene Region (12%). The lowest percentage of people in cohabiting relationships is in the Caprivi Region (2%).<sup>8</sup>

The most common marital status in all regions is “never married” (national average 56%, with a regional range from 39% to 63%).

<sup>7</sup> EM Ipinge, FA Phiri and AF Njabali, *The National Gender Study, Volume I*, Windhoek: University of Namibia, 2000 at 29-30. The age used to calculate “too young to have married” is not given in the report, but appears from accompanying data to have probably been below age 15.

<sup>8</sup> *2001 Population and Housing Census* at 4-17.

| Region       | Percentage of people married consensually (cohabitation) |
|--------------|--|
| Otjozondjupa | 13%  |
| Omaheke      | 13%  |
| Kunene       | 12%  |
| Erongo       | 10%  |
| Hardap       | 9%   |
| Kavango      | 8%   |
| Karas        | 8%   |
| Oshikoto     | 7%   |
| Khomas       | 7%   |
| Oshana       | 6%   |
| Ohangwena    | 4%   |
| Omusati      | 4%   |
| Caprivi      | 2%   |

**Source:** Based on 2001 Population and Housing Census at 4-17.

An assessment of marital status for Otjozondjupa, Omaheke and Kunene shows that a similar proportion of people in those regions live in various types of conjugal relationships (civil marriage, customary marriage, and cohabitation).

On the other hand, in Kavango, Oshikoto and Caprivi there are interesting contrasts between the percentages of people cohabiting and the percentages of people in customary marriages (see table below). In the Caprivi and Kavango Regions, the percentage of people who are divorced or separated is the highest for Namibia (6% in both regions). The percentage of persons in customary marriages in the Caprivi Region is far above the national average (34% compared to a national average of 9%); in contrast, cohabitation (2% compared to a national average of 7%), never married (46% compared to a national average of 56%) and married with a certificate (5% compared to a national average of 18%) are all very low (the first, third and second lowest for Namibia, respectively).

Thus, for the Caprivi Region, cohabitation and civil marriage are both far less favoured than customary marriage. In contrast, in the neighbouring Kavango Region, a larger percentage of people are cohabiting or married under civil law than in Caprivi (with cohabitation in Kavango being 8% compared to Caprivi's 2%), even though the incidence of customary marriages in Kavango is also high (29% compared to a national average of 9%). These complex patterns mean that one cannot say, for example, that cohabitation is replacing customary marriage, or that it is more or less popular in regions where customary marriage is popular.

| Region       | Percentage of people cohabiting | Percentage of people married under customary law | Difference |
|--------------|---------------------------------|--|------------|
| Otjozondjupa | 13%                             | 10%  | +3%        |
| Omaheke      | 13%                             | 8%   | +5%        |
| Kunene       | 12%                             | 17%  | -5%        |
| Kavango      | 8%                              | 29%  | -21%       |
| Oshikoto     | 7%                              | 45%  | -38%       |
| Caprivi      | 2%                              | 34%  | -32%       |

**Source:** Based on 2001 Population and Housing Census at 4-17.

The percentage of people cohabiting is similar to the percentage of people in civil marriages in Otjozondjupa, Omaheke and Kunene – which have varying rates of customary marriage (lower than cohabitation in Otjozondjupa and Omaheke, but somewhat higher in Kunene). Customary marriages are considerably more common than cohabiting relationships in Kavango, Oshikoto and Caprivi.

The percentage of people in civil marriages is 10-20 percentage points higher than the percentage of people in cohabiting relationships in most regions (Hardap, Karas, Khomas, Oshikoto, Omusati, Erongo, Oshana and Ohangwena). The five regions where civil marriages and cohabitation are similar (Kavango, Caprivi, Otjozondjupa, Omaheke and Kunene) are regions where either customary marriage is high, or where there is a general mix of marital status.

Looking at any form of formal marriage compared to informal cohabitation, the gap is smallest in Omaheke (where only 8% more of the population is married than cohabiting), followed by Otjozondjupa (where 12% more are married), Erongo (where 16% more are married), Kunene (where 17% more are married), and Oshana (where 18% more are married in both regions). The gap is largest by far in Oshikoto (where 60% more of the population is formally married than cohabiting).

The dramatic regional differences suggest that whilst both civil marriage and customary marriage are more common than cohabiting, conjugal status appears to be influenced at least in part by cultural preferences.<sup>9</sup>

| Region         | Married consensually (cohabitation) (%) | Married with certificate (civil marriage) (%) | Married traditionally (customary marriage) (%) | Never married (%) | Divorced/ Separated (%) | Widowed (%) |
|----------------|---|---|--|-------------------|-------------------------|-------------|
| <b>Namibia</b> | <b>7</b>                                | <b>19</b>                                     | <b>9</b>                                       | <b>56</b>         | <b>3</b>                | <b>4</b>    |
| Otjozondjupa   | 13                                      | 15  | 10   | 55                | 2                       | 3           |
| Omaheke        | 13                                      | 13  | 8  | 60                | 2                       | 3           |
| Kunene         | 12                                      | 12  | 17   | 52                | 2                       | 4           |
| Erongo         | 10                                      | 24  | 2  | 57                | 2                       | 3           |
| Hardap         | 9                                       | 30  | 1  | 54                | 2                       | 4           |
| Kavango        | 8                                       | 13  | 29   | 39                | 6                       | 6           |
| Karas          | 8                                       | 29  | 3  | 55                | 1                       | 3           |
| Oshikoto       | 7                                       | 22  | 45   | 59                | 2                       | 4           |
| Khomas         | 7                                       | 24  | 3  | 61                | 2                       | 2           |
| Oshana         | 6                                       | 20  | 4  | 63                | 2                       | 4           |
| Ohangwena      | 4                                       | 17  | 9  | 59                | 4                       | 6           |
| Omusati        | 4                                       | 19  | 8  | 60                | 3                       | 5           |
| Caprivi        | 2                                       | 5   | 34   | 46                | 6                       | 5           |

Source: Based on 2001 Population and Housing Census at 4-17.

| Region         | Married consensually (cohabitation) (%) | Married with certificate or traditionally (civil or customary marriage) (%) | Never married (%) | Divorced/ Separated (%) | Widowed (%) |
|----------------|---|---|-------------------|-------------------------|-------------|
| <b>Namibia</b> | <b>7</b>                                | <b>28</b>   | <b>56</b>         | <b>3</b>                | <b>4</b>    |
| Otjozondjupa   | 13                                      | 25  | 55                | 2                       | 3           |
| Omaheke        | 13                                      | 21  | 60                | 2                       | 3           |
| Kunene         | 12                                      | 29  | 52                | 2                       | 4           |
| Erongo         | 10                                      | 26  | 57                | 2                       | 3           |
| Hardap         | 9                                       | 31  | 54                | 2                       | 4           |
| Kavango        | 8                                       | 42  | 39                | 6                       | 6           |
| Karas          | 8                                       | 32  | 55                | 1                       | 3           |
| Oshikoto       | 7                                       | 67  | 59                | 2                       | 4           |
| Khomas         | 7                                       | 27  | 61                | 2                       | 2           |
| Oshana         | 6                                       | 24  | 63                | 2                       | 4           |
| Ohangwena      | 4                                       | 26  | 59                | 4                       | 6           |
| Omusati        | 4                                       | 27  | 60                | 3                       | 5           |
| Caprivi        | 2                                       | 39  | 46                | 6                       | 5           |

Source: Based on 2001 Population and Housing Census at 4-17.

<sup>9</sup> It is estimated that 90.9% of people in Namibia are either Protestant or Roman Catholic. *Namibia Demographic and Health Survey 2006-07* at table 3.1.



### 2.1.3 Regional studies

Several recent localised studies have found that the rates of cohabitation and marriage are about equal in some study populations, whilst cohabitation is about half as common as marriage in several other study populations.

More localised studies of family arrangements conducted at points spanning a longer time period have varying figures on the incidence of cohabitation, but show that it is not a new phenomenon.

For example, comparative studies of Katutura in the 1960s and the 1990s found that about 20% of the households studied in both periods were formed by couples living together informally, compared to about 24% who were married in the 1960s and about 47% who were married in the 1980s. (The study attributed the increase in marriage between the two studies to an improved economic situation, which meant that the cost of marriage was not so great a barrier as it had been in the past.)<sup>10</sup>

A 1994 study that surveyed 600 female respondents in three sites in north-central Namibia found that 7% to 8% reported that they were living in a “*non-formalized union*”, compared to 32% who indicated that they were married.<sup>11</sup>

A study undertaken in 2004 to investigate the relationship between HIV/AIDS and female migration to Windhoek involved 712 interviews of randomly-selected men and women between the ages of 21 and 35 in four different informal settlements in Windhoek: Goreangab, Okahandja Park, Hakahana and Greenwell Matongo. In this population, there was more cohabitation than marriage: 15.5% of the respondents reported that they were cohabiting with a partner as compared to only 13.4% who were married. This outcome may, of course, have been influenced by the fact that the study population was made up of female migrants who may have been living separate from extended family members or husbands, and thus unwilling or unable to marry.<sup>12</sup>

<sup>10</sup> Wade C Pendleton, *Katutura: A Place Where We Stay, Life in a Post-Apartheid Township in Namibia: Katutura Before and Now*, Windhoek: Gamsberg Macmillan, 1994 (hereinafter “**Pendleton**”) at 80-82. The data on marital status from the 1960s appears to be based primarily on examinations of public records (housing cards and marriage records), supplemented by interviews with 100 individuals. The 1991 data comes from a 1991 Katutura Survey which collected data on 1865 individuals in 369 households. Id, Appendices I and II at 124-ff.

<sup>11</sup> Namibia Development Trust (NDT), Social Impact Assessment and Policy Analysis Corporation-Namibia (SIAPAC-Namibia), Friedrich Ebert Stiftung (FES) and Centre for Applied Social Studies (CASS), *Improving the Legal and Socio-economic Situation of Women in Namibia. Uukwambi, Ombalantu and Uukwanyama Integrated Report*, Windhoek: NDT, 1994 at 23-24. The figures for “living in a non-formalised union which is not a second house relationship” were 7.3% for Uukwanyama, 7.7% for Ombalantu and 8.3% in Uukwambi. This is probably an underestimate; the researchers speculated that some women who referred to themselves as being single may have been in “second house” relationships. There is some limited information in this report on the dynamics of such relationships (at 31, 34-35 and 44-45), but this is drawn only from a limited number of case studies (methodology described at 16-17).

North-central Namibia is considered to be more “traditional” than the rest of the country. Anecdotal evidence from 2009 LAC research suggests the NDT study might not be representative, as women in north-central Namibia may be more prone to under-report instances of cohabitation. It was quite difficult to assemble focus groups in this region for this reason.

<sup>12</sup> Lucy Edwards, *HIV/AIDS, Poverty and Patriarchy: A Gendered Perspective*, Windhoek: !Nara Training Centre, 2004 at 11-12, 47.



The highest incidence of cohabitation in the studies examined was reported in a very small 2006 study which interviewed 150 adults age 30 and up, all with children between the ages of 10 and 19, in the Kavango, Omaheke and Ohangwena Regions:

- almost half of this sample (47%) reported being married
- almost 23% said that they were living together with a partner
- 3% were in a relationship but not living together
- 7% were divorced or separated
- 21% were single

There was a significant sex discrepancy in respect of cohabitation: 19% of the men in the sample were cohabiting, whilst 25% of the women in the sample were cohabiting.<sup>13</sup> The study also shows an unusually high rate of marriage, probably because it sampled an older group than most of the other studies discussed here. The small sample size and the high sample age in this study mean that it is difficult to compare to the others discussed in this report.

A 2006-2007 survey covering 1680 randomly-selected individuals in eight regions (Caprivi, Erongo, Karas, Kavango, Kunene, Ohangwena, Omaheke and Otjozondjupa) also found high levels of cohabitation, with almost equal numbers of respondents cohabiting (19%) as being married (20%).<sup>14</sup>

| MARITAL STATUS – 2006-07 SIAPAC survey in eight regions |     |
|---|-----|
| Married – monogamy                                      | 19% |
| Married – polygamy                                      | 1%  |
| Cohabiting  | 19% |
| Single (never married)                                  | 57% |
| Divorced / permanently separated                        | 3%  |
| Widowed   | 2%  |

**Source:** Social Impact Assessment Policy Analysis Corporation (SIAPAC), *Knowledge, Attitudes and Practices Study on Factors that may Perpetuate or Protect Namibians from Violence and Discrimination: Caprivi, Erongo, Karas, Kavango, Kunene, Ohangwena, Omaheke and Otjozondjupa Regions*, Windhoek: Ministry of Gender Equality and Child Welfare, 2009 at A3.<sup>15</sup>

This study also noted a general increase in relationships between unmarried men and women since independence, of which cohabitation is but one manifestation:

*“Virtually all [focus group] participants in all regions agreed that relationships between unmarried women and men have increased dramatically since independence. This type of relationship was felt to have not been very prevalent in the past, as it was heavily frowned upon. ‘In the past, there was great respect between partners before they got married, but now this respect is lacking in many relationships, resulting in increased physical and mental abuse’ among unmarried partners.”*<sup>16</sup>

<sup>13</sup> Research Facilitation Services, *Knowledge, Attitudes, Practice and Behaviour Study*, Windhoek: UNICEF, 2006 at 22-23.

<sup>14</sup> Social Impact Assessment Policy Analysis Corporation (SIAPAC), *Knowledge, Attitudes and Practices Study on Factors that may Perpetuate or Protect Namibians from Violence and Discrimination: Caprivi, Erongo, Karas, Kavango, Kunene, Ohangwena, Omaheke and Otjozondjupa Regions*, Windhoek: Ministry of Gender Equality and Child Welfare, 2009, Table A1, Report Annexes.

<sup>15</sup> This table is based on data from a survey of 210 adult males and females (aged 18-49) in each of eight regions studied, for a total sample of 1 680 persons (half men and half women) drawn from Table A1 in Report Annexes, rounded to nearest whole percentage. Id at 3.

<sup>16</sup> Id at 57.

## 2.1.4 Understanding the statistics

The studies probably under-represent the true incidence of cohabitation because of persisting negative social perceptions of cohabitation.

Even those studies that report the highest rates of cohabitation probably under-represent the true number of Namibian cohabitants. An analysis of the situation in South Africa notes that census figures on cohabitation (which showed that 5% of the South African population over the age of 14 were cohabiting in 1996, rising to 8% of the population in the 2001 census<sup>17</sup>) may be under-counting for a number of reasons. Firstly, married people who are also cohabiting with a different partner will probably describe themselves as married rather than cohabiting since marriage is seen as being generally more socially acceptable. Secondly, unmarried people may not admit that they are cohabiting because of the perceived negative social connotations of this unofficial status. Thirdly, many same-sex cohabitants are probably unwilling to identify their relationship because of homophobia in society. Fourthly, the prevalence of cohabitation would probably be much higher if the sample population were limited to adults instead of including relatively young teens together with adults. Fifthly, different interviewees may have interpreted questions regarding cohabitation differently, as the subject is complicated and very culture-specific.<sup>18</sup> These factors are likely also relevant in Namibia.

Another indicator which suggests that the Namibian studies probably undercount the actual percentage of cohabiting Namibians is the low percentage of the population which reported being married in the same studies. The 2001 census reported that less than 29% of the population over the age of 15 were currently married in either a civil or customary marriage, while 56% reported that they had never married.<sup>19</sup> Similarly, the *Namibia Demographic and Health Survey 2006-2007* found that only about 20% of women and 18% of men surveyed (between the ages of 15 and 49) were married at the time of the survey, while the majority of respondents had never been married (58% of women and 65% of men).<sup>20</sup> Both studies found that only small percentages of respondents were divorced, separated or widowed.<sup>21</sup> As one recent study put it, “*In Namibia, the rate of marriage has been historically low and is decreasing*”, suggesting that this raises questions about how social and sexual relations in contemporary Namibian society are changing and the impact such low levels of marriage may have on the incidence of multiple or concurrent partnerships.<sup>22</sup> It is reasonable to assume that many members of a large unmarried population will have some stable intimate relationships which involve cohabitation.

<sup>17</sup> Beth Goldblatt, *Cohabitation and Gender in the South African Context – Implications for Law Reform*, Johannesburg: Centre for Applied Legal Studies, University of the Witwatersrand, 2001 at 8; South African Law Reform Commission (SALRC), *Project 118: Report on Domestic Partnerships*, Pretoria: SALRC, March 2006 at 21; 2001 census figure from *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at paragraph 119. See also <[www.statssa.gov.za](http://www.statssa.gov.za)>.

<sup>18</sup> Beth Goldblatt, *Cohabitation and Gender in the South African Context – Implications for Law Reform*, Johannesburg: Centre for Applied Legal Studies, University of the Witwatersrand, 2001 at 8.

<sup>19</sup> *2001 Population and Housing Census*, Table 2.5 at 26.

<sup>20</sup> *Namibia Demographic and Health Survey 2006-07* at 25-26 and 75.

<sup>21</sup> Only about 7% of the population in the 2001 census reported being divorced, separated or widowed in the 2001 census, and only 7% of women and 4% of men reported being in these categories in the *Namibia Demographic and Health Survey 2006-07*. See page 6.

<sup>22</sup> Debie LeBeau and P Stanley Yoder, *Alcohol Consumption, Sexual Partners, and HIV Transmission in Namibia*, Calverton, Maryland, USA: US-AID, 2009 (hereinafter “**LeBeau & Yoder**”) at 7-8.

## MARITAL STATUS OVER TIME in Namibia Demographic and Health Surveys (sample age 15-49/59)

| Marital Status  | 1992       | 2000  |      | 2006-07 |      |
|-----------------|------------|-------|------|---------|------|
|                 | Women only | Women | Men  | Women   | Men  |
| Never married   | 51%        | 54%   | 60%  | 58%     | 65%  |
| Married         | 27%        | 23%   | 23%  | 20%     | 18%  |
| Living together | 15%        | 16%   | 13%  | 16%     | 13%  |
| Divorced        | 3%         | 1%    | 1%   | 1%      | 0.5% |
| Separated       | 2%         | 4%    | 4%   | 3%      | 3%   |
| Widowed         | 1%         | 2%    | 0.3% | 3%      | 0.3% |

**Source:** Based on Ministry of Health and Social Services, *Namibia Demographic and Health Survey 1992*, Table 2.7, page 16; *Namibia Demographic and Health Survey 2000*, Table 5.1, page 79; *Namibia Demographic and Health Survey 2006-07*, Table 6.1, page 75. The 1992 survey included only women between the ages of 15 and 49. The 2000 survey included women between the ages of 15 and 49 and men between the ages of 15 and 59, whilst the 2006-07 survey sampled men and women between the ages of 15 and 49.

**The Namibia Demographic and Health Survey 2006-07 found that more than one-fifth of women between the ages of 25 and 40 were “living together” with someone, with the same broad percentages applying to men between the ages of 30 and 45.**

The Demographic and Health Surveys provide a useful breakdown of marital status by age, which shows that cohabitation is most common in individuals in the prime of adulthood. The breakdown from the most recent survey in 2006-07 is shown in the table below. This breakdown indicates that more than one-fifth of women between the ages of 25 and 40 are “living together” with someone, with the same broad percentages applying to men between the ages of 30 and 45.<sup>23</sup> The highest percentages of cohabitation are found in these age groups, with the highest percentages of marriages being found in slightly older age groups for both men and women – which suggests that some couples may be living together prior to getting married.

## MARITAL STATUS BY SEX AND AGE, Namibia Demographic and Health Survey 2006-07

| MARITAL STATUS  | AGE GROUP |       |       |       |       |       |       |             |
|-----------------|-----------|-------|-------|-------|-------|-------|-------|-------------|
|                 | 15-19     | 20-24 | 25-29 | 30-34 | 35-39 | 40-44 | 45-49 | Total 15-49 |
| <b>Women</b>    |           |       |       |       |       |       |       |             |
| Never married   | 95%       | 76%   | 55%   | 40%   | 31%   | 26%   | 17%   | 58%         |
| Married         | 1%        | 5%    | 17%   | 32%   | 38%   | 42%   | 47%   | 20%         |
| Living together | 4%        | 16%   | 22%   | 21%   | 21%   | 15%   | 15%   | 15%         |
| Divorced        | 0%        | 0%    | 0%    | 2%    | 1%    | 4%    | 4%    | 1%          |
| Separated       | 0%        | 2%    | 5%    | 4%    | 5%    | 6%    | 6%    | 3%          |
| Widowed         | 0%        | 0%    | 1%    | 2%    | 4%    | 8%    | 12%   | 3%          |
| Missing         | 0%        | 0%    | 0%    | 0%    | 0%    | 0%    | 0%    | 0%          |
| <b>Men</b>      |           |       |       |       |       |       |       |             |
| Never married   | 100%      | 87%   | 65%   | 48%   | 34%   | 21%   | 17%   | 65%         |
| Married         | 0%        | 2%    | 12%   | 22%   | 39%   | 55%   | 60%   | 18%         |
| Living together | 0%        | 8%    | 16%   | 22%   | 23%   | 18%   | 16%   | 13%         |
| Divorced        | 0%        | 0%    | 0%    | 1%    | 1%    | 1%    | 3%    | 1%          |
| Separated       | 0%        | 3%    | 6%    | 7%    | 4%    | 3%    | 3%    | 3%          |
| Widowed         | 0%        | 0%    | 0%    | 1%    | 0%    | 1%    | 2%    | 0%          |
| Missing         | 0%        | 0%    | 0%    | 0%    | 0%    | 0%    | 0%    | 0%          |

**Source:** Based on Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek: MoHSS, August 2008, Table 6.1, page 75.

<sup>23</sup> *Namibia Demographic and Health Survey 2006-07*, Table 6.1 at 75. The *Namibia Demographic and Health Survey 2000* similarly indicated that about 22% of women between the ages of 25 and 40 and about 21% of men between the ages of 30 and 45 were in a “consensual union”. Table 5.1 at 79.

Looking at the data from another angle, even if we accept the statistics from the 2001 census, which gives the lowest percentage of cohabitation of all the large-scale surveys considered, this still means that over 82 000 Namibians were cohabiting at the time of that census – not an inconsiderable number by any means.

It seems safe to say that a significant proportion of the Namibian population is currently cohabiting.

Even taking the statistics from the 2001 census, which gives the lowest percentage of cohabitation of all the large-scale surveys considered, this still means that over 82 000 Namibians were cohabiting at the time of that census.

## 2.2 The historical background to cohabitation

Historical influences on cohabitation include contract labour, and patterns of economic activity which still in the post-independence era lead to extensive rural-urban migration in search of employment, particularly by men. It has also been speculated that informal cohabitation with multiple partners may be gradually replacing polygamy.

It is important to remember the historical background which has affected family life in Namibia. The system of **contract labour** imposed during the colonial era had the effect of separating husbands and wives, as men from rural areas were recruited to provide labour on farms, in mines and factories and as domestic servants. Women were excluded from the contract labour system, and male workers were not allowed to bring their families along, as the colonial authorities wished to prevent migration into the white settlement areas. Often, migrant workers were able to see their families in the rural areas only once a year (or even less frequently), so it is not surprising that many migrant workers established relationships with other women in urban areas – often establishing a second household that in many cases included children.<sup>24</sup>

The economic patterns set during the colonial era persist in the post-independence era, as economic opportunities are still concentrated in urban areas while many families maintain a home base in the rural areas where there is access to communal land – and where the

<sup>24</sup> See, for example, Ndeutala Hishongwa, *The Contract Labour System and its Effects on Family and Social Life in Namibia: A Historical Perspective*, Windhoek: Gamsberg Macmillan, 1992; Heike Becker, *Namibian Women's Movement 1980 to 1992*, Frankfurt: Verlag für Interkulturelle Kommunikation, 1993, at 94-ff; and B Hango-Rummukainen, "Gender and Migration: Social and Economic Effects on Women in Owambo (1890-1940)" in Eunice Ipinge & Marlene Williams (eds), *Gender and Development*, Windhoek: Pollination Publishers, 2000 at 78-79.

It has been estimated that over 50 000 Namibian workers were employed under the contract labour system in the mid-1970s. Heike Becker, *Namibian Women's Movement 1980 to 1992*, Frankfurt: Verlag für Interkulturelle Kommunikation, 1993 at 95.

economic activities of women are dominated by subsistence agriculture. **Migration in the post-independence era** is still predominantly male, although the number of women moving to urban areas in search of employment has increased since independence.<sup>25</sup>

Formal relationships were in some cases prohibited by the **laws against inter-racial marriage**. The Prohibition of Mixed Marriages Act 55 of 1949 banned marriage and cohabitation between whites and non-whites, and amendments to the Immorality Amendment Act 21 of 1950 went even further and prohibited sexual relations between whites and non-whites. As one commentator notes, “*this Act gave the police the power to spy on people, hunt them down, invade their homes, enter their bedrooms and confiscate their bed sheets and underwear as evidence...*”; “*...[a]partheid effectively pushed interracial gender and sexuality underground.*”<sup>26</sup> This situation obviously drove some relationships underground, which may have a persisting influence on the attitudes of some people toward formalising their relationships.

Another persisting colonial influence can be seen in the fact that, even now in post-independence Namibia, **the common law does not give full recognition to customary unions or Muslim marriages** – which prevents some people from receiving recognition of the marriage rites and ceremonies appropriate to their beliefs. In some cases people have combined their own forms of marriage with civil marriage just to get the requisite “piece of paper” required for various administrative purposes, but in other cases marriage-like relationships have simply remained outside the legal framework.

Another issue to consider is that **cohabitation may be gradually replacing polygamy**. The *Namibia Demographic and Health Survey 2006-2007* found that 6% of currently-married women were in a polygamous union and had co-wives, showing a sharp decrease over the 2000 survey where the proportion of women in polygamous unions with co-wives was double (12%)<sup>27</sup> – and raising the possibility that polygamous relationships may be becoming less formal in nature. A 1995 study of customary marriage in Namibia found a growing trend for formal polygamous unions to be replaced by “second house” relationships, where a married man sets up house with another woman without following any civil or customary formalities.<sup>28</sup> Another indication that this could be the case is the discrepancy noted between men and women surveyed in reporting polygamy. The *Namibia Demographic and Health Survey 2000* remarked that substantially more women than men reported that they were in polygamous relationships; whilst this is no doubt partly due to the fact that polygamy in Namibia by its

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<sup>25</sup> See Volker Winterfeldt, “Labour Migration in Namibia – Gender Aspects” in V Winterfeldt, T Fox & Pempelani Mufume, eds, *Namibia\* Society\* Sociology*, Windhoek: UNAM, 2002 at 64; Lucy Edwards, *HIV/AIDS, Poverty and Patriarchy: A Gendered Perspective*, Windhoek: !Nara Training Centre, 2004 at 24: “*An interesting result, and one that confirms findings of other studies, is that female migration has increased since Independence. A gender disaggregation of the number of years in Windhoek shows that as the years pass, more and more women are migrating and that female migration has doubled in the last two years.*”

See also Herbert Jauch, Lucy Edwards and Braam Cupido, *A Rich Country with Poor People: Inequality in Namibia*, Windhoek: Labour Resource and Research Institute, 2009 at 17, which notes that despite the fact that influx control ended with independence, “*labour migration still results in split households where co-residence only occurs for limited periods during the year*”.

<sup>26</sup> Suzanne LaFont, “Overview of Gender and Sexuality in Namibia”, in Suzanne LaFont and Dianne Hubbard (eds), *Unravelling Taboos: Gender and Sexuality in Namibia*, Windhoek: Legal Assistance Centre, 2007 at 14-15.

<sup>27</sup> *Namibia Demographic and Health Survey 2006-07* at 76.

<sup>28</sup> Heike Becker and Manfred Hinz, *Namibia Papers No. 30: Marriage and Customary Law in Namibia*, Windhoek: Centre for Applied Social Studies (CASS), 1995 (hereinafter “**Becker & Hinz**”) at 35 and 63 and note 140.



nature involves more women than men,<sup>29</sup> the researchers noted that women may be more likely to identify their husbands' 'girlfriends' as 'wives'.<sup>30</sup>

## 2.3 Why do people cohabit?

Previous studies indicate that there are a range of reasons for cohabitation in Namibia.

There are numerous explanations for why people cohabit. Historical factors which have created a propensity for cohabitation have been discussed above, but there are also other issues at play.

Many people cohabit to save costs on living expenses or to test the relationship before formalising it.<sup>31</sup> Some cohabitants erroneously believe that the law already protects cohabitants or that they are legally married after they have lived together for a period of time.<sup>32</sup> Many cohabitants say that they would prefer to marry, but do not do so for a variety of reasons, often because the man does not want to formalise the union (usually because he does not wish to share assets with the woman) or because he cannot afford to pay the traditional bride price (*lobola*).<sup>33</sup>

Some couples live together as a prelude to marriage, often while they are saving for the expenses attendant upon marriage.<sup>34</sup> In fact, a number of studies have suggested that the high costs of getting married are correlated to the reduction in marriage rates.<sup>35</sup> Traditional church weddings are costly (entailing food and drink for many guests as well as special clothes), and customary marriages can involve expensive gifts and *lobola*.<sup>36</sup> An elaborate marriage has become a badge of wealth and status. According to one author, "*Marriage has become an expression of a certain elite lifestyle and as such serves to mark the border between a small*

<sup>29</sup> Men may have multiple wives in many Namibian communities, but there is no community which recognises a right for women to have multiple husbands.

<sup>30</sup> *Namibia Demographic and Health Survey 2000* at 80. A similar discrepancy between men and women is evident in the 2006-07 survey (where over 6% of women and only 3% of men surveyed reported that they were currently party to a marriage which involved multiple wives), but was not commented upon. *Namibia Demographic and Health Survey 2006-07*, Table 6.2 at 77.

<sup>31</sup> See also Canadian HIV/AIDS Legal Network, *Respect, Protect and Fulfil: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property Issues*, Toronto: Canadian HIV/AIDS Legal Network, 2009 at 2-1.

<sup>32</sup> Interview with former GIPF legal adviser, 2009. See also Beth Goldblatt, *Cohabitation and Gender in the South African Context – Implications for Law Reform*, Johannesburg: Centre for Applied Legal Studies, University of the Witwatersrand, 2001 at 35-36.

<sup>33</sup> "Buying my Bride", *The Namibian Weekender*, 26 June 2009; see also Canadian HIV/AIDS Legal Network, *Respect, Protect and Fulfil: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property Issues*, Toronto: Canadian HIV/AIDS Legal Network, 2009 at 2-1 to 2-3.

<sup>34</sup> For example, a study of Katutura in the early 1990s found the following with respect to the Herero community in Katutura: "A couple might start their relationship by living together, but then conduct a magistrate's marriage due to social pressure. Later, when they have saved enough money for a church marriage, they may even marry in church. Herero who still wish to contract a traditional marriage may find it necessary to also get legally married on account of the need for a marriage certificate." Pendleton at 87.

<sup>35</sup> Pauli at 201-03, referencing several studies of specific ethnic groups.

<sup>36</sup> *Lobola* is the customary practice of making a payment in cattle, cash or goods to the bride's family. It is sometimes referred to as "brideprice".

*minority of wealthy and married persons and an overwhelming majority of more or less poor and unmarried persons.*<sup>37</sup>

Some may prefer the privacy of informal arrangements, where it is not necessary to obtain the permission or blessing of relatives. Cohabitation sometimes occurs in situations where relatives have refused to sanction a church marriage or customary marriage. The couple may also like the fact that they are free to terminate the relationship without consulting anyone about this step.<sup>38</sup>

Some women avoid marriage in an attempt to avoid the male domination so often associated with marriage. They may wish to protect their independence, particularly if they have income-earning opportunities on their own, and fear that marriage might entail losing decision-making autonomy or control over their own income.<sup>39</sup> They may also fear being tied to an abusive spouse. Some women see no benefits to marriage. For example, a woman interviewed in Fransfontein in a study that took place between 2003-2005 said:

*Men? I don't even have doubts about men anymore. You know the father of my first child, the father of my second child, the father of my last two children, they all disappointed me very, very much. It's maybe from there on that I got a feeling of 'no' to marriage.*<sup>40</sup>

This woman stressed that since she can feed herself and her children, she has no need to live with a man who is not supportive.<sup>41</sup> Conversely, some men have complained that women's increasing sense of equality has caused a breakdown in social norms, with women no longer interested in marriage, but focusing instead on maintaining their own economic security and *"sleeping with many men to get money for maintenance"*.<sup>42</sup>

In contrast, since Namibian women are generally poorer than men and often financially dependent upon men, the decision not to marry is often forced on them. It is considered culturally inappropriate in most of Namibia's ethnic groups for a woman to initiate a discussion of marriage.<sup>43</sup> The men in the relationships may be reluctant to make the commitment of marriage. There are also some men who prefer the freedom of an informal arrangement, since *"a partner does not have the right to question his or her co-partner's behaviour"*.<sup>44</sup> In some cases, the man in question may already have a wife elsewhere;<sup>45</sup> in fact, in the Namibian economic climate, one of the complicating issues surrounding cohabitation is that the situation may pit vulnerable

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<sup>37</sup> Pauli at 203.

<sup>38</sup> Pendleton at 80-81.

<sup>39</sup> See Pauli at 200-01, who cites several Namibian studies which have made this finding. See also LeBeau & Yoder at 32.

<sup>40</sup> Pauli at 208.

<sup>41</sup> Ibid.

<sup>42</sup> Social Impact Assessment Policy Analysis Corporation (SIAPAC), *Knowledge, Attitudes and Practices Study on Factors that may Perpetuate or Protect Namibians from Violence and Discrimination: Caprivi, Erongo, Karas, Kavango, Kunene, Ohangwena, Omaheke and Otjozondjupa Regions*, Windhoek: Ministry of Gender Equality and Child Welfare (MGE CW), 2009 at 55.

<sup>43</sup> Pendleton at 81.

<sup>44</sup> See id at 80; according to Pendleton, this reason was given by many men in Katutura in the early 1990s as a justification for not wanting to marry.

<sup>45</sup> See LeBeau & Yoder at 64:

*One of the most striking findings of this research is the large proportion of informants who have one main sexual partner who lives far away, and one or more local partners at the same time. The need to move to other regions for employment separates sexual partners and facilitates having concurrent sexual relationships, thus greatly increasing HIV transmission.*



women against each other, with the wife and the cohabiting partner competing for the male wage-earner's resources.

Some couples may live together without formally marrying in order to retain benefits which might otherwise be lost – such as maintenance from a divorce which would end upon remarriage.<sup>46</sup>

Other couples simply do not believe in formalising their relationship through marriage.<sup>47</sup>

The declining rate of marriage may also mean that, since many children grow up in a family environment that does not include both a mother and a father, marriage is not a readily available model to be copied.<sup>48</sup>

A 1994 study provides a very detailed and interesting description of why people choose not to marry in the southern communal areas of Namibia, citing various social and economic reasons:

*Since marriage is a family matter, men are sometimes concerned that they will be unable to carry the social and financial burden of a marriage, ie meet the expectations and demands of their future wife's family. They therefore prefer to maintain a loose partnership until they are in a position to meet these demands.*

*Mothers, on the other hand, sometimes discourage their daughters from getting married on the grounds that once married a daughter will not be as easily able to financially support her mother since her income will have to be shared with her husband.*

*Among educated women, conflicting gender roles were cited as the main obstacle preventing marriage: women felt that their lifestyle and independence would be constrained because the man would automatically assume the traditional position of head of household. The fact that men are often loath to marry women who are better educated than they are or who earn better salaries also prevents some women from marrying.*

*A further deterrent to marriage is the fear that a new partner might not get along with the children the woman already has.*

*Parents' disapproval of the partner may also serve as a deterrent.*

*Women also complained that there is a shortage of responsible men, ie men who are employed and do not abuse alcohol.*

*Women are also often unaware of the fact that the father of their child is already married or that he has other children. In other instances, the relationship had already ended by the time the woman realised that she was pregnant, or she felt that she was too young for marriage, or the father denied paternity.<sup>49</sup>*

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<sup>46</sup> See South African Law Reform Commission (SALRC), *Project 118: Report on Domestic Partnerships*, Pretoria: SALRC, March 2006 at paragraph 2.2.14.

<sup>47</sup> See Canadian HIV-AIDS Network, *Respect, Protect and Fulfil: Legislating for Women's Rights in the Context of HIV/AIDS, Volume Two: Family and Property Issues*, Toronto: Canadian HIV/AIDS Legal Network, 2009 at 2-1.

<sup>48</sup> More than 50% of adolescents in Namibia are growing up with single mothers. Pandu Hailonga-van Dijk, "Adolescent Sexuality: Negotiating between Tradition and Modernity", in Suzanne LaFont and Dianne Hubbard (eds), *Unravelling Taboos: Gender and Sexuality in Namibia*, Windhoek: Legal Assistance Centre, 2007 at 145.

The 2000 and 2006-07 Demographic and Health Surveys found that only a little over a quarter of Namibian children are living with both of their parents. *Namibia Demographic and Health Survey 2000* at 11-12; *Namibia Demographic and Health Survey 2006-07* at 255-256.

<sup>49</sup> A Iken, M Maasdorp and C Solomon, *Socio Economic Conditions of Female-Headed Households and Single Mothers in the Southern Communal Areas of Namibia*, SSD Research Report 17, Windhoek: Social Sciences Division, Multi-Disciplinary Research Centre, University of Namibia, 1994 at 82-83.

## 2.4 Attitudes about cohabitation

Although there are differing opinions about cohabitation, some of the terms for it in indigenous languages, and various investigations into community attitudes, indicate that it still attracts widespread social disapproval in some communities whilst being well-tolerated in others.

Cohabitation may be common, but that does not mean that it is universally condoned. The terms used in indigenous languages to describe cohabitation sometimes carry negative connotations. For example, Nama/Damara terms which are used to describe cohabitation include “*≠nû gomes !ameb*” or “*≠nû- gomas üib*”. These terms literally mean “black cattle marriage” and “black cattle life” and arise from the fact that cohabitation outside of marriage has been viewed, particularly in the past, as a dirty practice. An Oshiwambo word for informal cohabitation is “*okwootekwa*”, which means “staying together illegally”.

On the other hand, some communities use more judgement-neutral terms for cohabitation, such as the Nama term “*hâ-lhaos*” and the Afrikaans term “*saamelewes*” (both of which mean simply “living together”), the Nama/Damara term “*soregu hâ*” (which refers to “people who are dating for a long time”) and the Otjiherero word “*otjiwoteka*” (which refers to “a fixed girlfriend” and is not confined to the situation where a couple lives under one roof).<sup>50</sup> In Rukwangali two terms for cohabitation were mentioned during the research – “*sihorwa*”, meaning simply “love”, and “*kulisikisa*”, which according to one person interviewed, “means ‘girl invites and introduces the boy (man) to her parents’. They welcome the man and call him ‘tamuae’. This is quite common with poor families where the ‘tamuae’ supports the girl’s family financially.”<sup>51</sup>

Attitudes about cohabitation appear to differ. For example, several studies have found that cohabitation is generally accepted in Herero communities. An anthropological study based on research carried out in Omatjette in the late 1980s concluded that “*Herero couples have often lived together for years before they formally marry. Owing to the frequency of such concubinal unions and their apparent general acceptance in Herero society the distinction between formal marriage and long-term living-together arrangements have to a large extent become blurred*”.<sup>52</sup> A 1995 study similarly found “*that non-formalised living-together relationships play a big role*” and were considered to be “*socially acceptable*” among Herero living in Katutura and rural Herero living in central Namibia.<sup>53</sup> However, this same study found that cohabitation relationships were disapproved of by Owambo communities in Katutura:

*Oshiwambo-speaking Katutura residents do not approve of non-formalised unions and are involved in such relationships to a lesser extent than residents belonging to other communities. There is a strong sentiment among Owambo that living together is “not the right thing to do”.*<sup>54</sup>

<sup>50</sup> Information from persons interviewed by LAC and LAC staff members. See also Becker & Hinz at 89 and Pendleton at 81-82.

<sup>51</sup> The information on Namibian terms for cohabitation comes from the 2002 UNAM study and the 2002 field research described in Chapter 10.

<sup>52</sup> HP Steyn, “Huwelikspatrone by die Herero van Omatjette, Namibie”, in *South African Journal of Ethnology/Suid-Afrikaanse Tydskrif vir Etnologie*, Vol 14, No 3, 1991 at 86, as quoted in Becker & Hinz at 78.

<sup>53</sup> Becker & Hinz at 78 and 89.

<sup>54</sup> Id at 76.

A social anthropologist who interviewed some 200 women in Khorixas in 2005-06 reported that whilst most of these women, particularly the older ones, dreamt of being married, only 15-20% of them were actually married.<sup>55</sup> Couples often lived together for many years and had all their children before they got married, and marriage usually took place only when people were in their late thirties or even older. The women interviewed for this study acknowledged that marriage does not guarantee faithfulness, but they generally said that they would feel safer in a relationship with legal status.<sup>56</sup>

In contrast, a woman interviewed in Katutura in 2008 identified little difference between marriage and cohabitation:

*Some people go to the magistrate, others to church. But Oshiwambo people just get together. [Sometimes men] put you in a Kambashu [shanty house]. You just live together. You can even stay together for ten years. It's just like marriage, but the only difference is there is no legal paper.*<sup>57</sup>

Similarly, it was reported in the early 1990s that in Katutura, “*there is very little stigma attached to or social sanction against couples living together*” – although formal marriage would carry some social status, and there was often social pressure in the church environment for couples to formalise their relationships.<sup>58</sup>

Prior to independence there were some economic advantages to marriage. For example, it was easier for married couples to obtain housing in urban areas, and a marriage certificate often gave some protection to a woman in an urban area who had no identification papers. It is also reported that white employers often encouraged their black employees to get married in a civil marriage, thus promoting Western values about marriage.<sup>59</sup> These factors, combined with church disapproval of informal cohabitation, probably increased the sense that informal cohabitation was an inferior and undesirable status.

During the LAC's interviews, a Damara woman's response reflected a common attitude about cohabitation when she stated that “*...it is common. It is a black cultural thing. Even though it is a sin, people cohabit anyway*”. As discussed in more detail below, the LAC's 2009 research indicated that, although attitudes may be changing, most cohabitants feel as though community members still generally disapprove of their relationships.

One disturbing fact about cohabitation in Namibia is that it tends to be a common site of domestic violence. A 2003 study of women in Windhoek found that the prevalence of violence was higher for Namibian women who were cohabiting with partners than for married women.<sup>60</sup>

<sup>55</sup> Martina Gockel-Frank, “The gift from God: Reproductive Decisions and Conflicts of Women in Modern Namibia”, in Suzanne LaFont and Dianne Hubbard (eds), *Unravelling Taboos: Gender and Sexuality in Namibia*, Windhoek: Legal Assistance Centre, 2007 at 188.

<sup>56</sup> Ibid.

<sup>57</sup> LeBeau & Yoder at 29.

<sup>58</sup> Pendleton at 81. Pendleton reports that cohabiting couples in Katutura in the early 1990s would be forced to sit at the back in the Lutheran church, and prohibited from taking communion. The Lutheran and Catholic churches would not baptise the children of couples who were not formally married. The African Methodist Episcopal Church also encouraged marriage but would baptise the first three children of a cohabiting couple.

<sup>59</sup> Id at 83-84.

<sup>60</sup> Ministry of Health and Social Services (MoHSS), *An Assessment of the Nature and Consequences of Intimate Male-Partner Violence in Windhoek, Namibia: A sub-study of the WHO multi-Country Study on Women's Health and Domestic Violence*, Windhoek: MoHSS, 2003 at 24.

# Chapter 3

## CONSTITUTIONAL BACKGROUND

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The Namibian Constitution protects the family, prohibits discrimination on the basis of sex and social status, and provides for the right to dignity. Court cases in Namibia and South Africa show that all these rights are relevant to cohabitation.

One of the key provisions of the Namibian Constitution with respect to cohabitation is Article 14 on “*Family*”, which protects both marriage and the undefined concept of “*family*”.

### **Article 14 – Family**

- (1) *Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social economic status shall have **the right to marry and to found a family**. They shall be entitled to equal rights as to **marriage**, during marriage and at its dissolution.*
- (2) ***Marriage** shall be entered into only with the free and full consent of the intending spouses.*
- (3) *The **family** is the natural and fundamental group unit of society and is entitled to protection by society and the State.<sup>1</sup>*

This constitutional provision is almost identical to Article 23 of the International Covenant on Civil and Political Rights:

### **Article 23**

- (1) *The **family** is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
- (2) *The right of men and women of marriageable age **to marry and to found a family** shall be recognized.*
- (3) *No **marriage** shall be entered into without the free and full consent of the intending spouses.*
- (4) *States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during **marriage** and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.<sup>2</sup>*

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<sup>1</sup> Emphasis added.

<sup>2</sup> Emphasis added. See *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC) at 145C-D: “*The International Covenant on Civil and Political Rights... has almost identical provisions in its Article 23 in regard to the “family” [as] the Namibian Constitution in its Art. 14. The only difference is that the sequence of the sub-paragraphs [has] been changed in the Namibian Constitution.*”

It also has some resonance with the statement in Article 18(1) of the African Charter on Human and Peoples' Rights that "*the family shall be the natural unit and basis of society*".<sup>3</sup>

Other relevant Namibian Constitutional provisions include Article 10, which provides that all people are equal before the law and explicitly forbids discrimination on the grounds of sex, creed or social status (amongst other grounds).<sup>4</sup> Arguably, the prohibition on discrimination on the basis of social status includes a ban on discrimination on the ground of marital status, although this issue has not yet been canvassed by Namibian courts. The prohibition on sex discrimination is relevant because, in practice, the dearth of legal protections for cohabitants usually disadvantages women. Article 8(1), which states that the "*dignity of all persons shall be inviolable*" also protects the rights of cohabitants because the basic human dignity of those who cohabit is at stake when the laws do not respect and protect their fundamental life choices.

## 3.1 Family and cohabitation in international law

International law recognises and protects the myriad varieties of families that exist in practice, including families in the form of unmarried cohabitating couples. Comments and recommendations officially interpreting the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women, have explicitly stated that the protections for the family in these conventions apply to women in cohabitation relationships.

International law on family and cohabitation is important to Namibia – firstly, because public international law and binding international agreements become part of the law of Namibia by virtue of Article 144 of the Namibian Constitution,<sup>5</sup> and secondly, because international law serves as a guide to the meaning of "*family*" in Article 14 of the Namibian Constitution.

The South African Constitutional Court's brief survey of international treatment of marriage and the family in its judgment certifying the new South African Constitution provides a useful starting point.<sup>6</sup>

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<sup>3</sup> Emphasis added.

<sup>4</sup> Namibian Constitution, Article 10(2): "*No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.*"

<sup>5</sup> Article 144 states: "*Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.*"

<sup>6</sup> During South Africa's transition to democracy, the Constitutional Court was called upon to certify that the Constitution was consistent with the principles agreed to by the negotiating parties. The Constitutional Court explained the history of these principles in its certification judgment:

*[12] One of the deadlocks [in talks between the previous minority government of the Republic of South Africa and the liberation movements], a crucial one on which the negotiations all but foundered, related to the formulation of a new constitution for the country. All were agreed that such an instrument was necessary and would have to contain certain basic provisions. Those who negotiated this commitment were confronted, however, with two problems. The first arose from the fact that they were not elected to their positions in consequence of any free and verifiable elections and that it was therefore necessary to have this commitment articulated in a final constitution adopted by a credible body properly mandated to do so in consequence of free and fair elections*



*From a survey of international instruments it is clear that, in general, states have a duty, in terms of international human rights law, to protect the rights of persons freely to marry and to raise a family. The rights involved are expressed in a great variety of ways with different emphases in the various instruments. Thus the African Charter on Human and Peoples' Rights expressly protects the right to family life (article 18), but says nothing about the right to marriage. Similarly the Convention on the Elimination of All Forms of Discrimination against Women departs from many other international documents by emphasising rights of free choice, equality and dignity in all matters relating to marriage and family relations (article 16), without referring at all to the family as the basic unit of society.*

*A survey of national constitutions in Asia, Europe, North America and Africa shows that the duty on the states to protect marriage and family rights has been interpreted in a multitude of different ways. There has by no means been universal acceptance of the need to recognise the rights to marriage and to family life as being fundamental in the sense that they require express constitutional protection.*

*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, 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*

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*based on universal adult suffrage. The second problem was the fear in some quarters that the constitution eventually favoured by such a body of elected representatives might not sufficiently address the anxieties and the insecurities of such constituencies and might therefore subvert the objectives of a negotiated settlement. The government and other minority groups were prepared to relinquish power to the majority but were determined to have a hand in drawing the framework for the future governance of the country. The liberation movements on the opposition side were equally adamant that only democratically elected representatives of the people could legitimately engage in forging a constitution: neither they, and certainly not the government of the day, had any claim to the requisite mandate from the electorate.*

*[13] The impasse was resolved by a compromise which enabled both sides to attain their basic goals without sacrificing principle... Instead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government, established and functioning under an interim constitution agreed to by the negotiating parties, would govern the country on a coalition basis while a final constitution was being drafted. A national legislature, elected (directly and indirectly) by universal adult suffrage, would double as the constitution-making body and would draft the new constitution within a given time. But – and herein lies the key to the resolution of the deadlock – that text would have to comply with certain guidelines agreed upon in advance by the negotiating parties. What is more, an independent arbiter would have to ascertain and declare whether the new constitution indeed complied with the guidelines before it could come into force.*

*Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) at paragraphs 12-13. A similar process took place during Namibia's transition to independence and democracy, albeit without the mechanism of an interim Constitution.*

*Constitutional Principle II stated that "[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution...". See Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC), Annexure 2. Therefore, as part of the certification process, the Court had to ensure that the Constitution embodied all universally accepted fundamental rights*

*During the certification process, some objected that the proposed Constitution contained no provision recognising the family as the basic unit of society, and no explicit protection for the right to marry and to establish family life. Id at paragraphs 22-23. These objections prompted the Constitutional Court to consider the international context pertinent to the right to marriage and family life. Id at paragraph 96.*

*constitute a marriage deserving of constitutional protection. Thus, some cultures and faiths recognise only monogamous unions while others permit polygamy. These are seen as questions that relate to the history, culture and special circumstances of each society, permitting of no universal solutions.*<sup>7</sup>

The diversity of family forms noted by the South African Constitutional Court was emphasised in a General Comment<sup>8</sup> on Article 23 of the **International Covenant on Civil and Political Rights**,<sup>9</sup> which noted the existence of various forms of “family”:

*The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23. Consequently, State parties should report on how the concept and scope of the family is construed or defined in their own society and legal system. Where diverse concepts of the family, “nuclear” and “extended”, exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.*<sup>10</sup>

A subsequent General Comment emphasised the need to include “unmarried couples” in the concept of family, along with single parents, and to ensure that women in these family contexts get equal treatment with similarly-situated men:

*In giving effect to recognition of the family in the context of article 23, it is important to accept the concept of the various forms of family, including unmarried couples and their children and single parents and their children and to ensure the equal treatment of women in these contexts. Single parent families frequently consist of a single woman caring for one or more children, and States parties should describe what measures of support are in place to enable her to discharge her parental functions on the basis of equality with a man in a similar position.*<sup>11</sup>

Diverse, culturally specific forms of family are similarly protected by the **International Covenant on Economic, Social, and Cultural Rights**. Article 10(1) expressly requires that States Parties accord the “widest possible protection and assistance . . . to the family, which is the natural and fundamental group unit of society”. This protection encompasses a broad definition of family; the Committee on Economic Social and Cultural Rights, the body charged

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<sup>7</sup> Id at paragraphs 97-99 (footnotes omitted). See also *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 paragraph 29.

<sup>8</sup> Article 28 of the Covenant provides for the establishment of a Human Rights Committee consisting of eighteen independent experts, nominated and elected by states parties to the Covenant. This Human Rights Committee monitors implementation by examining periodic reports from states parties to the Covenant. It also issues “General Comments” from time to time which explain its interpretation of specific articles of the Covenant.

<sup>9</sup> Article 23 is reproduced above at page 22.

<sup>10</sup> Human Rights Committee, *General Comment 19: Protection of the family, the right to marriage and equality of the spouses (Art 23)*, HRI/GEN/1/Rev.2 (1990) at paragraph 2.

<sup>11</sup> Human Rights Committee, *General Comment 28: Equality of rights between men and women (Article 3)*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000) at paragraph 27.



with officially interpreting this Convention, has stated that “*the term ‘family’ should be interpreted broadly and in accordance with appropriate local usage*”.<sup>12</sup>

A similarly broad concept of family is found in the **UN Convention on the Rights of the Child**. Discussing the Convention’s use of the term “*family environment*”, the UN Committee on the Convention on the Rights of the Child has stated that the Convention reflects “*different family structures arising from various cultural patterns and emerging family relationships*” and “*refers to various forms of families, such as the extended family, and is applicable in a variety of families such as the nuclear family, re-constructed family, joint family, single-parent family, common-law family [referring to cohabitation] and adoptive family*”.<sup>13</sup>

Cohabitation has received more detailed attention under the **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**, in one of the General Recommendations of the Committee on the Elimination of Discrimination Against Women which monitors compliance with the Convention.<sup>14</sup>

Article 16 of CEDAW states that “*States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations...*”. The Committee’s 1994 General Recommendation on equality in marriage and family relations emphasised the need to ensure that women receive equal treatment in all the diverse forms of family relations:

*The form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires.*<sup>15</sup>

The same general recommendation noted the following concerns about the treatment of women in informal cohabitation relationships, which it referred to as “*de facto*” relationships:

*...generally a **de facto union** is not given legal protection at all. Women living in such relationships should have their **equality of status with men** both in family life and in the **sharing of income and assets** protected by law. Such women should share equal*

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<sup>12</sup> Committee on Social, Economic and Cultural Rights, *General Comment 5: Persons with Disabilities*, UN Doc. E/C.12/1994/13 (1994) at paragraph 30; see also Committee on Social, Economic and Cultural Rights, *General Comment 12: The right to adequate food (art. 11)*, UN Doc. E/C.12/1999/5 (1999) at paragraph 1 (“*The human right to adequate food is of crucial importance for the enjoyment of all rights. ... [T]he reference ... to ‘himself and his family’ does not imply any limitation upon the applicability of this right to individuals or to female-headed households.*”); Committee on Social, Economic and Cultural Rights, *General Comment 4: The right to adequate housing*, E/1992/23 (1991) at paragraph 6 (“*The right to adequate housing applies to everyone. ... [T]he phrase [‘himself and his family’ in Article 11(1)] cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. Thus, the concept of ‘family’ must be understood in a wide sense.*”).

<sup>13</sup> See UN Committee on the Rights of the Child, “Fortieth Session: Day of General Discussion, Children without Parental Care”, CRC/C/153, 17 March 2006 at paragraph 644 (emphasis added).

<sup>14</sup> This Committee issues General Recommendations from time to time. These serve as important guides to the interpretation of CEDAW, and indicate how some of the articles of CEDAW have been amplified, what practical measures should be taken to implement them and what information state reports should include on specific articles.

<sup>15</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No 21: Equality in marriage and family relations*, HRI/GEN/1/Rev.7 (1994) at paragraph 13.

*rights and responsibilities with men for the care and raising of dependent children or family members.*<sup>16</sup>

*... any law or custom that grants men a right to a greater **share of property at the end of a marriage or de facto relationship**, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.*<sup>17</sup>

*There are countries that do not acknowledge that **right of women to own an equal share of the property** with the husband during a marriage or **de facto relationship** and when that marriage or relationship ends. Many countries recognize that right, but the practical ability of women to exercise it may be limited by legal precedent or custom.*<sup>18</sup>

*In many States, including those where there is a community-property regime, there is no legal requirement that a **woman be consulted when property owned by the parties during [a] marriage or de facto relationship is sold or otherwise disposed of**. This limits the woman's ability to control disposition of the property or the income derived from it.*<sup>19</sup>

*In many countries, **property accumulated during a de facto relationship** is not treated at law on the same basis as property acquired during marriage. Invariably, **if the relationship ends**, the woman receives a significantly lower share than her partner. Property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged.*<sup>20</sup>

The Committee accordingly recommended that States Parties should enact and enforce legislation to comply with Article 16 of the Convention.<sup>21</sup>

The European Court of Human Rights has provided recognition to cohabitating partners. Article 8 of the European Convention on Human Rights protects the “*right to respect for . . . private life and family*”. The European Court has expressly determined that the concept of “family” under Article 8 “*is not confined solely to marriage-based relationships and may encompass other de facto ‘family’ ties where the parties are living together outside of marriage*”.<sup>22</sup> Thus, “*a couple who have lived together for many years constitute a ‘family’ for the purposes of Article 8 § 1 of the Convention and are entitled to its protection notwithstanding the fact that their relationship exists outside marriage*”.<sup>23</sup>

<sup>16</sup> Id at paragraph 18 (emphasis added).

<sup>17</sup> Id at paragraph 28 (emphasis added).

<sup>18</sup> Id at paragraph 30 (emphasis added).

<sup>19</sup> Id at paragraph 31 (emphasis added).

<sup>20</sup> Id at paragraph 33 (emphasis added).

<sup>21</sup> Id at paragraph 49.

<sup>22</sup> *Keegan v Ireland*, no 16969/90, § 41, ECHR 1994; see also *Elsholz v Germany*, no 25735/94, §43, ECHR 2000 (“The Court recalls that the notion of family under this provision is not confined to marriage-based relationships and may encompass other de facto “family” ties where the parties are living together out of wedlock.”); *Kroon v The Netherlands*, no 18535/91, §30, ECHR 1994 (“[T]he Court recalls that the notion of “family life” in Article 8 (art. 8) is not confined solely to marriage-based relationships and may encompass other de facto “family ties” where parties are living together outside marriage.”).

<sup>23</sup> *Petrov v Bulgaria*, no 15197/02, §51, ECHR 2008, citing *Velikova v Bulgaria* (dec.), no 41488/98, ECHR 1999-V (extracts); see also *Johnston and Others v Ireland*, no. 9697/82, §55-56, ECHR 1986 (concluding that Article 8 protects “illegitimate” families, ie those based on an unmarried rather than a married couple, and therefore an unmarried couple who had cohabitated for fifteen years constitutes a family for the purposes of Article 8).

Moreover, the European Court's jurisprudence allows for the concept of family to evolve to suit realities on the ground. Rather than considering legal formalities alone, the Court has decided on a more contextualised approach: "*In the Court's opinion, 'respect' for 'family life' requires that biological and social reality prevail over a legal presumption which... flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone.*"<sup>24</sup> Thus, "[w]hen deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means".<sup>25</sup> Although the European Court's judgments are obviously not binding on Namibia, its judgments nonetheless reflect the strong trend in international law towards recognizing diverse forms of family life based on social realities.

Thus, it would seem that international law on marriage and the family obligates Namibia to give increased protection to cohabitation relationships.

**International law on marriage and the family obligates Namibia to give increased protection to cohabitation relationships, since the current legal framework is insufficient to ensure equity between cohabiting partners.**

## 3.2 Namibian constitutional cases

There is little Namibian jurisprudence on cohabitation. The *Frank* case refused to give the relationship of a same-sex couple the same status as a marriage for the purposes of permanent residence, but left open many other questions about various kinds of cohabitation. The *Detmold* and *Frans* cases gave recognition to some non-traditional family forms (adoptive parents and children and children born outside marriage).

There is to date only one Constitutional case which has addressed cohabitation. The **2001 *Frank* case**<sup>26</sup> dealt with the role of a lesbian relationship between a foreigner and a Namibian citizen in the foreign partner's application for permanent residence. Ms Frank argued that if her relationship with a Namibian citizen had been a heterosexual one, she could have married and would have been able to reside in Namibia or to apply for citizenship as the spouse of a Namibian citizen. She asserted that the failure to afford her comparable rights in her lesbian relationship implicated the constitutional right to equality in Article 10 and the protection of the family in Article 14.<sup>27</sup>

<sup>24</sup> *Kroon v The Netherlands*, no 18535/91, §40, ECHR 1994.

<sup>25</sup> *X, Y, and Z v United Kingdom*, no 21830/93, §36, ECHR 1997. Indeed, under the European Court's approach, current cohabitation is not necessary in order for a couple to constitute a family provided other factors are present. Thus, a child born to a couple that were cohabitating at her conception but separate by the time of her birth is nonetheless part of a family unit with both of her parents. See, for example, *Keegan v Ireland*, no 16969/90, §44, ECHR 1994; *Berrehab v the Netherlands*, 10730/84, §20-21, ECHR 1988.

<sup>26</sup> *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC).

<sup>27</sup> The right to privacy in Article 13(1) and the right to reside and settle in, and leave and return to, Namibia in Article 21(1)(h)-(i) were also raised, but these were rather summarily rejected by the Court as being irrelevant and farfetched. At 147A-E and 148G.

With respect to Article 10, the Court noted that Article 10(2) does not expressly prohibit discrimination on the grounds of “sexual orientation”<sup>28</sup>, and indicated (somewhat obliquely) that the term “sex” in this provision does not encompass “sexual orientation”.<sup>29</sup> Turning to Article 10(1), the Court concluded without further discussion that there is no unfair discrimination because “[e]quality before the law for each person does not mean equality before the law for each person’s sexual relationships”.<sup>30</sup> This finding was elaborated in the Court’s consideration of whether Ms Frank’s right to dignity had been violated, where it noted that the state’s failure to afford the same treatment in respect of permanent residence to “an undefined, informal and unrecognized lesbian relationship with obligations different from that of marriage” as compared to “a recognized marital relationship” amounts to differentiation, but not discrimination.<sup>31</sup>

The Court found Article 14 inapplicable on the ground that the “family” protected by it “envisages a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race”.<sup>32</sup>

The focus on procreation as a defining feature of the concept of “family” is problematic. Family units can and often do comprise many groupings not defined by procreative potential, such as siblings, aunts or uncles and their nieces or nephews, cousins, single parents and children, single grandparents and children, and child-headed households – just to name a few of the myriad household compositions one might find in Namibia. The Canadian Supreme Court has criticised the use of procreation as a pre-requisite for “family”:

*The argument is that procreation is somehow necessary to the concept of family and that same-sex couples cannot be families as they are incapable of procreation. Though there is undeniable value in procreation, the Tribunal could not have accepted that the capacity to procreate limits the boundaries of family. If this were so, childless couples and single parents would not constitute families. Further, this logic suggests that adoptive families are not as desirable as natural families. The flaws in this position must have been self-evident. Though procreation is an element in many families, placing the ability to procreate as the inalterable basis of family could result in an impoverished rather than an enriched version.*<sup>33</sup>

<sup>28</sup> Id at 149I.

<sup>29</sup> The Court stated: “Whereas the word ‘sex’ can be defined as ‘being male or female’, or ‘males or females as a group’, ‘sexual orientation’ could encompass in theory ‘any sexual attraction of anyone towards anyone or anything’. The prohibition against discrimination on the grounds of sexual orientation is so wide, that a case may even be made out for decriminalizing the crime of bestiality, particularly, when done in private”. Id at 149G-H (citation omitted).

The Court also notes “in passing” that the International Covenant on Civil and Political Rights specifies ‘sex’ as one of the grounds on which discrimination is prohibited but not ‘sexual orientation’. Id at 145E-F. In fact, in March 1994 (before Namibia’s ratification of the Covenant), the Human Rights Committee charged with monitoring the Covenant stated that the references to “sex” in the provisions on discrimination are “to be taken as including sexual orientation”. *Toonen v Australia* Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

<sup>30</sup> *Frank* 2001 NR 107 (SC) at 155E-F. For a more detailed discussion of the court’s application of the equality clause, see Dianne Hubbard, “The paradigm of equality in the Namibian Constitution: Concept, contours and concerns” in Anton Bösl, Nico Horn and Andre du Pisani, eds, *Constitutional Democracy in Namibia; A Critical Analysis After Two Decades*, Windhoek: Konrad-Adenauer Stiftung, 2010.

<sup>31</sup> *Frank* 2001 NR 107 (SC) at 155I-156C.

<sup>32</sup> Id at 146F-G.

<sup>33</sup> *Canada (Attorney-General) v Mossop* [1993] 1 SCR 554 at 710C-E (per L’Heureux-Dubé J), quoted in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, 2000 (2) SA 1 (CC) at paragraph 52.



Moreover, defining the family unit in terms of childbearing seems in tension with Namibia's international commitments, which seem to require recognition and protection for all kinds of families as they exist in practice.

It is not clear what the *Frank* case would mean for some future constitutional challenge to the failure to afford appropriate protections to cohabiting relationships. It may be that a male-female cohabiting couple might have more success in utilising Article 14(3), given the *Frank* case's comments on the nature of the "family" contemplated by that Article. It may also be the case that an attempt to establish constitutional protection for either same-sex or opposite-sex relationships might have more success in a context which does not involve a discretionary decision such as a grant of permanent residence.

At the moment, there is little other Namibian jurisprudence to guide us on cohabitation. However, comments made by the High Court suggest that there is scope for a more generous interpretation of "family".

In the **2004 *Detmold* case**<sup>34</sup>, the High Court examined a provision in the Children's Act 33 of 1960 which prohibited the adoption of children born to Namibian citizens by non-Namibian citizens.<sup>35</sup> The Court held that the prohibition in question violated Article 10(1) on equality and Article 14(3) on the family.<sup>36</sup> The Court agreed with the applicants' assertion that the provision in question might deprive a child of the benefits of a loving and stable family life which might otherwise be available to that child and expressed agreement with the statement of the South African Constitutional Court that such an exclusion of potential parents "*defeats the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child's development, which can be offered by suitably qualified persons*".<sup>37</sup>

Another significant statement on the meaning of "family" in Namibia was made in the context of the **2007 *Frans* case**.<sup>38</sup> Here, the High Court struck down the common law rule prohibiting 'illegitimate' children from inheriting intestate from their fathers. The Court found that the

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<sup>34</sup> *Detmold and Another v Minister of Health and Social Services and Others* 2004 NR 174 (HC).

<sup>35</sup> Exceptions were provided only for relatives of the child or for non-Namibian citizens who qualified for Namibian citizenship and had an application for naturalization pending. Section 71 of the Children's Act 33 of 1960 stated, in relevant part:

(2) ... A children's court to which application for an order of adoption of a child is made shall not grant the application unless the court is satisfied –

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(f) in the case of a child born of any person who is a Namibian citizen, that the applicant or one of the applicants is a Namibian citizen resident in Namibia: Provided that the provisions of this paragraph shall not apply –

(i) where the applicant or one of the applicants is a Namibian citizen or a relative of the child and is resident outside the Republic; or

(ii) where the applicant is not a Namibian citizen or both applicants are not Namibian citizens but the applicant has or the applicants have the necessary residential qualifications for the grant to him or them under the Namibian Citizenship Act (Act 14 of 1990), of a certificate or certificates of naturalization as a Namibian citizen or Namibian citizens and has or have made application for such a certificate or certificates,

and the Minister has approved of the adoption.

<sup>36</sup> *Detmold* 2004 NR 174 (HC) at 181C-183B.

<sup>37</sup> Id at 181G-I, quoting *Du Toit & Another v Minister of Welfare and Population Development & Others* 2003(2) SA 198 (CC) at paragraph 21, in reference to partners in a same-sex partnership who were seeking to adopt. (The Namibian High Court mistakenly cited paragraphs 18 and 19 as the source of the quotation.)

<sup>38</sup> *Frans v Paschke and Others* 2007 (2) NR 520 (HC).

differentiation between ‘legitimate’ and ‘illegitimate’ children was based on “*social status*”, and that the historical basis for the rule was the punishment of “*lustful*” parents. However, the rule made no distinction between children born of adultery, incest or a long-term relationship between loving partners and thus gave a “*social stigma*” to all such children. The Court concluded that this amounted to unfair discrimination and that the rule was therefore unconstitutional.<sup>39</sup> Although the *Frans* case did not invoke Article 14, the Court noted that “*loving partners and parents have the right to live together as a family with their children without being married*”.<sup>40</sup>

The three cases suggest that the Namibian courts may take a functional approach to the concept of family in some circumstances, rather than confining it to a specific definition.<sup>41</sup> This indicates that there is probably some scope for establishing a constitutional right to some protections for families formed by cohabitation.

*... loving partners and parents have the right to live together  
as a family with their children without being married.*

*Frans v Paschke and Others*, High Court of Namibia  
2007 (2) NR 520 (HC) (per Heathcote AJ)

### 3.3 South African constitutional cases

South African Constitutional jurisprudence has given increasing protection to same-sex cohabitants, who until recently were not able to marry in South Africa. It has given less protection to opposite-sex cohabitants, on the theory that such couples have the choice to marry. The points made in majority, concurring and dissenting opinions in the leading *Volks* case on opposite-sex cohabitation offer useful points of legal debate on the topic.

Because this paper compares the position in Namibia and South Africa, it is important to note that the two countries have different constitutional backdrops to the issue of cohabitation. The constitutions of both countries provide that all persons shall be equal before the law.<sup>42</sup> However, the South African Constitution, whilst lacking any explicit protection for the right to family life or the right to marry, explicitly prohibits discrimination on the basis of “marital status”.<sup>43</sup>

<sup>39</sup> Id at 528-29 (*per* Heathcote AJ).

<sup>40</sup> Id at 529A.

<sup>41</sup> Even the *Frank* case did not confine its concept of family to families formed by marriage, despite the fact that it problematically and arbitrarily limited its notion of family function to procreation. It contrasted the applicant’s lesbian relationship to marriage, but concluded that the “‘*family institution*’ of the *African Charter*, the *United Nations Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *Namibian Constitution*, envisages **a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race**”. *Frank* 2001 NR 107 (SC) at 146F-G (emphasis added).

<sup>42</sup> Namibian Constitution, Article 10(1): “*All persons shall be equal before the law*”; South African Constitution, Article 9(1): “*Everyone is equal before the law and has the right to equal protection and benefit of the law*”.

<sup>43</sup> Article 9(1) of the South African Constitution provides: “*Everyone is equal before the law and has the right to equal protection and benefit of the law.*” Article 9(3) states: “*The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic*

### 3.3.1 Opposite-sex cohabitation

The South African Constitutional Court has provided few protections to cohabitating opposite-sex couples. Although it has considered cohabitation relevant when considering a parent's relationship to a child born of that relationship, it has refused to provide cohabitating heterosexual couples with the same rights as married couples on the ground that marriage was a viable option they chose not to undertake. In treating marriage and cohabitation as voluntary choices, however, it has ignored the social and economic realities that circumscribe women's autonomy.

In *Fraser v The Children's Court, Pretoria North*,<sup>44</sup> the Constitutional Court considered parental cohabitation as a factor relevant to determining a father's rights over his child. At issue was the constitutionality of a statute that allowed unmarried women to consent to the adoption of their children without the consent of the children's fathers.<sup>45</sup> The Court held that this categorical exclusion of unmarried fathers amounted to unconstitutional discrimination.<sup>46</sup> Giving Parliament two years to develop an alternative approach,<sup>47</sup> the Court warned that the problem required the consideration of individual circumstances, including the nature of the parents' relationship:

*Why should the consent of a father who has had a very casual encounter on a single occasion with the mother have the automatic right to refuse his consent to the adoption of a child born in consequence of such a relationship, in circumstances where he has shown no further interest in the child and the mother has been the sole source of support and love for that child? Conversely, why should the consent of the father not ordinarily be necessary in the case where both parents of the child have had a long and stable relationship over many years and have equally given love and support to the child to be adopted? Indeed, there may be cases where the father has been the more stable and more involved parent of such a child and the mother has been relatively uninterested in or uninvolved in the development of the child. Why should the consent of the mother in such a case be required and not that of the father? The fact that there is no formal marriage between the parents who have lived together may even be due to the steadfast refusal of the mother to marry the father and not owing to any unwillingness on his part to formalise their relationship or to accept his responsibility towards the child.*<sup>48</sup>

The Court noted that statutory and judicial responses to these problems in other jurisdictions are “nuanced”, having regard to a variety of factors, including the duration and the stability of the relationship between the parents.<sup>49</sup>

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*or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” (emphasis added). See also South African Law Reform Commission (SALRC), Project 118: Report on Domestic Partnerships, Pretoria: SALRC, March 2006 at paragraph 2.4.85-2.4.86.*

<sup>44</sup> 1997 (2) SA 261 (CC).

<sup>45</sup> The relevant South African statute at the time was the Child Care Act 74 of 1983.

<sup>46</sup> *Fraser* 1997 (2) SA 261 (CC) at 272E-H, 273D-274F.

<sup>47</sup> *Id* at 284F.

<sup>48</sup> *Id* at 283E-H (*per* Mahomed DP).

<sup>49</sup> *Id* at 281F-H. The Court further directed Parliament to note that “[t]he question of parental rights in relation to adoption bears directly on the question of gender equality”. Consequently, it urged Parliament to be “acutely sensitive to the deep disadvantage experienced by the single mothers in our society” and to ensure that law reforms on the issue did not “exacerbate that disadvantage”. *Id* at 282C-D.

The South African Parliament has passed a series of statutes attempting to take into account these nuances, including concerns about gender equity, in regulating adoption. See the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997; the Adoption Matters Amendment Act 56 of 1998, and the Children's Act 38 of 2005.



In the 2005 case of *Volks NO v Robinson*<sup>50</sup> the South African Constitutional Court addressed the question of whether the exclusion of an opposite-sex cohabiting partner from the Maintenance of Surviving Spouses Act 27 of 1990 was unconstitutional. The Act grants a surviving spouse a claim for maintenance against the estate of the deceased spouse if the spouse lacks sufficient means and earnings to provide for his or her own maintenance. The *Volks* case involved a woman who had been in a life partnership with a man for 16 years. The man, an attorney, was the main breadwinner in the relationship, whilst the woman had only a small income from intermittent freelance work as a journalist and artist. She was registered as a dependant on his medical aid scheme and named as a beneficiary in his will. They were publicly accepted as a couple, and she nursed him through a recurrent mental illness.<sup>51</sup> After her partner's death, she sought to claim maintenance from the residue of the estate but was barred from doing so because the Act covered only a "surviving spouse in a marriage dissolved by death". Consequently, she argued that the statute's failure to afford a surviving partner in a heterosexual life partnership the same protection as a surviving spouse violated the constitutional rights of equality and dignity.

The issue split the Constitutional Court. There were a total of four opinions: a majority judgment joined by seven justices in all, a concurring judgment joined by six of these same seven justices, and two dissenting opinions written by three justices.<sup>52</sup>

The majority found no unfair discrimination on the basis of marital status, holding that the Act's distinction between married and unmarried people is fair because the law imposes a reciprocal duty of support upon spouses whilst there is no such legal duty between unmarried persons:

*Mrs Robinson never married the late Mr Shandling. There is a fundamental difference between her position and spouses or survivors who are predeceased by their husbands. Her relationship with Mr Shandling is one in which each was free to continue or not, and from which each was free to withdraw at will, without obligation and without legal or other formalities. There are a wide range of legal privileges and obligations that are triggered by the contract of marriage. In a marriage the spouses' rights are largely fixed by law and not by agreement, unlike in the case of parties who cohabit without being married.*

*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... 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.*<sup>53</sup>

The majority concluded that cohabitants, in contrast to married couples, acquire only the duties they have agreed to assume:

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<sup>50</sup> 2005 (5) BCLR 446 (CC).

<sup>51</sup> Id at 450E-451D.

<sup>52</sup> Skweyiya J wrote the majority judgment, which was joined by Chaskalson CJ, Langa DCJ, Moseneke, Ngcobo, Van der Westhuizen and Yacoob JJ. Ngcobo J wrote a separate concurring judgment, in which Chaskalson CJ, Langa DCJ, Moseneke, Van der Westhuizen and Yacoob JJ also concurred. Mokgoro and O'Regan JJ prepared a joint dissenting judgment, and Sachs J prepared a separate dissenting judgment.

<sup>53</sup> Id at 463B-E (*per* Skweyiya J, majority opinion).

*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.*<sup>54</sup>

However, after noting that women in particular are often suffer hardships as the vulnerable parties in cohabitation relationships, the majority noted 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*”.<sup>55</sup>

The concurring opinion focussed on dignity as “*an underlying consideration in the determination of unfairness*” when considering the constitutionality of legal distinctions between categories of persons.<sup>56</sup> After examining the specific recognition given to marriage and family in a range of international instruments, this opinion concluded that recognition of the institution of marriage and the right to marry justifies legal distinctions between married and unmarried persons “*in appropriate circumstances*”.<sup>57</sup> It emphasised that the law in question was not intended to impair the dignity of persons in life partnerships or to impair their sense of equal worth,<sup>58</sup> and focussed on the fact that heterosexual couples in life partnerships may choose to marry if they wish:

*All that the law does is to put in place a legal regime that regulates the rights and obligations of those heterosexual couples who have chosen marriage as their preferred institution to govern their intimate relationship. Their entitlement to protection under the Act, therefore, depends on their decision whether to marry or not. 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.*<sup>59</sup>

This opinion also concluded that the choice not to marry must be respected:

*People involved in a relationship may choose not to marry for a whole variety of reasons, including the fact that they do not wish the legal consequences of a marriage to follow from their relationship. It is also true that they may not marry because one of the parties does not want to get married. Should the law then step in and impose the legal consequences of marriage in these circumstances? To do so in my view would undermine the right freely to marry and the nature of the agreement inherent in a marriage. Indeed it would amount to the imposition of the will of one party upon the other.*<sup>60</sup>

However, like the majority opinion, this judgment also pointed to “*the need to regulate permanent life partnerships*” by means of legislation.<sup>61</sup>

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<sup>54</sup> Id at 464C-D.

<sup>55</sup> Id at 465F-G.

<sup>56</sup> Id at 469A-C (*per* Ngcobo J, concurring opinion).

<sup>57</sup> Id at 471E-G.

<sup>58</sup> Id at 472B-D, 474C-D.

<sup>59</sup> Id at 473B-D.

<sup>60</sup> Id at 473H-474A.

<sup>61</sup> Id at 474B.

In a joint dissenting opinion, Justices Mokgoro and O'Regan were of the opinion that discrimination on the ground of marital status occurs where relationships that serve a similar social function to marriage “*are not regulated in the same way as marriage*”.<sup>62</sup> This opinion emphasised that “*not every family is founded on a marriage recognised as such in law*”, but “*members of such families often play the same roles as in families which are founded on marriage and provide companionship, support and security to one another*”.<sup>63</sup>

This judgment conceded that there are “*differences between marriage and cohabitation even where cohabitation plays a similar social function to marriage*” – meaning that it not necessarily unfair discrimination to treat the two types of relationship differently in some situations.<sup>64</sup> They viewed the statute’s discrimination in the present case as unfair because the cohabiting couple had entered into reciprocal duties of support during the relationship, the survivor was financially vulnerable upon the death of her partner and the current law does not provide people in this position with any effective recourse. These two justices would have allowed Parliament a period of two years to correct the problem, making the following comments on possible future legislation:

*It should be emphasised that this conclusion does not mean that the Legislature is required to regulate cohabitation relationships in the same way that it regulates marriage. In particular, the Legislature need not extend the provisions [on the maintenance of surviving spouses] to all cohabitation relationships. As indicated earlier, marriage is a particular form of relationship, concluded formally and publicly with specified and clear consequences. Many people who choose to cohabit may do so specifically to avoid those consequences. In our view, the Legislature is entitled to take this into account when it regulates cohabitation relationships. However, cohabitation relationships that endure for a long time can produce patterns of dependence and vulnerability which in the light of the substantial and increasing number of people in cohabitation relationships cannot be ignored by the Legislature without offending the constitutional prohibition on unfair discrimination on the grounds of marital status.*<sup>65</sup>

The theme of the other dissenting opinion, written by Justice Sachs, was the interplay between freedom of choice and equality. He argued that the basis for the discussion should not be “*the narrow confines of the rules established by matrimonial law*”, but rather “*the broader and more situation-sensitive framework of the principles of family law*”.<sup>66</sup> Sachs rejected the argument that the choice to marry or not to marry should be the key consideration, arguing for a more subtle and nuanced approach which focuses on the function of relationships rather than their definition:

*Respecting autonomy means giving legal credence not only to a decision to marry but to choices that people make about alternative lifestyles. Such choices may be freely undertaken, either expressly or tacitly. Alternatively, they might be imposed by the*

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<sup>62</sup> Id at 478A (*per* Mokgoro and O'Regan JJ, dissenting).

<sup>63</sup> Id at 477C-D.

<sup>64</sup> Id at 483C.

<sup>65</sup> Id at 487G-488A. If the legislature failed to act, these two justices were of the opinion that the unconstitutionality of the statute in question could be cured by expanding the availability of maintenance from the deceased’s estate to include 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*”. Id at 490B-D. They concluded that, in the case at hand, Mrs Robinson had in fact already received an equitable share of the deceased’s estate in terms of his will and so was not entitled to any further relief. Id at 491B-C.

<sup>66</sup> Id at 491B-C (*per* Sachs J, dissenting).

*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.*<sup>67</sup>

Relying on a line of Canadian judgments, Justice Sachs asserted that the significance which should be afforded to choice is context-specific;<sup>68</sup> it is not necessary to equate cohabitation with marriage to establish a right to support from the partner, but only to consider the function of the law in question and whether the cohabitation relationship serves a similar social role as marriage for this purpose.<sup>69</sup>

Justice Sachs then considered the context of cohabitation in South Africa, which is marked by patriarchy and poverty:

*It should be remembered that many of the permanent life partnerships dissolved by death today would have been established in past decades, when conditions were even harsher than they are now, and people had far less choice concerning their life circumstances. Thus, in respect of most of the significant transactions potentially affecting present-day claims for maintenance, the social reality would have been that in a considerable number of families the man would have regarded himself as the head of the household with the right to take all major decisions concerning the family. It would have been he who effectively decided whether he and his partner should register their relationship in terms of the law. If she refused to do what he wanted, he could have been the one to threaten violence or expulsion, with little chance of the law intervening. Because he would in many cases have been the party to go out to work while she stayed at home to look after the children and attend to his needs, it would have been he who accumulated assets, and he who had the proprietary right to determine how they were to be disposed of after his death.*

*It should be remembered too that the migrant labour system had a profoundly negative effect on family life. An essential ingredient of segregation and apartheid, it involved the deliberate and targeted destruction of settled and sustainable African family life in rural areas so as to provide a flow of cheap labour to the mines and the towns. The chaotic, unstable and oppressive legal universe in which the majority of the population were as a consequence compelled by law and policy to live had a severe impact on the way many families were constituted and functioned. Repeal of the racist laws which sustained the system, and entry into the new constitutional era, opened the way to fuller lives for those whose dignity had been assailed, and gave them renewed opportunity to take responsibility for their lives. Yet it did not in itself correct the imbalances inside the family or eliminate the desperate poverty that is still so prevalent.*<sup>70</sup>

Justice Sachs contended that the key question should be whether the law should acknowledge and enforce the “responsibilities” and “expectations” created by a domestic partnership.<sup>71</sup>

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<sup>67</sup> Id at 495D-F; see also id at 502D-F.

<sup>68</sup> Id at 496D-497D.

<sup>69</sup> See id at 498A-B.

<sup>70</sup> Id at 499D-500B; citations omitted.

<sup>71</sup> Id at 510F-H. In the context of the case at hand, the question was, more specifically: “[I]s there 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 had been married?” Id at 518C.

The fact that various individual statutes recognise cohabitation, albeit in piecemeal fashion, shows that there is already a legislative movement towards a recognition of a broader range of family relationships.<sup>72</sup> Reasoning on the basis of this legislation, academic opinion, and law reform proposals under discussion, Justice Sachs concluded that legal emphasis is shifting “from locating conjugal rights and responsibilities exclusively within the tight framework of formalised marriages, towards embracing a wider canvass of rights and responsibilities so as to include all marriage-like, intimate and permanent family relationships”.<sup>73</sup>

Against this background, Justice Sachs found that the challenged statute discriminated unfairly in respect of at least two classes of surviving cohabitants: those where the parties had “committed themselves to a life of interdependence, marked by express or tacit understandings to provide each other with emotional and material support”; and those where the relationship had produced dependency for the party who was the more economically vulnerable, who would in all probability have been unable to insist upon marriage.<sup>74</sup>

Like his fellow justices, Justice Sachs noted that the situation cries out for “democratic debate and legislative solution” and so would have allowed Parliament two years to correct the problem.<sup>75</sup>

*...we must take care not to entrench particular forms of family at the expense of other forms.*

**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 paragraph 31 (per O'Regan J)

*...family life as contemplated by the Constitution can be provided in different ways and... legal conceptions of the family and what constitutes family life should change as social practices and traditions change.*

**Du Toit and Another v Minister of Welfare  
and Population Development and Others**  
2003 (2) SA 198 (CC) at paragraph 19 (per Skweyiya J)

*... the general purpose of family law is to promote stability, responsibility and equity in intimate family relations.*

**Volks NO v Robinson** 2005 (5) BCLR 446 (CC)  
at paragraph 212 (per Sachs J, dissenting)

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<sup>72</sup> Id at 504B-J, 505G-I.

<sup>73</sup> Id at 507A-C.

<sup>74</sup> Id at at 518D-E and 519F-G. Further: “I believe it is socially unrealistic, unduly moralistic and hence constitutionally unfair, for the Act to discriminate against the powerless and economically dependent party, now threatened with destitution, on the basis that she should either have insisted on marriage or else withdrawn from the relationship.” Id at 520H-521A.

<sup>75</sup> Id at 525E-I. Justice Sachs agreed with the other dissenters that no remedy was required in the case at hand as the cohabiting partner was adequately provided for in the deceased’s will. Id at 526B.



*...it is necessary to acknowledge and respond in a sensitive and practical manner to the fact that people have had to accommodate themselves to harsh and diverse life circumstances over which they may have had little control.*

**Volks NO v Robinson** 2005 (5) BCLR 446 (CC)  
at paragraph 224 (*per* Sachs J, dissenting)

Prior to the *Volks* case, the South African Law Reform Commission was already in the process of considering legislative reform on same-sex domestic partnerships<sup>76</sup> – although as of October 2010, the proposed bill on this topic had not yet been passed by Parliament. The South African Domestic Partnerships Bill will be discussed in more detail below.<sup>77</sup>

We have been unable to locate any precedent-setting court cases on the exclusion of opposite-sex cohabitants from particular benefits or protections in the wake of the *Volks* case.<sup>78</sup>

### **3.3.2 Same-sex cohabitation**

There have been a number of South African cases dealing with same-sex cohabitation which have held that certain rights analogous to the rights afforded to married couples must be extended to persons in same-sex life partnerships – including the rights of same-sex partners to statutory health insurance schemes, residence permits, pensions for judges, adoption, guardianship and intestate inheritance. Moreover, the Constitutional Court has also declared the common law definition of marriage and the provisions of the Marriage Act to be unconstitutional because they exclude same-sex partners, and the state has accordingly provided for civil unions for same-sex partners through the Civil Union Act 17 of 2006.<sup>79</sup>

However, this line of cases is not directly applicable to a discussion of opposite-sex cohabitation, as their holdings have been generally premised on the fact that same-sex life partners have no option to enter into a marriage. In fact, most of these cases explicitly emphasised that they had

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<sup>76</sup> See generally South African Law Reform Commission (SALRC), *Project 118: Report on Domestic Partnerships*, Pretoria: SALRC, March 2006.

<sup>77</sup> Section 11.3.3 at pages 238-240.

<sup>78</sup> According to the Women's Legal Centre in South Africa, there has been no precedent-setting litigation on opposite-sex cohabitation since the *Volks* case was decided by the Constitutional Court as most lawyers and clients are hesitant to approach the courts on this issue again due to the difficulty and expense of having to litigate all the way to the Constitutional Court and then facing the distinct possibility that the Court will decline to overrule its previous decision. Personal communication, Mushahida Adhikari, Women's Legal Centre. It may be that the prospect of imminent law reform on domestic partnerships has discouraged cases on this topic.

<sup>79</sup> This law allows same-sex couples to undergo a ceremony administered by a marriage officer to conclude a civil union which they can choose to designate as "marriage" or a "civil partnership" – but a same-sex civil union has the same legal consequences as a civil marriage, regardless of the terminology chosen. One commentator suggests that the terms may have been left over from an earlier draft of the Bill designed to satisfy conservatives by declining to apply the term "marriage" to same-sex unions, and that it may now function as a useful option for same-sex couples who would prefer not to be associated with the term "marriage" because they associate it with heterosexual norms. Pierre de Vos, "The 'Inevitability' of Same-Sex Marriage in South Africa's Post-Apartheid State", 23 (3) *SAJHR* 432 (2007) at 461-62. See also David Bilchitz and Melanie Judge, "For Whom Does the Bell Toll? The Challenges and Possibilities of the Civil Union Act for Family Law in South Africa", 23 (3) *SAJHR* 466 (2007) at 484-87. (The 2007 de Vos article in particular provides an excellent analysis of the legal and political developments associated with the line of cases summarised here. See also Pierre de Vos, "Same-Sex Sexual Desire and the Re-imagining of the South African Family", 20 (2) *SAJHR* 177 (2004).)



considered only same-sex partnerships and not opposite-sex cohabitation; as the Constitutional Court stated:

*Same-sex partners cannot be lumped together with unmarried heterosexual partners without further ado. The latter have chosen to stay as cohabiting partners for a variety of reasons... without marrying although generally there is no legal obstacle to their doing so. The former cannot enter into a valid marriage.*<sup>80</sup>

Discrimination against same-sex partners was first recognised by the South African courts in **Langemaat v Minister of Safety and Security and Others**.<sup>81</sup> The applicant's partner in a stable, long-term lesbian relationship was denied access to a statutory police health insurance scheme. The High Court agreed with the applicant that this exclusion violated her right to equality in Article 9(3) of the South African Constitution, because the scheme excluded many persons who were "de facto dependants" of its members.<sup>82</sup> In further support of its holding, the Court stated 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".<sup>83</sup> The Court noted further that in a "thinking and decent society", the law must recognise, respect and protect diverse forms of family.<sup>84</sup>

In **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others**<sup>85</sup> the Constitutional Court considered whether section 25 of the Aliens Control Act 96 of 1991 unfairly discriminated against those in same-sex partnerships by not advancing them the same rights that were available to spouses. The applicants contended that the Act discriminated against them on the grounds of both sexual orientation and marital status because their partners were foreign nationals but, unlike foreign spouses, were not entitled to a residence permit. In declaring the section unconstitutional, the Court found that the provision in question not only discriminated against the applicants on the basis of sexual orientation and marital status, but also violated their right to dignity because the message of the law was that "...gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity."<sup>86</sup> The Court's remedy was to read into the relevant statutory provision, after the word "spouse", the words "or partner, in a permanent same-sex life partnership".<sup>87</sup>

The case of **Satchwell v President of the Republic of South Africa**<sup>88</sup> involved a similar challenge to the constitutionality of certain provisions in the Judges Remuneration and Conditions of Employment Act 88 of 1989. These provisions provided pension payments and

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<sup>80</sup> *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) at paragraph 16.

<sup>81</sup> 1998 (3) SA 312 (T).

<sup>82</sup> Id at 316A-B.

<sup>83</sup> Id at 316H.

<sup>84</sup> Id at 316G, 317A-D.

<sup>85</sup> 2000 (2) SA 1 (CC). The ground-breaking prelude to this case was **National Coalition for Gay and Lesbian Equality v Minister of Justice** 1998 (6) BCLR 726 where the Constitutional Court confirmed a High Court holding that criminalising sodomy violates the rights to equality, dignity and privacy. Significant to this discussion, the High Court noted that the challenged criminal provisions deprive gay men of a basic human need which is central to family life. 1998 (6) BCLR at 746E-F.

<sup>86</sup> 2000 (2) SA 1 (CC) at paragraph 54.

<sup>87</sup> Id at paragraph 98. The Court expressly limited its holding to same-sex partnerships: "It is necessary to emphasise again that the Court need only provide the reading in remedy for excluded same-sex life partners because it is only in relation to them that the Court was called upon to decide...". Id at paragraph 87.

<sup>88</sup> 2002 (6) SA 1 (CC).

other benefits only for spouses, thereby denying the benefits to the same-sex partners of judges. The Constitutional Court found that this was unconstitutional discrimination on the grounds of sexual orientation<sup>89</sup>, but emphasised that the benefits in question would be appropriate only in a relationship where the parties have undertaken “*reciprocal duties of support*”, noting that “*the Constitution cannot impose obligations towards partners where those partners themselves have failed to undertake such obligations*”.<sup>90</sup> This caveat suggests that courts may in future be called upon to consider the functional role of relationships between persons who are not formally married before deciding to treat them analogously to married couples.<sup>91</sup>

Joint rights in respect of children by a couple in a same-sex relationship were addressed in ***Du Toit v Minister of Welfare and Population Development***.<sup>92</sup> The applicants contended that certain sections of the Child Care Act 74 of 1983 and the Guardianship Act 192 of 1993, which provided for joint adoption and guardianship rights only for married persons, were unconstitutional forms of discrimination on the grounds of sexual orientation and marital status. The Constitutional Court agreed, noting also that the best interests of the child should be the paramount consideration in such issues and finding that the exclusion of suitable persons in permanent same-sex partnerships from joint adoption –

*...defeats the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child’s development, which can be offered by suitably qualified persons... .*  
*... The impugned provisions of the Child Care Act thus deprive children of the possibility of a loving and stable family life as required by section 28(1)(b) of the Constitution.*<sup>93</sup>

The Court also found that the limitation in question violated the right to dignity in that both applicants could not under the existing law be legally recognised as parents, despite functioning in a stable, loving and happy family as “*co-parents*”.<sup>94</sup> The Court emphasised that although 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*”, “*legal conceptions of the family and what constitutes family life should change as social practices and traditions change*”.<sup>95</sup>

The case of ***J v Director General, Department of Home Affairs***<sup>96</sup> concerned a woman who wanted to be recognised and registered as the parent of a child conceived by her same-sex female partner by means of artificial insemination. The South African Children’s Status Act 82 of 1987 provides that a child born of artificial insemination will be deemed to be the child of the woman who gives birth to the child and (if applicable) her husband.<sup>97</sup> The Constitutional Court held that this rule embodied unconstitutional discrimination on the

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<sup>89</sup> Id at paragraph 21.

<sup>90</sup> Id at paragraph 24.

<sup>91</sup> It should be noted that the Court refused to comment on whether or not its ruling should encompass permanent heterosexual life parent who are not married, on the grounds that this issue was not actually before the court in the case at hand. Id at paragraph 33.

<sup>92</sup> 2003 (2) SA 198 (CC).

<sup>93</sup> Id at paragraph 21. Section 28(1)(b) of the South African Constitutional states that “[e]very child has the right... to family care or parental care, or to appropriate alternative care when removed from the family environment”.

<sup>94</sup> Id at paragraph 27.

<sup>95</sup> Id at paragraph 19.

<sup>96</sup> 2003 (5) SA 621 (CC).

<sup>97</sup> Id at paragraph 5.

grounds of sexual orientation.<sup>98</sup> In commenting on the courts' increasing tendency to recognise rights and benefits stemming from long-term same sex relationships, the Court's unanimous opinion commented that:

*Comprehensive legislation regularising relationships between gay and lesbian persons is necessary. It is unsatisfactory for the courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation.*<sup>99</sup>

The common law was extended in ***Du Plessis v Road Accident Fund***<sup>100</sup> where the applicant argued that he was entitled to claim damages for loss of support after the death of his long-term same-sex partner in a car accident, as an opposite-sex spouse would be able to do. The Supreme Court of Appeal held that the answer depended in part on whether the parties had undertaken a reciprocal duty of support – a factual question which must be decided on a case-by-case basis in respect of “a conjugal relationship between two people of the same sex”.<sup>101</sup> The Court found that there was a reciprocal duty of support in this case, relying on the following factors:

*The plaintiff and the deceased would have married one another if they could have done so. As this course was not open to them, they went through a ‘marriage’ ceremony which was as close as possible to a heterosexual marriage ceremony. The fact that the plaintiff and the deceased went through such a ‘marriage’ ceremony and did so before numerous witnesses gives rise to the inference that they intended to do the best they could to publicise to the world that they intended their relationship to be, and to be regarded as, similar in all respects to that of a heterosexual married couple i.e. one in which the parties would have a reciprocal duty of support. That having been their intention, it must be accepted as a probability that they tacitly undertook a reciprocal duty of support to one another.*

*Further support for this finding is the fact that the plaintiff and the deceased thereafter lived together as if they were legally married in a stable and permanent relationship until the deceased was killed some 11 years later; they were accepted by their family and friends as partners in such a relationship; they pooled their income and shared their family responsibilities; each of them made a will in which the other partner was appointed his sole heir; and when the plaintiff was medically boarded, the deceased expressly stated that he would support the plaintiff financially and in fact did so until he died.*<sup>102</sup>

The Court therefore inferred a contractual duty of support which was legally enforceable. The Court then found that the constitutional rights to dignity and equality required legal protection

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<sup>98</sup> Id at paragraph 13.

<sup>99</sup> Id at paragraph 23. As in other similar cases, the Court declined to comment on the import of its ruling for unmarried heterosexual couples on the grounds that this issue was not implicated in the case before the Court. Id at paragraph 19.

The difficulties of resolving such complex issues by judicial amendment of statutes is illustrated by Chuma Himonga, “Same-Sex Unions and Guardianship of Children”, 121 (4) *SALJ* 730 (2004) which points out that neither the *Du Toit* adoption case nor the *J v Director General* artificial insemination case resolve all of the issues of guardianship of children jointly adopted by same-sex couples or parented by same-sex couples by means of artificial insemination, such as the question of whether such couples have equal guardianship provided for opposite-sex married couples by virtue of section 1(1) of the Guardianship Act 192 of 1993, which was not addressed by either case.

<sup>100</sup> 2004 (1) SA 359 (SCA).

<sup>101</sup> Id at paragraphs 12-13.

<sup>102</sup> Id at paragraphs 14-15.

of this duty of support, by permitting the surviving partner to claim damages from the Road Accident Fund in the same way as a surviving spouse.<sup>103</sup>

The Constitutional Court confirmed the right of same-sex partners to marry in *Minister of Home Affairs and Another v Fourie and Another*.<sup>104</sup> This case challenged both the common law definition of marriage and the constitutional validity of section 30(1) of the Marriage Act which confined marriage to a man and a woman. The Constitutional Court held that “*the exclusion of same-sex couples from the status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes a denial to them of their right to equal protection and benefit of the law*”.<sup>105</sup> This landmark case was the culmination of the line of South African cases on same-sex cohabitation, but since it is irrelevant to the issue of opposite-sex cohabitation, there is no need to examine it in detail here.

The *Fourie* case was followed by *Gory v Kolver NO*<sup>106</sup> where the Constitutional Court considered the constitutional validity of a provision of the Intestate Succession Act 1987 which conferred rights of intestate succession only on heterosexual spouses, thereby excluding permanent same-sex life partners who had undertaken reciprocal duties of support. Despite pending legislation that would legalise same-sex marriage, the Court held that the exclusion of permanent same-sex life partners who have undertaken reciprocal duties of support from the law on intestate succession constitutes unconstitutional discrimination on the ground of sexual orientation, since the partners are not legally entitled to marry.<sup>107</sup> The Court remedied the discrimination by reading the words “*or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*” into the statute after the word “spouse”.<sup>108</sup> Although the Court noted that the unconstitutional statute became invalid from the moment that the Constitution took effect,<sup>109</sup> it nonetheless limited the retrospective effect of its holding to estates which had not yet been wound up as of the date of the judgment, in order to “*reduce the risk of disruption in the administration of deceased estates and to protect the position of bona fide third parties as best possible*”.<sup>110</sup>

In response to the *Fourie* holding, a Civil Union Bill was tabled in the South African Parliament in August 2006. The Bill proposed a “civil partnership” for same-sex couples, intended to parallel marriage in terms of its legal consequences whilst reserving the term “marriage” for heterosexual couples.<sup>111</sup> The Bill was criticised for providing a “separate but equal” approach which would actually make same-sex unions seem inferior to opposite-sex ones. Critics also argued that the Bill’s approach was not consistent with the holding in the *Fourie* case which

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<sup>103</sup> Id at paragraphs 17, 19-33, 42. As in the other cases in this line of jurisprudence, the Court limited its holding to same-sex couples:

*It is not necessary for purposes of this judgment to consider whether the dependant’s action should be extended to unmarried persons in a heterosexual relationship or to any other relationship; and I expressly leave those questions open.*

Id at paragraph 43.

The Court found further that the surviving partner, as the deceased’s sole heir, was entitled to claim funeral expenses. Id at paragraphs 44-45.

<sup>104</sup> 2006 (1) SA 524 (CC). The Supreme Court of Appeal first recognised the right in *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA).

<sup>105</sup> 2006 (1) SA 524 (CC) at paragraph 75.

<sup>106</sup> 2007 (4) SA 97 (CC).

<sup>107</sup> Id at paragraph 19.

<sup>108</sup> Id at paragraph 43.

<sup>109</sup> Id at paragraph 39.

<sup>110</sup> Id at paragraphs 43.

<sup>111</sup> Draft Civil Union Bill, GG 29169 (31 August 2006).

was premised on the Constitutional principle of equality. As a result of advocacy around these points by the gay and lesbian community, the Bill was amended to give same-sex couples a choice between two versions of a “civil union” – “marriage” or “civil partnership” – both of which would have the same procedures for solemnization and the same legal consequences. Marriage officers who object to solemnising a civil union between persons of the same sex on the ground of conscience, religion and belief are not compelled to do so. The amended Bill became the Civil Union Act 17 of 2006 and came into force on 30 November 2006.<sup>112</sup>

The law was aimed at providing an avenue “for same-sex couples to enjoy the status and the benefits coupled with the responsibilities that marriage accords to opposite-sex couples”.<sup>113</sup> As a result it is not clear if the monogamous civil unions it establishes are available to opposite-sex couples or not. The definition of “civil union” refers in gender-neutral fashion to “two persons who are both 18 years of age or older”,<sup>114</sup> but another provision says: “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 Marriages Act.”<sup>115</sup>

Although the line of cases which led to the Civil Union Act do not apply to persons of the opposite sex who cohabit, since they were not excluded by law as a class from getting married, it has been suggested that this line of cases and the Civil Union Act which flowed from them are (at least potentially) part of a move away from “stigmatizing any particular legal classification that a relationship has as having less worth than any other such designation”, which will help in “de-centring marriage as the sole and primary status to be accorded to interpersonal relationships”.<sup>116</sup>

On the other hand, it has also been asserted that the emphasis on choice in this line of cases may be detrimental to both same-sex and opposite-sex couples who are informally cohabiting. Much of the reasoning in the same-sex partnership cases was premised on the fact that gay and lesbian couples, unlike opposite-sex couples, did not have the choice to marry. Since both same-sex and opposite-sex couples in South Africa can, since the enactment of the Civil Union Act, ‘choose’ to marry, the ultimate result may be detrimental for couples in *both* categories who remain unmarried in future, because the idea that all parties to intimate relationships have an equal ability to choose to marry or not to marry is illusory:

<sup>112</sup> For more detail on the Bill and its amendments, see Pierre de Vos, “The ‘Inevitability’ of Same-Sex Marriage in South Africa’s Post-Apartheid State”, 23 (3) *SAJHR* 432 (2007) at 458-63.

<sup>113</sup> Civil Union Act 17 of 2006, Preamble.

<sup>114</sup> Id, section 1.

<sup>115</sup> Id, section 8(6) (emphasis added). See also BS Smith & JA Robinson, “An Embarrassment of Riches or a Profusion of Confusion? An Evaluation of the Continued Existence of the *Civil Union Act 17 of 2006* in the Light of Prospective Domestic Partnerships Legislation in South Africa”, 13 (2) *PER / PELJ* 30 (2010), which states at 51-52 (footnotes omitted): “The problem caused in this regard can be summarised by stating that wherever the Act refers to gender it only refers to **same-sex** couples, with the result that it is uncertain whether it is possible for a heterosexual couple to conclude a civil union. 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, 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.**” These authors conclude that the Civil Union Act is unnecessary and that the legislature should incorporate same-sex marriage into the Marriage Act and replace civil partnerships with “domestic partnerships” available to both same-sex and opposite-sex couples under the Domestic Partnerships Bill 2008. Id at 68.

<sup>116</sup> David Bilchitz and Melanie Judge, “For Whom Does the Bell Toll? The Challenges and Possibilities of the Civil Union Act for Family Law in South Africa”, 23 (3) *SAJHR* 466 (2007) at 497-98.



*Feminists show that in heterosexual couples, both married and unmarried, gendered roles and expectation create very marked inequalities between the partners. In fact one of the manifestations of inequality within couples is in the issue of who makes and how 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. In fact, several of the same-sex couples who litigated in our courts adopted exactly these gendered roles and stereotypically gendered divisions of labour. For the weaker partners in these couples and for couples who cannot afford to transgress community and family norms against same-sex couples, the right to marry may be of theoretical value only, although the law will now assume that they actively chose to cohabit and to eschew the benefits of marriage.*<sup>117</sup>

In the same vein, a South African academic has made the following observation:

*The jurisprudence reinforces notions of an idealised dominant group – a heterosexual, Christian, happily married, able-bodied and healthy couple with two children – and this idealised group seems to serve as a normative reference point for decisions on which intimate relations are worthy of legal recognition and protection and which ones are not.*<sup>118</sup>

This writer asserts that while it is of course acceptable to place limits on the types of intimate relationships which are worthy of legal protection, this should be placed on rational principles and values – the need to protect vulnerable parties such as children, for instance – rather than on social stereotypes,<sup>119</sup> and suggests that the law might focus on who fulfils what tasks in terms of taking care of dependents and then address inequalities and injustices in respect of those functions.<sup>120</sup>

***...what constitutes family life should change  
as social practices and traditions change.***

***Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC)**

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<sup>117</sup> Elsje Bonthuys, “Race and Gender in the Civil Union Act”, 23 (3) *SAJHR* 526 (2003) at 539-40.

<sup>118</sup> Pierre de Vos, “Same-sex Sexual Desire and the Re-Imagining of the South African Family”, 20 (2) *SAJHR* 179 (2004) at 199.

<sup>119</sup> *Id* at 200-201.

<sup>120</sup> *Id* at 202-206.



# Chapter 4

## SOME THEORETICAL CONSIDERATIONS

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Some fundamental questions are raised by a discussion of possible law reform on cohabitation. This chapter introduces some of the key considerations.<sup>1</sup>

### 4.1 Cohabitation, marriage and new concepts of ‘family’

Should marriage be the touchstone for defining cohabitation, or should the law approach different forms of families in a more open-ended way by asking what function they serve in society?

A key question in considering the best legal approach to cohabitation is: Should marriage be the standard, or should the law take a more open-ended approach to different forms of families?

*... families come in many shapes and sizes. The definition of family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.*

**Dawood v Minister of Home Affairs**, South African Constitutional Court 2000 (8) BCLR 837 (CC) at paragraph 31 (*per* O'Regan J)

When people enter into a marriage, their status changes. In the case of a civil marriage, there is a very specific point in time when the parties change from being unmarried to being married, and this change in status is associated with new legal rights and responsibilities.<sup>2</sup>

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<sup>1</sup> For an excellent brief introduction to the key issues, see Elsje Bonthuys & Catherine Albertyn, *Gender, Law and Justice*, Cape Town: Juta & Co, 2007 at 207-213.

<sup>2</sup> There is a useful summary of the clear public process for concluding a civil marriage in South Africa in the *Volks* case; the description applies equally well to civil marriages in Namibia:

*Marriage is voluntarily undertaken by the parties, but it must be undertaken in a public and formal way and once concluded it must be registered. Formalities for the celebration of a marriage are set out in the Marriage Act. A marriage must be conducted by a marriage officer, to whom objections may be directed. If objections to the marriage are lodged, the marriage officer must satisfy herself*

Customary marriage may involve lengthier rituals and processes, but it also involves a change in status which affects the families involved as well as the individuals.<sup>3</sup> Furthermore, it is a constitutional imperative that marriage must be undertaken by free choice on the part of the spouses.<sup>4</sup>

The end-point of a marriage involves another clear change in status. There are specific procedures for dissolution by divorce, with many of the procedures involved being designed to ensure that the interests of children and economically vulnerable spouses are protected. Where a spouse dies, the surviving spouse or spouses have a particular social status as widow or widower, and some of the consequences of marriage extend beyond death. For example some Namibian communities still practice “levirate and sororate unions”, informally known as “widow or widower inheritance”.<sup>5</sup> Furthermore, the kind of marriage the deceased had determines in part which rules of intestate succession apply.<sup>6</sup>

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*or himself that there are no legal obstacles to the marriage. Those wishing to get married must produce copies of their identity documents, or alternatively make affidavits in the prescribed form. Marriages must take place in a church or other religious building, or in a public office or home, and the doors must be open. Both parties must be present as well as at least two competent witnesses. A particular formula for the ceremony is provided in the Marriage Act, but other formulae, such as religious rites, may be approved by the Minister. Once the marriage has been solemnised, both spouses, at least two competent witnesses, and the marriage officer must sign the marriage register. A copy of the register must then be transmitted to the Department of Home Affairs to be officially recorded. These formalities make certain that it is known to the broader community precisely who gets married and when they get married. Certainty is important for the broader community in the light of the wide range of legal implications that marriage creates...”*

*Volks NO v Robinson & Others* 2005 (5) BCLR 446 (CC) at 479D-E.

The formula for concluding a marriage in Namibia is contained in the Marriage Act 25 of 1961, section 30(1):

*In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:*

*“Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?”*,

*and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words:*

*“I declare that A.B. and C.D. here present have been lawfully married.”*

<sup>3</sup> See Appendices in Debie LeBeau, Eunice Iipinge & Michael Conteh, *Women’s Property and Inheritance Rights in Namibia*, Windhoek: UNAM, 2004 for a description of customary marriage and divorce processes based on interviews with key informants. See also TW Bennett, *Customary Law and the Constitution: A Background and Discussion Paper*, Windhoek: Law Reform and Development Commission, 1996 and Heike Becker and Manfred Hinz, *Namibia Papers No. 30: Marriage and Customary Law in Namibia*, Windhoek: Centre for Applied Social Studies (CASS), 1995. See Legal Assistance Centre (LAC), *Proposals for Law Reform on the Recognition of Customary Marriages*, Windhoek: LAC, 1999, at 35-ff for a brief summary of key principles.

<sup>4</sup> Article 14, Namibian Constitution. See Lawrence Schäfer, “Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships”, 123(4) *SALJ* 626 at 627: “...marriage is by definition a consensual relationship. For this reason it is within the power of individuals to procure inclusion within the rights and duties extended by the state to this distinct relationship. It is, therefore, reasonable and legitimate for the state to use marital status as the touchstone for the allocation of rights and duties.”

<sup>5</sup> This is customary practice whereby a widow or widower marries the brother or sister of the deceased; its original intent was to ensure that the deceased’s surviving spouse and children would be taken care of. Although this practice appears to be in decline in Namibia, such unions do still take place. See, for example, Debie LeBeau, Eunice Iipinge & Michael Conteh, *Women’s Property and Inheritance Rights in Namibia*,

In contrast, cohabitation is not a formal status. There is not necessarily a clear point at which it begins or ends, and there are no established rituals or procedures associated with it. Few legal consequences flow automatically from cohabitation, regardless of its duration – the exceptions are a small number of, mostly recent, statutory provisions giving some limited rights and protections to cohabiting partners. Other legal rights and obligations between cohabiting partners arise only from an express agreement between the parties, or an agreement which can be inferred from their conduct – and it will usually be very difficult to infer what each party actually chose or consented to in such a situation. Another point of contrast between cohabitation and marriage is that informal cohabitation sometimes still attracts stigma and disapproval, on religious or other moral grounds.

The *Volks* case decided by the South African Constitutional Court (discussed above<sup>7</sup>) contains a useful exploration of the contrast between marriage and cohabitation.

The majority opinion quoted the following passage from a previous South African Constitutional Court case on the special significance of marriage, as part of its argument that differential treatment of married and unmarried couples can be justified:

*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. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.*

*The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends.*<sup>8</sup>

Even the dissenting justices in the *Volks* case seemed to agree that cohabitation should not be equated with marriage, even if it attracts legal protections which are consistent with its context and function. According to Justice Sachs:

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Windhoek: UNAM, 2004 at 42-43; Lucy Edwards-Jauch, *AIDS and Family Structures*, Windhoek: Department of Sociology, University of Namibia, 2010 at 9 and *Makono v Nguvauva* 2003 NR 138 (HC).

<sup>6</sup> At the time of writing, the Law Reform and Development Commission was in the process of preparing a statute which would replace Namibia's surviving race-based rules of intestate succession (which currently apply different rules depending on a combination of race and type of marriage); the proposed legislation would establish a uniform approach to intestate succession for everyone, and would recognise "surviving spouses" from both civil and customary marriages.

<sup>7</sup> *Volks NO v Robinson & Others* [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (21 February 2005); see pages 33-38 for initial discussion.

<sup>8</sup> *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 paragraphs 30-31 (footnotes omitted), quoted in *Volks* (per Skweyiya J) at 462B-E.

*The law would continue to privilege marriage, even if partnerships are given limited recognition. The purpose of family law is to promote stability and fairness in family relationships. Marriage is the most widely recognised and most straightforward way of achieving this. The law recognises this fact. Mere production of a marriage certificate is sufficient to establish the degree of commitment and seriousness that the Act requires. No proof need be provided of permanency, intimacy, cohabitation, fidelity or shared lives. The law attributes to marriage all these qualities in irrebutable [sic] fashion. It will continue to privilege married survivors...*<sup>9</sup>

Dissenting Justices Mokgoro and O'Regan made a similar point:

*It should be emphasised that this conclusion does not mean that the Legislature is required to regulate cohabitation relationships in the same way that it regulates marriage.... As indicated earlier, marriage is a particular form of relationship, concluded formally and publicly with specified and clear consequences. Many people who choose to cohabit may do so specifically to avoid those consequences. In our view, the Legislature is entitled to take this into account when it regulates cohabitation relationships.*<sup>10</sup>

However, Justices Mokgoro and O'Regan also emphasised the discriminatory historical background (common to both Namibia and South Africa) which favoured civil marriage over all other forms of family relationship:

*The law has tended to privilege those families which are founded on marriages recognised by the common law. Historically, marriages solemnised according to the principles of African customary law were not afforded recognition equal to the recognition afforded to common law marriages, though this has begun to change. Similarly, marriages solemnised in accordance with the principles of Islam or Hinduism were also not recognised as lawful marriages [because they were potentially polygamous] though this too is now altering. The prohibition of discrimination on the ground of marital status [in the South African Constitution] was adopted in the light of our history in which only certain marriages were recognised as deserving of legal regulation and protection.*<sup>11</sup>

These two Justices asserted that although there are a variety of situations which can give rise to cohabitation in current times,<sup>12</sup> long-term cohabitation relationships can be socially and functionally similar to marriage and should be afforded at least some of the same protective benefits as marriage.<sup>13</sup> Furthermore, like marriage, cohabitation can involve gender inequalities where one party (often the woman) takes primary responsibility for maintaining the household and caring for children and thus is more vulnerable in material and financial terms. Therefore,

<sup>9</sup> *Volks* (per Sachs J) at 524C-D.

<sup>10</sup> *Volks* (per Mokgoro and O'Regan JJ) at 487G-H.

<sup>11</sup> *Id* at 477E-F (footnotes omitted).

<sup>12</sup> As this opinion pointed out: "Some may be living together with no intention of permanence at all, others may be living together because there is a legal or religious bar to their marriage, others may be living together on the firm and joint understanding that they do not wish their relationship to attract legal consequences, and still others may be living together with the firm and shared intention of being permanent life partners. Moreover, one cohabiting relationship may change its joint character and purpose so that partners who may originally not intend to be living together as permanent life partners may over time alter that intention and intend to live together as permanent life partners." *Id* at 482F-G.

<sup>13</sup> ...[C]ohabitation relationships that endure for a long time can produce patterns of dependence and vulnerability which in the light of the substantial and increasing number of people in cohabitation relationships cannot be ignored by the Legislature without offending the constitutional prohibition on unfair discrimination on the grounds of marital status. *Id* at 487H-488A.

these two Justices concluded that there is a need for legal regulation “*to ensure some equitable protection for cohabitants, particularly those who have been in long-term relationships where patterns of dependence have been established*”.<sup>14</sup>

Several legal analysts in South Africa have argued for a functional approach to families, but with an emphasis on comparing the functions of cohabitation to the functions of marriage. For example, the South African Law Reform Commission noted that “*domestic partnerships have come to be perceived as functionally similar to marriage*” and recommended that “*the decisive consideration ought to be whether a mutual dependency can be inferred from the partners’ conduct during the existence of the relationship*”.<sup>15</sup>

Professor June Sinclair, a respected South African legal commentator, has also articulated support for a functional approach to cohabitation. Noting the similarities between marriage and cohabitation, she states:

*...[M]arriage is most often distinguishable from cohabitation only by the piece of paper that testifies to its existence. The nature of the human relationships is ubiquitously identical; children are often the result; and women are notoriously left financially at risk when the relationship fails. Marriage and cohabitation create similar emotional involvements, dependencies and complex issues of finance and property.*<sup>16</sup>

Sinclair asserts that the justification for legal intervention should be based on the needs of the parties rather than the nature of the relationship; “*the real issue is whether the victims of the breakdown of intimate relationships deserve protection*”.<sup>17</sup>

***Marriage and cohabitation create similar emotional involvements, dependencies and complex issues of finance and property.***

June D Sinclair assisted by Jacqueline Heaton,  
*The Law of Marriage, Volume 1*, Kenwyn: Juta & Co, Ltd, 1996 at 293

Justice Sachs went further in his dissent in the *Volks* case, proposing an alternative approach which would not use matrimonial law as the yardstick for cohabitation. He contended that it is unwise to insist upon “*a single framework for all intimate associations*” and recommended instead a search for “*legal guidelines that will distinguish casual from committed relationships*” – which could look to criteria such as the duration of the relationship, the degree of the parties’ financial interdependence, and the presence of children as relevant factors.<sup>18</sup> Justice Sachs stated that “[i]f we move away from defining relationships in terms of marriage, we can look at the actual functions that they perform in society.”<sup>19</sup> Thus, he proposed that it is necessary to re-think

<sup>14</sup> Id at 482F-H, 487F-H and 488A (quote from 487F).

<sup>15</sup> South African Law Reform Commission (SALRC), *Project 118: Report on Domestic Partnerships*, Pretoria: SALRC, March 2006 (hereinafter “**SALRC**”) at paragraphs 1.2.6 and 7.2.38-7.2.39.

<sup>16</sup> June D Sinclair assisted by Jacqueline Heaton, *The Law of Marriage, Volume 1*, Kenwyn: Juta & Co, Ltd, 1996 at 293.

<sup>17</sup> Ibid.

<sup>18</sup> *Volks* (per Sachs J) at 495A-C, quoting June D Sinclair assisted by Jacqueline Heaton, *The Law of Marriage, Volume 1*, Kenwyn: Juta & Co, Ltd, 1996 at 292 and 298, note 109, who is in turn quoting Deborah Rhode, *Justice and Gender*, Cambridge: Harvard University Press, 1991 at 139-140.

<sup>19</sup> Id at 502B, citing Beth Goldblatt “Regulating Domestic Partnerships — A Necessary Step in the Development of South African Family Law” (2003) 120 *SALJ* 610.



the prevailing understanding of marriage and turn towards a functional interpretation of that concept,<sup>20</sup> suggesting accordingly that the legal response to cohabitation should depend upon the “*qualitative and quantitative nature of the cohabitation and the particular legal purpose for which it is being claimed, or denied, that a couple is cohabiting*”.<sup>21</sup> For example, he suggested that it would make sense to draw distinctions “*between short-term and long-term cohabitation, between the casual affair and the stable relationship, between relationships which have resulted in the birth of children and those which have not, and between couples who live together and couples who do not. Marriage law in this respect is different: you are either married with all the legal consequences that follow, or you are not*”.<sup>22</sup>

Professor Pierre de Vos, another respected South African legal commentator, has also questioned the assumption that marriage should be treated as the norm against which we measure other relationships. He argues that “*there is no reason why this one kind of arrangement should form the basis for the legal regulation of intimate relations in our society*”,<sup>23</sup> asserting that marriage fulfils certain social functions primarily because the law has assigned those functions to marriage alone. He argues that the legal preference for marriage does not match the lived reality of many people in diverse societies like South Africa (and Namibia), pointing out that “*the law could just as well utilise other mechanisms for achieving the same goals*”.<sup>24</sup> For example, instead of looking to marriage as the ideal, the law could focus on practical issues such as caretaking and dependencies in a range of family units, and attempt to address the inequalities and injustices associated with those roles. This approach would “*allow individuals to arrange their intimate relations in ways that suit their social, emotional, sexual and ideological needs without the threat of deviation and marginalisation that inevitably follows if one legally regulates intimate relations with reference to institutions such as marriage*”.<sup>25</sup>

Judge Anna-Marié de Vos, a High Court judge in South Africa, discusses the primary role of families in “*the nurturing and acculturation of children and in providing care for the sick and the old*”.<sup>26</sup> She notes that families also perform an essential income distribution function, by moving income from “*adults in their prime earning years to the old, the young and (mostly) the women who care for them*”.<sup>27</sup> She writes:

*Despite the importance of family and family life in South African democracy and despite the many de facto forms such family life takes amongst so many people in South Africa, until very recently, family law in South Africa was almost exclusively associated with the institution of Western-style marriage....*

*...This approach assumed – in typical apartheid style – that there was consensus about family life and the role of family in our society. But this concept of family... utterly failed to take account of the cultural diversity and the value of pluralism of South Africa’s new constitutional democracy. The reality is, of course, that there are various family forms represented by same-sex unions, extended families, single parent*

<sup>20</sup> Id at 498G-503F.

<sup>21</sup> Id at 506C-D.

<sup>22</sup> Id at 506D-E.

<sup>23</sup> Pierre de Vos, “Same-sex Sexual Desire and the Re-Imagining of the South African Family”, 20 *SAJHR* 179 (2004) at 203-206, drawing on Martha Fineman, *The Neutered Mother: The Sexual Family and other Twentieth Century Tragedies*, New York: Routledge, 1995.

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Anna-Marié de Vos, “Sexual Orientation and Family Law in South Africa”, paper delivered at the Miller Du Toit Law Faculty of the University of the Western Cape Family Law Conference, Cape Town, March 2002 at 1.

<sup>27</sup> Id.



*families, African customary marriages, Hindu, Jewish and Muslim marriages which do not conform to the traditional family model.*<sup>28</sup>

She concludes that family law will inevitably move away “*from the traditional conception of family law as linked to marriage*”.<sup>29</sup>

A well-known proponent of an open-ended approach to family relationships is US law professor Martha Fineman, who advocates a focus on caretaking and dependency. Fineman attacks the traditional distinction between ‘public’ and ‘private’ spheres of life, noting the key role that various types of families play in society: “*The traditional function of the family is that it will be the primary repository for dependency, providing for the emotional, physical, and developmental needs of its members.*”<sup>30</sup> Families voluntarily and altruistically take care of their members, thus allowing the market to ignore issues of dependency and making it possible for the state to act as a “*default institution*” which steps in only when families fail.<sup>31</sup> Society depends on the functions which families play,<sup>32</sup> but generally fails to take collective responsibility for those crucial roles.<sup>33</sup> Marriage has historically played a central role in this function of caretaking for dependants, but this is changing such that “*family as a social category should not be dependent on having marriage as its core relationship*”.<sup>34</sup> Fineman suggests that contract law should provide the framework for the private ordering of all kinds of personal relationships, supplemented where necessary by underlying default rules which set forth basic parameters, such as those found in labour law.<sup>35</sup>

Another American law professor, Martha Ertman, proposes an approach to family law based on a range of morally-neutral legal frameworks for family relationships, in the same way that business enterprises can construct themselves as companies, partnerships or close corporations.<sup>36</sup> In the same vein, she suggests that laws on family relationships should focus on addressing financial losses, gains and interminglings in the same way as business law,<sup>37</sup> and that definitions of family affiliation should focus on finance rather than on sexual conduct.<sup>38</sup>

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<sup>28</sup> Id at 2.

<sup>29</sup> Id at 3.

<sup>30</sup> Martha A Fineman, “Contract and Care”, 76 *Chicago-Kent Law Review* 1418 (2000-01) at 1418.

<sup>31</sup> Id at 1421, 1427.

<sup>32</sup> “Caretaking labour provides the citizens, the workers, the voters, the consumers, the students, and others who populate society and its institutions. The uncompensated labour of caretakers is an unrecognised subsidy, not only to the individuals who directly receive it, but more significantly, to the entire society.” Martha A Fineman, “Cracking The Foundational Myths: Independence, Autonomy, And Self-Sufficiency”, 8 *American University Journal of Gender, Social Policy and the Law* 15 (2000) at 19.

<sup>33</sup> Other services provided by individuals for the good of society are acknowledged and financed by the state. For example, the armed services serve society’s collective need for defence – and individuals who perform this function are paid for their work and provided with a structure and resources to facilitate their jobs. But family structures are not similarly given general support or assistance in their function of caring for dependent members of society. Id at 19-20.

<sup>34</sup> Martha A Fineman, “Why marriage?”, 9 *Virginia Journal of Social Policy and Law* 239 (2001-02) at 245. Fineman also discusses how the profile of marriage is changing, from a hierarchical unit with the husband at the head to a more egalitarian partnership. Martha A Fineman, “Contract and Care”, 76 *Chicago-Kent Law Review* 1418 (2000-01) at 1429-1430.

<sup>35</sup> Martha A Fineman, “Why marriage?”, 9 *Virginia Journal of Social Policy and Law* 239 (2001-02) at 261-262. Fineman suggests the complete abolition of marriage as a legal category, in favour of an open-ended contractual approach with underlying default rules such which prevent harms such as unjust enrichment. Ibid.

<sup>36</sup> Martha M Ertman, “The ALI Principles’ Approach to Domestic Partnerships”, 8 *Duke Journal of Gender Law & Policy* 107 (2001) at 114-115.

<sup>37</sup> Ibid. The examples used by Ertman, based on US law, have been changed to similar Namibian examples in the text above.

<sup>38</sup> Id at 116.

These observations emphasise the need to move away from the idea that marriage is the only form of family worthy of legal protection, and toward a legal framework which does not view marriage as the ideal model for family relationships. A law aimed at providing protection for cohabiting couples need not accomplish an entire transformation of Namibian family law in one step, but it is useful to in thinking about law reform on cohabitation to keep the larger picture of family law and family relationships in mind.

*If we move away from defining relationships in terms of marriage, we can look at the actual functions that they perform in society.*

**Volks NO v Robinson** 2005 (5) BCLR 446 (CC) at 502B (Justice Sachs, dissenting),  
citing Beth Goldblatt “Regulating Domestic Partnerships –  
A Necessary Step in the Development of South African Family Law” (2003) 120 SALJ 610.

## 4.2 Freedom of choice and gender inequality

Because cohabitation occurs in a society marked by gender inequality, the role of the ‘choice’ not to marry is complex. Do men and women in Namibia have the same freedom of choice about the form their relationships will take?

Another interesting strand of debate concerns the role of freedom of choice. Personal choices should be afforded respect, but the role of choice in respect of cohabitation is complex. Is it fair to assume that both parties in a cohabitation relationship have really chosen not to marry? Are men and women positioned to have the same freedom of choice about the form their relationships will take? Should the law focus on the negative fact that the parties have chosen not to marry, or on the positive fact that they have chosen to be part of a relationship with particular emotional, social and financial functions?

In the *Volks* case, the majority found respect for the choice not to marry to be a persuasive reason *not* to treat cohabiting relationships like marriages:

*People involved in a relationship may choose not to marry for a whole variety of reasons, including the fact that they do not wish the legal consequences of a marriage to follow from their relationship. It is also true that they may not marry because one of the parties does not want to get married. Should the law then step in and impose the legal consequences of marriage in these circumstances? To do so in my view would undermine the right freely to marry and the nature of the agreement inherent in a marriage. Indeed it would amount to the imposition of the will of one party upon the other.*<sup>39</sup>

Justice Sachs in his dissenting judgment described “*the philosophical premise underlying the majority judgement*” as the view that people who opt not to marry do not have a right to

<sup>39</sup> *Volks* (per Ngcobo J) at 473H–474A.

complain if they do not enjoy the same legal benefits they would have had if they had married, because the choice not to marry must be respected as a valid choice.<sup>40</sup>

However, Justice Sachs' dissent argued for a different approach to the question of respect for choice, viewing cohabitation as a positive choice instead of merely a decision not to marry:

*Respecting autonomy means giving legal credence not only to a decision to marry but to choices that 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.*<sup>41</sup>

In support of this view, Justice Sachs quoted a passage from a Canadian Supreme Court judgment which also asserted that the question of choice is more complex than a decision simply “to marry or not to marry”:

*The importance actually ascribed to the decision to marry or, alternatively, not to marry, depends entirely on the individuals concerned. For a significant number of persons in so-called “non-traditional” relationships, however, I dare say that notions of “choice” may be illusory. It is inappropriate, in my respectful view, to condense the forces underlying the adoption of one type of family unit over another into a simple dichotomy between “choice” or “no choice”. Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons — all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law.*<sup>42</sup>

Justice Sachs concluded that it would be “socially unrealistic, unduly moralistic and hence constitutionally unfair to discriminate against the powerless and economically dependent party” to a cohabitation relationship “on the basis that she should either have insisted on marriage or else withdrawn from the relationship”.<sup>43</sup> This concern was expressed even more starkly in a Canadian case on cohabitation, where the court stated that it is small consolation to be denied legal protection on the grounds that “one’s partner had a choice”.<sup>44</sup>

Justice Sachs suggests that a consideration of the role of choice should be context-specific, citing a Canadian case which emphasised that not all cohabitation relationships can fairly be

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<sup>40</sup> “I believe, the philosophical premise underlying the majority judgment (as well as the basis for the judgment of Ngcobo J, which I have had the opportunity to read), is 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. Just as the choice to marry is one of life’s defining moments, so, it is contended, the choice not to marry must be a determinative feature of one’s life. These are powerful considerations.” *Volks* (per Sachs J, dissenting) at 494F-H.

<sup>41</sup> *Volks* (per Sachs J) at 495D-E.

<sup>42</sup> *Miron v Trudel* [1995] 2 SCR 418 (per L’Heureux-Dubé J, concurring) at paragraph 102, quoted in *Volks* (per Sachs J) at 496D-497D.

<sup>43</sup> *Volks* (per Sachs J) at 521A.

<sup>44</sup> *Miron v Trudel* [1995] 2 SCR 418 (per L’Heureux-Dubé J) at 471-472, quoted in *Volks* (per Sachs J) at 496B.

assumed to have “*a commonality of intention*”<sup>45</sup> In other words, not all cohabitation relationships should be treated identically to each other (or to marriage) for all purposes. For example, a cohabiting partner should be treated in the same way as spouse for purposes of the right to seek maintenance from a deceased estate if the parties to the cohabitation relationship undertook to support each other within their respective means, either by express or by tacit agreement, or directly from the nature of the particular life partnership itself.<sup>46</sup> In this way, specific choices lead to specific consequences; a person who enjoys the benefits of certain types of relationship will be understood to have taken on the concomitant responsibilities.

*It is small consolation, indeed, to be told that one has been denied equal protection... by virtue of the fact that one's partner had a choice.*

**Miron v Trudel** [1995] 2 SCR 418 (per L'Heureux-Dubé J) at 471-472, quoted in **Volks NO v Robinson** 2005 (5) BCLR 446 (CC) (per Sachs J) at 496B

There is an important gender dimension to the concept of free choice. Justice Sachs asserts that a consideration of cohabitation must take into account the context of systemic gender disadvantage, since many women in South Africa historically lacked the same degree of free choice as their male partners:

*It should be remembered that many of the permanent life partnerships dissolved by death today would have been established in past decades, when conditions were even harsher than they are now, and people had far less choice concerning their life circumstances... [T]he social reality would have been that in a considerable number of families the man would have regarded himself as the head of the household with the right to take all major decisions concerning the family. It would have been he who effectively decided whether he and his partner should register their relationship in terms of the law. If she refused to do what he wanted, he could have been the one to threaten violence or expulsion, with little chance of the law intervening. Because he would in many cases have been the party to go out to work while she stayed at home to look after the children and attend to his needs, it would have been he who accumulated assets, and he who had the proprietary right to determine how they were to be disposed of after his death.*<sup>47</sup>

In short, the choice in practice for many women, given the context of patriarchy and poverty, “*has been between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other.*”<sup>48</sup>

A similar point on the impact of gender inequality on freedom of choice has been forcibly made by South African researcher Beth Goldblatt, who conducted empirical research on cohabitation in South Africa:

*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.*

<sup>45</sup> *Nova Scotia (Attorney General) v Walsh* [2002] 4 SCR 325 (per Bastarache J) at paragraphs 41-44, quoted in *Volks* (per Sachs J) at 497C.

<sup>46</sup> *Volks* (per Sachs J) at 519B-G.

<sup>47</sup> *Volks* (per Sachs J) at 499E-G (footnotes omitted).

<sup>48</sup> *Volks* (per Sachs J) at 521G-I.

*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 and equally to set the terms of their relationships. It is precisely because weaker parties (usually women) are unable to compel the other partner to enter into a [marriage or] contract or register their relationship that they need protection ... [I]t 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 [sic] the already difficult position facing many women.<sup>49</sup>*

South Africa's Centre for Applied Legal Studies made a similar point about women's vulnerability in cohabitation relationships:

*Women, who may wish to marry, often feel unable to insist on this because they are dependent on men. Many of the men are reluctant to marry because of the freedom this affords them to come and go as they please and to remain outside of legal regulation of their relationship while benefiting from the domestic labour of women. Women depend on men because of their unequal position in society, their relative lack of access to income, their responsibilities to children and their inability to resist physical abuse by men.<sup>50</sup>*

The impact of systemic gender inequalities justifies some legal intervention to protect vulnerable and disempowered women who do not have the same degree of choice as their male partners.

***Their choice has been between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other.***

***Volks NO v Robinson*** 2005 (5) BCLR 446 (CC)  
(per Sachs J) at 521H (speaking of "many women").

Another relevant issue is the question of informed versus uninformed choice. Some people in South Africa and Namibia mistakenly believe that there is some legal protection for cohabitation relationships as a form of 'common-law marriage', and so may 'choose' not to marry or acquiesce to a partner's desire to remain unmarried on the basis of mistaken assumptions.<sup>51</sup> There may also be situations where one party is deceiving the other, or holding out false promises of future marriage, so that the other partner's 'choice' to cohabit is not being made with full and accurate knowledge of all the relevant factors.<sup>52</sup>

<sup>49</sup> Beth Goldblatt, "Regulating domestic partnerships – a necessary step in the development of South African family law", 120 *SALJ* 610 (2003) at 616.

<sup>50</sup> SALRC at paragraph 2.4.175. See also Saras Jagwanth, "Expanding Equality", 2005 *Acta Juridica* 131 at 136, where she emphasises "the social and economic context of women's lives and the patterns of disadvantage suffered by them" and concludes that "[t]o assume that couples in permanent life partnerships are not married out of choice ignores the fact that a disproportionately large number of women lack the power to negotiate the terms of their relationship." She also notes that the "financial and social vulnerability of women in domestic partnerships also contributes to their position of disadvantage".

<sup>51</sup> See, for example, Lawrence Schäfer, "Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships", 123 (4) *SALC* 626 (2006) at 642; SALRC at paragraphs 2.2.29-2.2.33. Questions put to the Legal Assistance Centre from members of the public evidence similar misperceptions in Namibia.

<sup>52</sup> SALRC at paragraph 2.4.132.



The South African Law Reform Commission has taken the view that it is necessary to strike a balance between the interests of vulnerable parties in relationships and the autonomy of partners who do not want the relationship to incur any legal consequences.<sup>53</sup> It suggests that there are two justifications for allowing the law to interfere with individual self-determination in the context of cohabitation: (1) a protective role, to prevent exploitation in a relationship where there are power imbalances and (2) a remedial role, to resolve disputes about rights and obligations fairly when a relationship has broken down.<sup>54</sup>

More generally, US law professor Martha Fineman asserts that an emphasis on individual ‘choice’ can obscure the fact that such choices occur “*within the constraints of social conditions (including the ideological) that funnel decisions into prescribed channels and often operate in a practical and symbolic manner to limit, or practically eliminate, options*”.<sup>55</sup> Fineman also notes that a focus on individual choice may ignore the fact that such choices may produce unanticipated or even unimagined consequences.<sup>56</sup> She asserts that, furthermore, some consequences are simply too oppressive or unfair to be countenanced by society, even if individuals choose them.<sup>57</sup>

This discussion should help to explain why the law is entitled to interfere with freedom of choice in the context of cohabitation, as in many other areas of life, when this is necessary to protect the fundamental rights of others.<sup>58</sup>

## 4.3 Cohabitation and religion

**Because Namibia is a secular state, the Christian preference for marriage is not a valid reason for refusing to give legal protection to cohabitation. In any event, polygamous customary marriages and marriages under various religions are already recognised for specific purposes, evidencing a tolerance for a variety of customs and belief systems.**

Although some Namibians may object to giving any legal recognition to cohabitation on religious grounds, such arguments should not be allowed to be the guiding influence on policy on this issue.

In Christian ideology, marriage has a special, sacred status and is considered to be the only acceptable vehicle for procreation; it is the relationship model provided by Adam and Eve and a human mirror of the relationship between Christ and the church.<sup>59</sup> Christian theology therefore generally disapproves of sexual relationships outside marriage.<sup>60</sup>

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<sup>53</sup> SALRC at paragraph 1.3.6.

<sup>54</sup> Id at paragraph 2.4.122.

<sup>55</sup> Martha A Fineman, “Contract and Care”, 76 *Chicago-Kent Law Review* 1418 (2000-01) at 1419.

<sup>56</sup> Id at 1419-1420; for example, “*we may believe (cultural, familial, and societal imperatives aside) that a woman chose to become a mother, but does this choice mean she has also consented to the societal conditions attendant to that role and the many ways in which that status will negatively effect [sic] her economic prospects? Did she even realise what those costs might be? Is it even possible that society and culture might have led her astray on the issue of costs, lied to her about the returns and rewards of caretaking?*”. Id at 1420.

<sup>57</sup> Id at 1420. This principle is already evident in Namibian law, which does not allow persons to sell themselves into slavery (Article 9(1) of the Namibian Constitution) or to consent to being assaulted (JRL Milton, *South African Criminal Law and Procedure, Volume 2*, Cape Town: Juta & Co, 1982 at 471-473).

<sup>58</sup> See SALRC at paragraph 2.4.134.

<sup>59</sup> See SALRC at 36-ff. See also, for example, Genesis 2:18-24, Hebrews 13:4, Matthew 19:4-6 and Ephesians 5:23-32.

<sup>60</sup> See, for example, 1 Corinthians 7:8-9.

However, even though a large proportion of the Namibia population subscribe to Christian values, Namibia is a secular state. This is explicitly recognised in the Preamble to the Namibian Constitution and in Article 1(1), both of which proclaim Namibia as a “*sovereign, secular, democratic and unitary state*”, and it is implicit in various other constitutional provisions – Article 10(2) which prohibits discrimination on the basis of religion, Article 19 which protects the practice of culture, language, tradition and religion within constitutional boundaries, and Article 21(1)(c) which protects “*freedom to practice any religion and to manifest such practice*”. Furthermore, Article 14 on marriage specifically states that the right to marry and found a family may not be limited on the basis of religion.

Respect for religions other than Christianity has been evidenced in several Namibian statutes which define marriage to include customary marriage (which can be polygamous) or marriages under various religions.<sup>61</sup> Since colonial times, there has been a tension between the Christian ideal of marriage between one man and one woman, and the institution of polygamy which is accepted by many Namibian cultures. Nevertheless, polygamous customary marriages are recognised in Namibian statutes for many purposes. Thus, in many ways, Namibian law and custom already respect a plurality of approaches to family life.

South Africa is also a secular state which guarantees freedom of religion, belief and opinion. Interestingly, the provision of the South African Constitution which does this, Article 15, includes specific authorisation for the legislature to recognise marriages concluded under various religions or systems of law:

### **15 Freedom of religion, belief and opinion**

- (1) *Everyone has the right to freedom of conscience, religion, thought, belief and opinion.*
- (2) *Religious observances may be conducted at state or state-aided institutions, provided that –*
  - (a) *those observances follow rules made by the appropriate public authorities;*
  - (b) *they are conducted on an equitable basis; and*
  - (c) *attendance at them is free and voluntary.*
- (3) (a) *This section does not prevent legislation recognising –*
  - (i) *marriages concluded under any tradition, or a system of religious, personal or family law; or*
  - (ii) *systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.*
- (b) *Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.*

The South African Constitutional Court has made the following comment on this provision:

*The special provisions of section 15(3) are anchored in a section of the Constitution dedicated to protecting freedom of religion, belief and opinion. In this sense they acknowledge the right to be different in terms of the principles governing family life. The provision is manifestly designed to allow Parliament to adopt legislation, if it so wishes, recognising, say, African traditional marriages, or Islamic or Hindu marriages, as part of the law of the land, different in character from, but equal in status to general marriage law. Furthermore, subject to the important qualification of being consistent*

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<sup>61</sup> See chapters 8 and 9 below.

*with the Constitution, such legislation could allow for a degree of legal pluralism under which particular consequences of such marriages would be accepted as part of the law of the land.*<sup>62</sup>

In the South African *Volks* case, dissenting Justices Mokgoro and O'Regan considered the role of religious condemnation of cohabitation outside marriage. They felt that religious views on marriage should not be the guiding principle: "*While marriage plays an important role in our society, and most religions cherish it, the Constitution does not permit rights to be limited solely to advance a particular religious perspective.*"<sup>63</sup> Dissenting Justice Sachs made a similar point, stressing that whilst freedom of religion means that those who believe that cohabitation outside marriage is morally wrong, this does not give a secular state the right to make the same moral judgment:

*It is important to stress at this point that the issue is not whether members of religious or cultural communities should as a matter of faith be free to regard marriage as a sacred contract which constitutes the only acceptable gateway to legitimate sexual intimacy and cohabitation. Nor is it to query the corollary right of such believers to condemn those who are guilty of what they may regard as fornication and adultery. Clearly their entitlement as part of their religious belief to criticise what they regard as misconduct remains unchallenged. The question, rather, is whether the state should be bound by such concerns.*<sup>64</sup>

In an argument which is often aligned to religious views on marriage, some worry that legal recognition of cohabitation may threaten the continuation of the institution of marriage. However, as discussed in Chapter 1, the rate of marriage is already very low in Namibia at a time when the law affords virtually no protection to cohabitation. This indicates that it is appropriate to place a priority on reforming the law so that it is appropriate to the nation's existing social reality. Furthermore, as Professor June Sinclair has pointed out, "*if the popularity of marriage is declining, ways should be found to make it more attractive, not cohabitation punitively unattractive*".<sup>65</sup>

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<sup>62</sup> *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* 2006 (1) SA 524 (CC) at 566F-H. It continues:

*The section "does not prevent" legislation recognising marriages or systems of family or personal law established by religion or tradition. It is not peremptory or even directive, but permissive. It certainly does not give automatic recognition to systems of personal or family law not accorded legal status by the common law, customary law or statute. Whether or not it could be extended to same-sex marriages, which might not easily be slotted into the concept of marriage or systems of personal or family law "under any tradition", it certainly does not project itself as the one and only legal portal to the recognition of same-sex unions.*

See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (1) SA 6 (CC) (per Ackermann J), which noted at paragraph 38 that even honest, sincere and deeply-held religious views cannot influence the dictates of the Constitution.

<sup>63</sup> *Volks* (per Mokgoro & O'Regan JJ) at 489A.

<sup>64</sup> *Id* (per Sachs J) at 514A-B.

<sup>65</sup> June D Sinclair assisted by Jacqueline Heaton, *The Law of Marriage, Volume 1*, Kenwyn: Juta & Co, Ltd, 1996 at 291-292.

# Chapter 5

## CURRENT COMMON LAW ON COHABITATION

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The current Namibian law on cohabitation is based primarily on common law principles. There is no legislation that comprehensively regulates cohabitation, although certain limited rights are extended to cohabiting partners by specific statutes.

This chapter first canvasses the common law principles on cohabitation. In order to place the legal position of cohabiting partners into perspective, it is contrasted to that of spouses in a civil marriage. While cohabitation cannot and should not necessarily be equated with marriage, comparisons may be helpful in considering the possible legal reforms in respect of cohabitation. The Legal Assistance Centre agrees with the theory that the law should ideally give appropriate recognition and protection to a range of family relationships, based on their function in society and the responsibilities and expectations of the parties to such relationships. Marriage should not be the only touchstone, but it nonetheless provides a helpful point of comparison – particularly for understanding the current legal situation.

The chapter then discusses common law concepts which could be applied to provide equitable remedies to some cohabiting partners, even though these legal concepts did not develop with this purpose in mind. Although cohabitants have no clear legal recognition for their relationship at common law, they may sometimes make use of common law concepts to enforce certain rights and obligations.<sup>1</sup> The main channel of litigation has been in the area of contract, and a number of cases have had successful outcomes on this basis. A less well-developed option is to utilise a claim of unjustified enrichment against the other party.<sup>2</sup> Because law reform on cohabitation may not be enacted, or may take some time to put into place, considerable attention is devoted here to the potential common law protections for cohabiting couples. Vulnerable parties could possibly find some assistance in existing common-law remedies in advance of law reforms.

This chapter also examines some causes of action which might be brought against cohabiting partners by a wronged spouse of one of the partners. In theory, someone cohabiting with a married partner who sought to utilise the common-law in respect of the cohabitation relationship could open themselves up to certain claims by the partner's spouse.

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<sup>1</sup> June D Sinclair assisted by Jacqueline Heaton, *The Law of Marriage, Volume 1*, Kenwyn: Juta & Co, Ltd, 1996 (hereinafter “**Sinclair**”) at 274-ff.

<sup>2</sup> See generally Victoria Mayer Consulting, “Developing Strategies for Litigation and Law Reform: Domestic Partnerships”, Cape Town: The Women's Legal Centre, 2000 and South African Law Reform Commission (SALRC), *Project 118: Report on Domestic Partnerships*, Pretoria: SALRC, March 2006 (hereinafter “**SALRC**”) at paragraphs 3.1.12-ff.

## 5.1 Common law on cohabitation versus marriage

Marriage and cohabitation currently have very different legal profiles.

### 5.1.1 Marriage

In the case of a civil marriage, the change in status which results from the marriage is associated with new legal rights and responsibilities. At marriage, husband and wife enter a *consortium omnis vitae*, which is “a physical, moral and spiritual community of life”.<sup>3</sup> This broad concept embodies companionship, love, affection, comfort, mutual services and sexual intercourse.<sup>4</sup>

Spouses in a civil marriage undertake to live together and to support one another on a scale commensurate with their social position, lifestyle and financial resources.<sup>5</sup>

This duty of support means that all spouses in civil marriages, regardless of the property regime which applies, can bind one another to third parties for the provision of household necessities.<sup>6</sup>

Spouses have a right to claim damages from third parties for the loss of the other spouse’s financial support in cases where the spouse has been killed or injured by the wrongful act of a third person, and, in actions for wrongs such as adultery and enticement, for the loss of consortium (which refers to the loss of affection, companionship and sexual gratification).<sup>7</sup>

Both spouses have a right to occupy the matrimonial home, and both are under a reciprocal duty to contribute to its upkeep. Neither spouse has a right to eject the other spouse from the matrimonial home without providing suitable alternative accommodation, even if the matrimonial home is owned by one spouse alone.<sup>8</sup> A similar principle applies to the appurtenances of the matrimonial home, such as the furniture.<sup>9</sup> These obligations are described

<sup>3</sup> Sinclair at 422; see also HR Hahlo, *The South African Law of Husband and Wife*, 4<sup>th</sup> edition, Wynberg: Juta & Co, Ltd, 1975 (hereinafter “**Hahlo**”) at 109-110 and *Peter v Minister of Law and Order* 1990 (4) SA 6 (E) at 9G, stating that the concept includes “*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*”.

<sup>4</sup> See SALRC at paragraphs 2.4.6-2.4.7, quoting *Grobbelaar v Havenga* 1964 (3) SA 522 (N).

<sup>5</sup> See B Van Heerden et al, *Boberg’s Law of Persons and the Family*, 2<sup>nd</sup> edition, Kenwyn: Juta & Co, 1999 at 255.

<sup>6</sup> The common law position was supplemented by the Married Persons Equality Act 1 of 1996, sections 9(5) (civil marriages in community of property) and 15 (civil marriages out of community of property).

<sup>7</sup> See Hahlo 1975 at 123.

<sup>8</sup> See id at 121; Sinclair at 476, citing *Owen* 1968 (1) SA 480 (E) and *Badenhorst* 1964 (2) SA 676 (T). See also, for example, *Oglodzinski* 1976 (4) SA 273 (D). This right is not absolute; a spouse has the right to protect his or her occupation of the matrimonial home against interference by the other spouse, which occurs most often in the form of domestic violence or threats of such violence.

<sup>9</sup> Hahlo at 122, citing *Whittingham* 1974 (2) SA 636 (R) and *Petersen* 1974 (1) PH B5 (R). See also, for example, *Du Randt* 1995 (1) SA 401 (O) (motor vehicle); *Ross* 1994 (1) SA 865 (E) (household goods); *Manga* 1992 (4) SA 502 (ZSC) (car and furniture); *Coetzee* 1982 (1) SA 933 (C) (car); *Rosenbruch* 1975 (1) SA 181 (W) (furniture).



as being “invariable” consequences of marriage, meaning that they may not be excluded by antenuptial contract.

There are various property regimes which can apply to civil marriages, but most such marriages in Namibia are “in community of property” with a joint estate,<sup>10</sup> where all major financial transactions require the consent of both spouses under the Married Persons Equality Act 1 of 1996.<sup>11</sup>

Marriage to a Namibian citizen can (after ten years) give a non-Namibian citizen the right to Namibian citizenship by marriage<sup>12</sup>, and the Namibian Constitution protects spouses from being compelled to give testimony against each other.<sup>13</sup>

A civil marriage between minors (with the requisite permissions<sup>14</sup>) also has the effect of transforming those minors into majors.<sup>15</sup>

There are legal rules and procedures which govern the dissolution of a marriage by divorce. Divorce can be ordered only by the High Court. The divorce order will usually address the division of the marital property in a marriage which was “in community of property”, and it may require one spouse to provide maintenance for the other regardless of the marital property regime which applied. If there are minor children, the divorce order will normally settle responsibility for their custody, access, guardianship and maintenance.

When one of the spouses dies, the estate will be divided before anything is inherited if the marriage was “in community of property”. Spouses had no right of intestate inheritance at common law, but this has now been changed by statute; now all surviving spouses have a right to inherit intestate from the property of the deceased spouse.<sup>16</sup>

Customary marriage also involves a change in status which affects the families involved as well as the individuals.<sup>17</sup> It is conceptualised as a union between two families or kin groups

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<sup>10</sup> See Legal Assistance Centre (LAC), *Proposals for Divorce Law Reform in Namibia*, Windhoek: LAC, 2000, at 47.

The default marital property regime for civil marriages in most parts of Namibia is “in community of property”, meaning that unless a couple arrange to have an ante-nuptial agreement applying “out of community of property” or the “accrual system”, they will automatically be married “in community of property”. See Legal Assistance Centre (LAC), *Marital Property in Civil and Customary Marriages: Proposals for Law Reform*, Windhoek: LAC, 2005 at 36-48.

<sup>11</sup> Married Persons Equality Act 1 of 1996, sections 7-8.

<sup>12</sup> Article 4(3)(b), as amended by Namibian Constitution Second Amendment Act 7 of 2010.

<sup>13</sup> Namibian Constitution, Article 12(1)(f).

<sup>14</sup> Minors under age 18 need state consent to enter into a civil marriage, while those under 21 also need parental consent. See Marriage Act 25 of 1961, sections 24-26.

<sup>15</sup> See Hahlo at 107.

<sup>16</sup> Before the passing of the South African Succession Act 13 of 1934 (which applied to Namibia), under the common law, spouses *did not* have the right to inherit intestate from the property of the deceased spouse. See MM Corbett, HR Hahlo & GYS Hofmeyr, *The Law of Succession in South Africa*, Kenwyn: Juta, 1980 at 586, note 21: “Prior to [the passing of] this Act, in accordance with the principles of *Scheependomsrecht*, the surviving spouse had no right of succession *ab intestato*: *Ex parte Leeuw* (1905) 22 SC 340”.

<sup>17</sup> See Appendices in Debie LeBeau, Eunice Ipinge & Michael Conteh, *Women’s Property and Inheritance Rights in Namibia*, Windhoek: UNAM, 2004 for description of customary marriage and divorce processes based on interviews with key informants. See also TW Bennett, *Customary Law and the Constitution: A Background and Discussion Paper*, Windhoek: Law Reform and Development Commission, 1996 and Heike Becker and Manfred Hinz, *Namibia Papers No. 30: Marriage and Customary Law in Namibia*, Windhoek: Centre for Applied Social Studies (CASS), 1995. See Legal Assistance Centre (LAC), *Proposals for Law Reform on the Recognition of Customary Marriages*, Windhoek: LAC, 1999, at 35-ff for a brief summary of key principles.

rather than a union between two individuals. The extended families of the two spouses often play a large role in mediation and attempting to resolve marital disputes, while community elders and members of the community or age mates may also play a mediating role.<sup>18</sup> Divorce is usually accomplished by a relatively informal procedure which takes place without any intervention from traditional leaders, who are likely to become involved only if there are issues which cannot be resolved between the couple and their families.<sup>19</sup> But despite its greater fluidity in respect of process, customary marriage still results in a clear status which places rights and obligations on the spouses and their family members.<sup>20</sup>

### 5.1.2 Cohabitation

In contrast to marriage, cohabitation produces no automatic consequences under Namibian common law. Most statutes which involve issues pertaining to intimate and dependent relationships similarly ignore cohabitants.

There is no legal duty of support between cohabitants either during the relationship or when it ends. In the eyes of the law, each partner is responsible for his or her own upkeep.<sup>21</sup>

The only way that cohabiting partners in Namibia can acquire mutual duties and obligations is through agreements – either express agreements between the two partners or implicit agreements inferred from their conduct. However, as discussed below, these avenues for establishing mutual obligations have limitations.

The law does not regard the property of cohabitants to be jointly owned unless they have entered into an express or implied agreement to this effect. If the property is owned individually, the cohabitant who owns the property has a legal right to deal with that property as he or she wishes, without consulting his or her partner – even if the property was acquired during the course of the relationship and even if the other partner made financial contributions to the purchase of the property. The person who holds the title to the property is regarded as the owner of the property and is not required to act with the consent or knowledge of his or her partner.

The cohabiting partner has no right to occupy a common home which is individually owned or leased by the other partner.<sup>22</sup> (The only exceptions would be in the rare cases where a

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<sup>18</sup> See, for example, Axel Thoma and Janine Piek, *Customary Law and Traditional Authority of the San Windhoek*, Centre for Applied Social Studies, 1997, at 22, 26, 36, 55; Hester van Wingerden, “‘I don’t want any nonsense in my courtyard!’: The position of women in Subia family law” Utrecht: Utrecht Unitwin Network, 1996 at 53-ff and Margaret Jacobsohn, “Negotiating Meaning and Change in Space and Material Culture: An ethno-archaeological study among semi-nomadic Himba and Herero herders in north-western Namibia” (1995) at 67.

<sup>19</sup> See Tami Friesen and Jewel Amoah, *Reform of Namibia’s Customary Marriage Law: Issue Paper*, Centre for Applied Social Sciences, 1999 at 85, 89, 95. See also, for example, Renee Sylvain, “‘We work to have life’: Ju/’hoan women, work and survival in the Omaheke Region, Namibia”, PhD thesis, Graduate Department of Anthropology, University of Toronto, 1999 at 331-ff, and Axel Thoma and Janine Piek, *Customary Law and Traditional Authority of the San Windhoek*, Centre for Applied Social Studies, 1997 at 55.

<sup>20</sup> See generally Debie LeBeau, Eunice Ipinge & Michael Conteh, *Women’s Property and Inheritance Rights in Namibia*, Windhoek: UNAM, 2004.

<sup>21</sup> This means that cohabiting partners cannot legally bind each other for the purchase of household necessities unless they enter into an agreement and appoint each other as agents. However, if cohabiting partners hold themselves out to third parties as being legally married, they may be estopped from denying the existence of a contract of agency. SALRC at paragraph 3.1.62; Brigitte Clark, “Families and domestic partnerships”, 119 (3) *SALJ* 634 (2002) at 639.

<sup>22</sup> See Sinclair at 286.

cohabiting partner might be able to apply the common law principles of universal partnership or unjust enrichment, discussed in detail below.) Cohabiting partners similarly have no rights under the statutes which govern private land or communal land which is held in the name of the partner.<sup>23</sup>

Like any other person, a partner who is cohabiting has the right to bequeath his property to whomever he or she wishes. Thus, cohabitants may in a will bequeath their estate to their partners, provided that this is clearly stated.<sup>24</sup> If no will exists, then the surviving cohabitant has no right to inherit from the deceased cohabitant under the laws of intestate succession.

Spouses are protected from being compelled to testify against each other in civil and criminal cases,<sup>25</sup> but there is no analogous protection for cohabiting partners.

The treatment of dependent cohabiting partners differs under different statutes; cohabitants would fall under the definition of “*dependant*” in a few, but are often left out and thus deprived of various benefits which would accrue to a spouse.<sup>26</sup>

The only area in which cohabitation closely resembles marriage concerns children. This is primarily a result of statutory enactments which have overruled the common law (discussed below<sup>27</sup>). Also, opposite-sex cohabitants are covered by the provisions of the Combating of Domestic Violence Act in the same way as spouses.<sup>28</sup>

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<sup>23</sup> See Deeds Registries Act 47 of 1937 (which protects spouses married in community of property) and the Communal Land Reform Act 5 of 2002 (which gives widows and widowers the right to remain on communal land allocated to the deceased spouse).

<sup>24</sup> Sinclair at 289, citing *Momeen v Bassa* 1976 (4) SA 338 (D) where a testator died survived by two wives – one to whom he was married in a civil marriage and another to whom he was married by Muslim rites. The reference to “my wife” in his will, in the absence of any contrary indication, was held to include only his legal wife.

<sup>25</sup> This is by virtue of Article 12(1)(f) of the Namibian Constitution, the Criminal Procedure Act 51 of 1977 and the Civil Proceedings and Evidence Act 25 of 1965.

<sup>26</sup> This issue is discussed in detail in the following chapter. Briefly:

- The Employees’ Compensation Act 30 of 1941 makes opposite-sex cohabiting partners eligible to claim compensation in the case of injury, death or disablement if they can prove that they were dependent on the employee for the necessities of life at the time of the accident. A cohabiting partner is treated as a spouse so long as there is no other surviving spouse who was factually dependent on the employee, and given precedence along with children over other persons may have been dependent on the deceased employee.
- Cohabitants are covered by the definition of “*dependant*” in the Pension Funds Act 24 of 1956, but not by the definition of “*dependant*” for the purposes of claims under the Motor Vehicle Accidents Fund Act 10 of 2007.
- The Medical Aid Fund Act 23 of 1995 leaves the coverage of cohabitants to the rules of individual medical aid schemes.
- The Labour Act 11 of 2007 takes different approaches to the definition of “*family*” and “*dependants*” for different purposes; these inconsistencies should be harmonised to include cohabiting partners.
- The Social Security Act 33 of 1994 takes account of cohabiting partners in its definition of “*dependant*”.

<sup>27</sup> See Chapter 7.

<sup>28</sup> Combating of Domestic Violence Act 4 of 2003, section 3(1). In a related provision, any person who has suffered an offence by “*a partner in a permanent relationship*” is eligible to use the special arrangements for vulnerable witnesses set forth in the Criminal Procedure Act 51 of 1977.

## 5.2 Express contracts

Cohabiting couples could make a contract to govern their relationship. However, there are certain limitations to what such contracts can do. Moreover, it is unlikely that many cohabiting couples would find this option accessible.

People who are cohabiting could make a straightforward agreement about their respective rights and duties. Both oral and written contracts are enforceable, although there are obvious problems of proof in respect of oral contracts.

There are several potential limitations to this approach.

A contract which was considered to include sexual relations as a form of consideration might be considered unenforceable as a matter of public policy.<sup>29</sup>

Also, where one of the cohabiting partners had a subsisting marriage in community of property, a contract of this nature might fall foul of the Married Persons Equality Act 1 of 1996.<sup>30</sup>

Yet another potential limitation to the use of express contracts between cohabitants concerns the power of cohabiting parties to contractually bind themselves beyond death. In South Africa, one of the dissenting opinions in the *Volks* case stated that a contract for support extending beyond the death of either partner would be unenforceable:

*The need to provide protection to such surviving partners is all the more acute in the light of the prevailing common law principle that provides that such partners would not be able to enter into legally enforceable contractual obligations to support one another after the termination of their partnership by the death of one of them. The law prohibits contracts between individuals which seek to regulate their affairs or relationships posthumously.*<sup>31</sup>

The reasoning was that such a contract would be a *pacta successoria* (“succession agreement”), which is prohibited in terms of Roman-Dutch common law – although it was noted that there is no uniform view on whether such contracts are merely unenforceable<sup>32</sup> or invalid because contrary to public policy.<sup>33</sup>

A *pactum successorium* or succession agreement is an agreement that purports to regulate matters of succession. Such an agreement is arguably invalid because it conflicts with public

<sup>29</sup> SALRC at paragraphs 3.1.41-3.1.44; Brigitte Clark, “Families and domestic partnerships”, 119 (3) *SALJ* 634 (2002) at 639.

<sup>30</sup> Under section 7(1)(j) of the Married Persons Equality Act 1 of 1996, the consent of both spouses married in community of property is required to donate assets from the joint estate where this would prejudice the interest of the other spouse.

<sup>31</sup> *Volks NO v Robinson* 2005 (5) BCLR 446 (CC), paragraph 136 (*per* Mokgoro and O'Regan JJ), referring to Christie, *The Law of Contract in South Africa*, 4th edition (Butterworths, 2001) at 415-416.

<sup>32</sup> *Id* at note 123, citing *Salzer v Salzer* 1919 EDL 221 and *Van Jaarsveld v Van Jaarsveld's Estate* 1938 TPD 343.

<sup>33</sup> *Ibid*, citing *Nieuwenhuis v Schoeman's Estate* 1927 EDC 266.

policy by infringing freedom of testation and seeking, through contract, to evade the formalities required for wills.<sup>34</sup> But it may be difficult to distinguish normal commercial contracts (which have the ultimate effect of divesting a person's estate of assets) and an indirect *pactum successorium* which purports to bind a party to a post-mortem disposition of his property.<sup>35</sup> It has been held that the test is whether or not the agreement vested rights in the party benefiting from it at the time when the agreement is made, or only after the death of the other party.<sup>36</sup>

Several South African cases have indicated (in dicta) that a contract for maintenance can continue after the death of the promisor.<sup>37</sup> Most recently, the case of *Odgers v De Gersigny*<sup>38</sup> indicated (again in dicta) that parties may make a private agreement regarding maintenance which extends beyond the death of one of them. This case involved ex-spouses who had concluded a written deed of settlement which was intended to be incorporated into the decree of divorce, but was omitted from the court order for unknown reasons. The Supreme Court of Appeal held that the agreement was accordingly a contractual one, and would not come to an end upon the re-marriage of the spouse receiving the maintenance since the agreement made no reference to remarriage. The Court stated:

<sup>34</sup> *Van Ardt v Van Aardt & Others* (342/05) [2006] ZAECHC 37 (10 August 2006) at paragraph 17 (footnotes omitted), citing *McAlpine v McAlpine NO and Another* 1997 (1) SA 736 (A).

<sup>35</sup> *Id* at paragraph 18.

<sup>36</sup> *Id* at paragraph 21, citing *McAlpine* at 751C-D (per Corbett CJ):

*The pactum successorium occupies a somewhat shadowy position between contract and testation. It is frowned upon by the law because it tends to inhibit freedom of testation and because, if allowed, it would result in the circumvention of the rules relating to the formal execution of wills. But for these reasons it is only a contractual disposition which, like a testamentary one, vests the right in question in the promisee upon or after the death of the promisor that should fall foul of the rule which invalidates pacta successoria. Accordingly, it seems only logical that vesting should be the litmus test for identifying a pactum successorium.*

<sup>37</sup> For example, *Ex Parte Standard Bank Ltd and Others* 1978 (3) SA 323 (R) stated at 327F that “If the parties had added a provision in their agreement to the effect that maintenance would continue to be payable out of the estate in the event of the debtor predeceasing the spouse entitled to it, there could be no room for argument as to its validity”. Similarly, in *Hodges v Coughbrough* 1991 (3) SA 58, the court stated at 66C-67A (per Didcott J) that:

*The field of contract is very different from the one where the present case lies. Everybody may bind his estate, by contract no less firmly than by will, to pay maintenance after his death. And he may settle the maintenance on whomsoever he chooses, on his current wife, a former wife, a mistress, an employee or anyone else. Whether in a given instance that result has been produced, whether the liability which was incurred survives the death of the person who assumed it and passes to his estate, depends of course on the terms of the contract, on their true meaning. And that goes too for the kind of contract in question, an agreement between spouses which is made an order of Court on their divorce. So, like the legislation whenever its meaning is sought, the agreement must be interpreted. By no means is the enquiry the same, however, since the objects of the exercise differ. The intention which has to be ascertained in the one case is that of Parliament, legislating in general terms and with general effect. In the other it is the intention of private individuals minding their own business and dealing solely with that. They have no occasion to reckon with the common law. They have no reason to worry about issues of policy.”*

The Court made this statement in the course of distinguishing a contract for maintenance from a maintenance obligation arising out of an order of court made pursuant to statute, holding that maintenance awarded under section 7(2) of the Divorce Act 70 of 1979 must end with the death of the supporting party. whilst drawing a distinction between maintenance obligations arising by and maintenance obligations arising from contract, Interestingly the Court discusses the problems that existed in relation to claims for maintenance based on contracts where the promisor had died prior to legislation being passed to deal with the issue (at 63B-C), but at no point lists *pactum successorium* amongst the difficulties encountered.

<sup>38</sup> [2006] SCA 153 (RSA).



***There are no restrictions to the quantum and time frames to which the parties may bind themselves relating to payment of maintenance irrespective of whether the recipient spouse remarries. The obligation may endure even beyond the death of the maintaining spouse if they so choose... . There is no bar to agreeing on the duration and extent of the payment of maintenance which is to be made, irrespective of any change in the parties' circumstances, [as] the agreement is valid and purely contractual in nature.***<sup>39</sup>

Looking to the doctrine of *pactum successorium*, it is not immediately obvious why this has not been in issue in any cases we have found concerning the continuance of maintenance payments after the death of a person who contractually obliged themselves to pay it. Although we have not located any specific discussion of this issue in case law or commentary, it is our theory that the key issue is when a right to maintenance 'vests' in the recipient.

***McAlpine v McAlpine***<sup>40</sup> held that the 'vesting test' was the appropriate means of determining whether a contract was an invalid *pactum successoria* or not. The key issue is *when* the promised right vests in the promisee – prior to the death of the promisor, in which case the contract is valid, or upon or after the death of the promisor.<sup>41</sup> In the case of an unconditional contract for maintenance, each periodical payment can be enjoyed only when it is paid. But the bequest itself is not conditional since the maintenance must be paid on the agreed-upon date, come what may; it is simply that the enjoyment of that benefit is postponed. Thus, the promisee would appear to acquire a vested right in the bequest from the date of the contract, even though he or she cannot enjoy it until the date of payment. Under this reasoning, an agreement for maintenance which was intended to extend beyond death would not fall foul of the *pactum successorium* doctrine.<sup>42</sup>

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<sup>39</sup> At paragraphs 7-8 (*per* Maya JA) (footnotes omitted and emphasis added). The Court cites *Ex Parte Standard Bank Ltd and Others* 1978 (3) SA 323 (R) at 327A and *Hodges v Coubrough NO* 1991 (3) SA 58 at 66D for the proposition that the obligation to pay maintenance can extend beyond death.

<sup>40</sup> 1997 (1) SA 736 (A).

<sup>41</sup> *Id* at paragraphs 20-21. On that issue, the Court stated that:

*whenever a bequest is made in words which indicate that the right bequeathed is not to be enjoyed or exercised until some future date (that is some date after the testator's death), then the question always arises whether the words indicating future enjoyment were inserted for the purpose of making the bequest conditional or merely for the purpose of postponing the enjoyment of the bequest... If the bequest is unconditional, then the legatee acquires a vested right in the bequest from the date of the death of the testator (dies cedit) though he cannot enjoy it until the time arrives for enjoyment (dies venit); if on the other hand the bequest is conditional, he acquires no vested right... "* *Id* at paragraphs 25-26.

<sup>42</sup> The question remains of what would happen in the case of a conditional contract for maintenance. At paragraph 31 of the *McAlpine* judgement, the Court found that

*The condition of survivorship in this case is, to my mind, clearly a suspensive one. It made the disposition dependent for its operation on the occurrence of an uncertain future event. It did not allow of the normal consequences of the disposition to flow from the contract, subject to annulment upon the happening of an uncertain future event.*

A condition of survivorship can be distinguished from conditions such as that a maintenance recipient must remain unmarried. In the case of the survivorship clause referred to, the very operation of the contract is suspended until the occurrence of certain unforeseeable events. In the case of the condition that the promisee must remain unmarried, the maintenance simply ceases to be payable in the event of that circumstance occurring. In other words, the maintenance must be paid **unless** certain specified events occur (such as the promisee getting married) in which case the contractual right ends. This is different from a contract which states that a right will vest only **if** certain events occur, such as the promisor dying. Accordingly, a contract for maintenance which would cease upon the remarriage of the maintenance recipient could also survive the *pactum successorium* doctrine.

However, because of the complexities of the common law on this point, it would currently be preferable for cohabiting partners to use the mechanism of wills to provide for maintenance to a surviving partner after one or the other partner dies.

Yet another limitation is that a contract between cohabitants would not be enforceable with respect to third parties.<sup>43</sup> It is a general principle of contract law that no one can be bound by the terms of a contract to which he or she is not a party. The doctrine of privity of contract states that parties who are not privy to a contract cannot sue or be sued on the basis of that contract.<sup>44</sup>

So, for example, in a situation involving a third party to whom assets had been sold or given in violation of an express agreement between cohabitants, contract law dictates that the primary cause of action would be against the party who has violated the terms of the contract by disposing of assets – that is, the cohabiting partner.<sup>45</sup> A contracting party may sue a third party for damages for unlawfully interfering with contractual rights, but only if the third party knows about the terms of the contract and intentionally interferes with them.<sup>46</sup>

Similarly, there is no basis in contract law for a suit against a third party who, without knowledge of the contract, prevents the other contractual party from fulfilling his duties – unless the third party knowingly frustrated the contract.<sup>47</sup> This means that a cohabitant could not sue a third party who, for example, caused her partner's death or injured him such that he could no longer work and support her.

It appears highly unlikely that a cohabitation contract setting out property division and support obligations could be read to include a duty of affection or fidelity which could support an action against a third party for adultery or enticement. Indeed, a contract purporting to include such things would probably be found to be unenforceable as a matter of public policy.<sup>48</sup>

Finally, cohabiting partners would appear to have no claim under common law for loss of support if the other partner is disabled or killed by the unlawful act of a third party, even if the cohabitants had previously entered into a contractual undertaking to support each other.<sup>49</sup> The South African courts have held that establishing such a claim requires a legally enforceable

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<sup>43</sup> SALRC at paragraph 3.1.36 (citing no authorities).

<sup>44</sup> RH Christie, *The Law of Contract of South Africa*, 3<sup>rd</sup> ed, Durban: Butterworths, 1996 at 288. Agreements between cohabitants would seem to be treated in the same way as any other contracts; in *Volks*, the South African Constitutional Court expressly recognised (in dicta) that, in the absence of any law that places specific rights and obligations on cohabiting partners, “[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”. 2005 (5) BCLR 446 (CC) at 464C-D (*per* Skweyiya J). There are some exceptions to this doctrine of privity of contract, but they do not appear to be relevant to cohabitation.

<sup>45</sup> See the discussion on privity of contract, which presumes that a contract is enforceable as against parties to the contract but not third parties, in RH Christie, *The Law of Contract of South Africa*, 3<sup>rd</sup> edition, Durban: Butterworths, 1996 at 288.

<sup>46</sup> See *id* at 551: “In certain circumstances an action in delict lies against a third party for inducing a party to a contract to commit a breach of it, and for intentionally and wrongfully interfering with contractual rights”.

<sup>47</sup> *Ibid*.

<sup>48</sup> See Gerrard Lubbe & Jacque du Plessis, “Chapter 7: Law of Contract” in CG van der Merwe, Jacque E du Plessis, eds, *Introduction to the Law of South Africa*, The Hague: Kluwer Law International, 2004 at 252.

<sup>49</sup> According to Sinclair at 284-285: “...because there is no duty of support between cohabitants, there is also no action for damages for loss of support against a third party who unlawfully causes the death of a cohabitant who has been supporting his or her partner. This would be so even if the couple have contractually undertaken to support each other, for in *Union Government v Warneke* [1911 AD 657] it was held that a claim for damages resulting from loss of support lies only if the duty to support exists by operation of the law.” (footnotes and citations omitted).

duty of support on the part of the deceased *and* a demonstration that the right to such support is worthy of protection. This was demonstrated in *Du Plessis v Road Accident Fund*,<sup>50</sup> where the cohabitating partners had been in a long-term permanent relationship, gone through a marriage-like ceremony, pooled their resources and supported each other during the relationship and would have married had the law permitted them to do so. Similarly, in the case of *Amod v Multilateral Motor Vehicle Accidents Fund*,<sup>51</sup> the Court relied on a contractual duty of support combined with a marriage ceremony concluded in terms of a recognised and accepted faith. Here, the Court specifically emphasised the narrowness of its holding:

*It was suggested in argument that the recognition of a dependant's claim which is premised on a contractual duty might unacceptably widen the scope of the dependant's action in the common law. It might indeed do so if the loss of support resulting from a contractually enforceable duty alone was sufficient to sustain the dependant's claim. But this is not what I have held. What I have held is that the dependant must show that:*

- (a) the deceased had a legally enforceable duty to support the dependant and*
- (b) that it was a duty arising from a solemn marriage in accordance with the tenets of recognised and accepted faith and*
- (c) it was a duty which deserved recognition and protection for the purposes of the dependant's action.*

*The dependant concerned would not succeed by establishing (a) alone. The requirement in (a) is a necessary condition... but it is not a sufficient condition.*<sup>52</sup>

Thus, it appears unlikely that a contract between cohabitants, on its own, would support a claim for loss of support. As discussed below, certain statutory schemes have made provision to include cohabitants as dependents, but this would not appear to support a common-law right to bring an action for loss of support.

Despite these caveats, an express cohabitation contract could provide some mechanism for regulating a cohabiting couple's financial affairs and sharing their assets upon the dissolution of the relationship, and it could create a contractual duty of mutual support during the existence of the relationship.

But it is rare in practice for cohabiting partners to make an express agreement about their respective obligations – which is unsurprising in a nation where few people even make wills.<sup>53</sup> Furthermore, this is something which economically-weaker parties will probably be unable to insist upon, or unable to negotiate from an equal bargaining position. Uneducated parties who could not afford legal assistance would also probably struggle to craft an agreement which protected their respective interests adequately, even if their intentions were good.<sup>54</sup>

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<sup>50</sup> 2004 (1) SA 359 (SCA).

<sup>51</sup> 1999 (4) SA 1319 (SCA).

<sup>52</sup> At paragraph 26.

<sup>53</sup> Robert Gordon, ed, *The Meanings of Inheritance: Perspectives on Namibian Inheritance Practices*, Windhoek: Legal Assistance Centre, 2005 at paragraph 7.42. LeBeau et al report an increase in the use of written wills. Debbie LeBeau, Eunice Iipinge and Michael Conte, *Women's Property and Inheritance Rights in Namibia*, Windhoek: University of Namibia, 2004 at 52-54.

It is similarly suggested that few cohabitants in South African would be likely to make express contracts. Elsje Bonthuys, "Family contracts", 121 (4) *SALJ* 879 (2004) at 889: "Given the high incidence of domestic partnership amongst the least affluent sectors of South African society and the consequent lack of access to legal advice, the likelihood of couples concluding contracts with one another is small." (footnotes omitted)

<sup>54</sup> See Sinclair at 283. For a more detailed discussion of some of the drawbacks to express contracts for regulating family matters, see Elsje Bonthuys, "Family contracts", 121 (4) *SALJ* 879 (2004) at 894-ff.

Some potential pitfalls of “do-it-yourself” contracts are illustrated by the South African case of *N (born C) v N*,<sup>55</sup> which involved two ex-spouses who shared a common residence for three years after a divorce. Although some of the facts were disputed, the essence of the situation was that the joint estate was not ever divided after the divorce. The parties made a private agreement about how to divide their goods, and (according to one of them) this agreement was signed in front of a Commissioner of Oaths and a witness. When it was temporarily mislaid, another written agreement was concluded and signed by the parties – which turned out to differ in some respects from the first agreement when it turned up again, although the common home was to go to the ex-husband in both of them. The ex-wife maintained that she had signed the agreements under duress, but the ex-husband denied this. The High Court refused to enforce the agreements, reasoning as follows:

*The two documents [the agreements signed by the ex-spouses] are hardly binding legal documents which could precede a lawful transfer of immovable property, nor is any one of them capable of being made an order of court. Even though I am unable to positively find on these papers, that the applicant was coerced by aggression or intimidation to sign these documents, as alleged by her, they were nonetheless signed by her when she was still in the matrimonial home with the respondent, and before she received proper legal advice. It is hardly likely that the applicant, with full knowledge of all her rights [and] being financially vulnerable... would voluntarily sign away all her rights to the immovable property. In any event, both documents fall foul of the provisions of the Alienation of Land Act, No 68 of 1981, as amended, more particularly in that they do not provide for material terms or a price or particulars of an “exchange”. In my view, there is no agreement binding the applicant to sign over her half share of the immovable asset in the yet undivided joint estate.*<sup>56</sup>

Even though this case was complicated by the previous marriage of the cohabiting parties, it still serves as a warning about the difficulty of attempting to regulate a cohabitation arrangement by means of private contract.

## 5.3 Universal partnerships

**Implied contracts establishing universal partnerships have been used in some cases to justify the distribution of assets between cohabiting partners. But establishing a universal partnership is difficult, and the outcome can be unpredictable.**

Because express cohabitation agreements are a rarity, cohabitants have more often found themselves in the position of attempting to rely upon a tacit or implied agreement. The existence and terms of such an agreement must be proved by the person who is seeking to rely upon it, which can be very difficult in practice.

The law of contract includes a concept known as universal partnership, which has been applied to cohabiting partners. In general, a universal partnership is an express or implied partnership agreement where the parties agree to pool their property for their joint benefit. When the

<sup>55</sup> [2009] ZAECGHC 82 (East London Circuit Local Division, 26 November 2009).

<sup>56</sup> At paragraphs 12-13 (*per* Revelas J). Namibia has a similar law on the sale of immoveable property, the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969.

partnership comes to an end, the partnership assets are divided in proportion to each party's contribution – taking into account contributions in the form of capital, shares, labour or services. If it is not possible to determine the respective contributions of the parties, then – at least according to some cases – the assets are to be divided equally.<sup>57</sup>

There are two types of universal partnership: (1) *universorum bonorum*, which covers all current and future assets from commercial activity or otherwise, and (2) *universorum quae ex quaestu veniunt*, which covers only assets acquired from commercial activity during the existence of the partnership.<sup>58</sup>

Early cases held that the first type of partnership could be established only by means of an express agreement,<sup>59</sup> but the 1984 case of *Ally v Dinath* held that it can also be established tacitly by the parties' conduct.<sup>60</sup> It is also possible for the second type of partnership to be established tacitly.<sup>61</sup>

Although both types of universal partnerships have been applied to cohabitation relationships,<sup>62</sup> the first type is clearly of greater potential use in such situations because of its broader nature.<sup>63</sup>

There are four basic requirements for establishing any universal partnership:

*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.*<sup>64</sup>

Establishing that a contract has been concluded tacitly is not easy; the test is a balance of probabilities, but courts have taken a cautious approach to inferring such contracts.<sup>65</sup>

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<sup>57</sup> See *Isaacs v Isaacs* 1949 (1) SA 952 (C) at 961. But see *Kritzinger v Kritzinger* 1989 (1) 1 SA 67 (A) at 77F-H (per Milne J): "Even if it was correct to say that there was a partnership in some vague general sense, there is no warrant whatsoever for saying that it is fair or appropriate to divide the joint net assets of the parties equally, regardless of their respective known and unequal contributions. Even in the case of the dissolution of a legal partnership, the dissolution takes into account the respective contributions of each of the partners, unless it is impossible to say that one has contributed more than the other." The Court cited *Fink v Fink & Another* 1945 WLD 226 at 241 and *Van Gysen v Van Gysen* 1986 (1) SA 56 (C) 61G-H.

According to *Robin v Theron* 1978 (1) SA 841 (A) at 856F-G: "A court has a wide equitable discretion in respect of the mode of distribution of partnership assets, having regard, inter alia, to particular circumstances, what is most to the advantage and what they prefer."

<sup>58</sup> SALRC at paragraph 3.1.16.

<sup>59</sup> See *Annabhai v. Randall and Others* 1980 (3) SA 802 (N).

<sup>60</sup> *Ally v Dinath* 1984 (2) SA 451 (T).

<sup>61</sup> *Fink v Fink & Another* 1945 WLD 226 at 228.

<sup>62</sup> For example, a *universorum quae ex quaestu veniunt* was found in *Isaacs v Isaacs* 1949 (1) SA 952 (C) where the parties had an Islamic marriage which was not legally recognised and in *V v De Wet NO* 1953 (1) SA 612 (O) which involved a couple who had cohabited for 21 years. A *universorum bonorum* was found in *Ally v Dinath* 1984 (2) SA 451 (T), where the parties had an unrecognised Islamic marriage.

<sup>63</sup> SALRC at paragraphs 3.1.15-3.1.20.

<sup>64</sup> *Joubert v Tarry & Co.* 1915 TPD 227 at 279. See also *Rhodesia Railways & Others v Commissioner of Taxes* 1925 AD 438 at 464-465 and *Purdon v Muller* 1961(2) SA 211 (A) at 218. It was held in *Ally v Dinath* 1984 (2) SA 451 (T) that the profit referred to in these criteria did not have to be a purely pecuniary one, but could be satisfied by other forms of material gain, such as a joint effort to save costs. The fourth essential element applies to all contracts and is not peculiar to partnerships. *Bester v Van Niekerk* 1960 (2) SA 779 (AD) at 784.

<sup>65</sup> *Mühlmann v Mühlmann* 1984 (3) SA 102 (A).



In the past, the concept of universal partnership was sometimes employed in divorce proceedings where the marriage was out of community of property, to justify a more equitable division of marital assets which were accumulated by the spouses' joint efforts.<sup>66</sup> Furthermore, as the Namibian High Court stated, "*A universal partnership concluded tacitly has frequently been recognized in our courts of law between a man and a woman living together as husband and wife but who have not been married by a marriage officer.*"<sup>67</sup> This concept can also be applied in other family contexts.<sup>68</sup>

It is helpful to women that the courts have recognised that labour in the home and the provision of child care can constitute contributions for the purposes of such a partnership.<sup>69</sup> Ironically, as the law currently stands, these contributions might carry more weight in a cohabitation relationship than in a marriage. The *Muhlman* case found that since a wife is expected to provide care and support to her husband in marriage relationship, a greater contribution on the part of the wife was required to demonstrate a tacit agreement of universal partnership.<sup>70</sup> Arguably, since there is no legal duty of care and support between cohabitants, *any* contribution of care and support by either party should substantiate a contribution to a universal partnership.<sup>71</sup> However, in the 2009 *Chetty* case, a woman's attempt to establish a universal partnership with her male cohabitant failed when she could not show that she had rendered unremunerated services to both his business and the household; assistance with household chores alone was deemed insufficient for this purpose.<sup>72</sup>

In practice, it may be more difficult for a person to establish an inferred partnership when the business in question is already established and flourishing when the relationship begins.<sup>73</sup>

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See *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A) at 292B (per Corbett JA): "In order to establish a tacit contract it is necessary to show, by a preponderance of possibilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem."

In *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vornor Investments (Pty) Ltd* 1984 (3) SA 155 (A), the former position in *Standard Bank* was challenged, but Corbett JA defended the existing law at 165C-E, stating that: "While it is perfectly true that in finding facts or making inferences of fact in a civil case the court may, by balancing possibilities, select a conclusion which seems to be the more natural or plausible one from several conceivable ones, even though that conclusion is not the only reasonable one, nevertheless it may be argued that the inference as to the conclusion of a tacit contract is partly, at any rate, a matter of law, involving questions of legal policy. It appears to be generally accepted that a term may not be tacitly imported into a contract unless the implication is a necessary one in the business sense to give efficacy to the contract. By analogy it could be said that a tacit contract should not be inferred unless there was proved unequivocal conduct capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged."

See also *Basson & Others v The Ministry of Fisheries & Marine Resources* NLLP 2003 (4) 58 NLC.

<sup>66</sup> *Sinclair* at 278-279; SALRC at paragraph 3.1.18.

<sup>67</sup> *Frank & Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC).

<sup>68</sup> See, for example, the Botswana case of *Tshiamo v Tshiamo* [2008] BWHC 26 (14 March 2008), where the court found a universal partnership between an elderly widow and her adult children.

<sup>69</sup> See *Issacs v Issacs* 1949 (1) SA 952 (C); *V v De Wet NO* 1953 (1) SA 612 (O).

<sup>70</sup> *Muhlmann v Muhlmann* 1981 (4) SA 632 (W) at 634F-H, stating that the wife was required to demonstrate conduct beyond "what is ordinarily to be expected of a wife in a given situation" to support her claim.

<sup>71</sup> See SALRC at paragraph 3.1.31.

<sup>72</sup> *Chetty v Pather* (16484/2008) [2009] ZAKZDHC 56 (22 September 2009). The Court found that it had not been established that the female partner had worked in the male partner's business without remuneration, going on to say: "It may well be that she did perform household chores whilst staying with the Respondent for the period of five (5) years as husband and wife as indicated above. This does not necessarily establish a universal partnership between the parties."

<sup>73</sup> For example, the point when the business enterprise commenced was considered in the calculation of the award in *Muhlmann v Muhlmann* 1981 (4) SA 632 (W) at 636C.

This is a factor which could work against women cohabitants in a context where much income-generating economic activity is still dominated by men.

There is only one reported case in Namibia which addresses the concept of a universal partnership in a cohabitation relationship. The 1999 *Frank* case<sup>74</sup> dealt with the refusal by the Immigration Selection Board to grant permanent residence to a German citizen who was in a long-term lesbian relationship with a Namibian citizen. In his affidavit concerning the case, the Chairperson of the Immigration Selection Board stated that “*Respondent’s long-term relationship with a Namibian citizen was also considered. Unfortunately, it does not fall within the ambit of relationships stipulated under s 26(3)(g) of the [Immigration Control] Act nor is such a relationship one recognised in a Court of law. Hence, it was not able to assist the respondent’s application.*”<sup>75</sup> (The section referred to makes permanent residence available to a “*spouse or dependent child, or a destitute, aged or infirm parent*” of another permanent resident who undertakes in writing to maintain the applicant.)

The High Court found that the assertion in this affidavit was an incorrect statement of the law, citing previous South African cases where universal partnerships were established between cohabiting couples involving partners of the opposite sex.<sup>76</sup> The Court then cited the equality clause of the Namibian Constitution (Article 10), and concluded that if a man and a woman can tacitly conclude such a partnership then the equality provision mandates that same-sex partners can equally do so. To support this conclusion, the Court also cited Article 16 on the right of all persons to “*acquire, own and dispose of all forms of immovable or movable property individually or in association with others and to bequeath their property to their heirs or legatees*” and Article 21(1)(e) on the right to freedom of association. The Court thus found that “*the long term relationship between applicants, in so far as it is a universal partnership, is recognised in law*” and concluded that the Immigration Selection Board should have taken it into account when considering the application for permanent residence.

The Namibian Supreme Court overturned the High Court decision, but its discussion of universal partnership made it clear that cohabiting partners can in theory rely on this concept. Firstly, the Supreme Court emphasised that the parties in the case at hand did not raise the concept of a universal partnership in the application for permanent residence, nor in the review proceedings at the High Court – and that it was “*a misdirection for the Judge to raise it mero motu for the first time in his judgment*”.<sup>77</sup> However, the Supreme Court apparently agreed that the concept *could* in theory have been relevant, noting that if the couple had raised it “*they would have had to prove its existence and its relevance to the application for a permanent residence permit*”.<sup>78</sup>

Secondly, the Supreme Court noted that “*even if such a partnership was proved and relied upon by respondents*”, it was still within the discretion of the Immigration Selection Board to decide whether to regard it as a factor relevant to the application, and whether to give it any weight in favour of the application for permanent residence.<sup>79</sup>

Thirdly, the Supreme Court found that the statement by the chairperson of the Immigration Selection Board that “*applicants’ long term relationship was not one recognized in a Court of*

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<sup>74</sup> *Frank & Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC); *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC).

<sup>75</sup> Id at 264C.

<sup>76</sup> The judgement (*per* Levy J) cited *Isaacs v Isaacs* 1949 (1) SA 952 (C) and *Ally v Dinath* 1984 (2) SA 451 (T).

<sup>77</sup> *Frank* 2001 NR 107 (SC) (*per* O’Linn AJA) at 114D.

<sup>78</sup> Ibid.

<sup>79</sup> Id at 114E.

*Law and was therefore not able to assist the respondents”* was correct if understood in the sense that “*the Courts in Namibia had never in the past recognized a lesbian relationship as a factor in favour of a lesbian alien applying for permanent residence in Namibia inter alia on the ground of her lesbian relationship with a Namibian citizen*”, and that the Immigration Control Act gives a special status and exemption to a spouse of a Namibian citizen but does not recognise a partner in a lesbian relationship as a “spouse” for the purposes of that law.<sup>80</sup> It is clear, however, that this view does not preclude the possibility that cohabiting relationships may be recognised in law in other concepts and for other purposes.

Fourthly, the Supreme Court disagreed with the High Court’s application of various constitutional provisions to the discussion of a universal partnership:

*I find it difficult to see the relevance of Art. 10, 16(1) and 21(1)(e) of the Namibian Constitution, dealing respectively with equality before the law, the right to acquire property in any part of Namibia and the right to freedom of association, applied to the argument based on a “universal partnership”.*

*Art. 10 is certainly relevant to any argument as to whether or not a lesbian relationship should be treated on an equal basis with marriages sanctioned by statute law, but the Court was not dealing with that problem. As far as Article 16 and 21(1)(e) is concerned, these rights do not assist in deciding whether or not either a “lesbian relationship” or “a universal partnership” should be recognized by the Immigration Selection Board as a relevant factor in considering an application for permanent residence.*<sup>81</sup>

Nothing in this statement indicates that a universal partnership could not be recognised in Namibian law with respect to cohabiting partners.

Fifthly, the Supreme Court disagreed with the High Court’s conclusion that the Immigration Selection Board acted in error because it did not take the universal partnership into account when considering the application for permanent residence. According to the Supreme Court, the Board “did not admit that it did not consider a ‘universal partnership’”. It also did not admit that it did not consider the alleged lesbian relationship. What it admitted was that it regarded the ‘lesbian relationship’ as a private matter and regarded it as ‘neutral’”.<sup>82</sup>

Thus, the entire discussion by the Supreme Court in the *Frank* case is premised on the idea that a universal partnership could be found in such circumstances, but that its existence or non-existence was not dispositive in the case at hand.

There are some drawbacks to the use of a universal partnership as the basis for the division of assets between cohabiting partners.

Firstly, proving a universal partnership is difficult. The onus of proof lies with the person attempting to rely on the contract (which will almost always be the economically more vulnerable party); this partner has to prove both the existence of the implied partnership and the terms of the implied agreement. Furthermore, if a cohabiting partner is married to someone else, it may be impossible to establish a universal partnership in respect of the cohabitation. In one recent case involving two simultaneous civil marriages, the court found that there could be no lawful universal partnership at all between the second “spouse” and the deceased partner because the

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<sup>80</sup> Id at 114F-H.

<sup>81</sup> Id at 114J & 115A-C.

<sup>82</sup> Id at 115E.

deceased had previously contracted a marriage in community of property with another woman which still subsisted.<sup>83</sup>

Secondly, this remedy provides no definite protection for vulnerable parties; it is unsure, unpredictable and largely limited to those with the financial resources to bring a civil action in court, meaning that it will not be a useful approach for the majority of Namibians.

Thirdly, this approach has severe disadvantages if the main asset is the home where the parties lived together. This was evident in the 2008 *Botha* case,<sup>84</sup> where the High Court found that there was no right to continued occupation of a couple's house by the surviving cohabitant after the death of the other partner. The Court held that in the absence of an agreement between the partners on how the dissolution of the partnership is to be achieved, the normal course of action is to appoint a receiver to liquidate the partnership.<sup>85</sup> Even if the surviving partner can prove a right to an undivided half share in a universal partnership, this does not necessarily entitle her to a half share in the immovable property which formed part of the partnership's assets.<sup>86</sup>

Fourthly, it may be particularly complex to untangle what assets belong to a universal partnership between cohabiting partners in a case where one of the cohabiting parties was married at the same time to another party in community of property.<sup>87</sup>

## 5.4 Unjust enrichment

The law governing unjust enrichment may be applied to cohabitation relationships to achieve fairness between the partners. This cause of action is still under development in Namibia and South Africa and has not yet been applied to cohabitants. But the concept of unjust enrichment has been applied to cohabitation in many other jurisdictions, including Zimbabwe, the Seychelles and Canada.

Another legal remedy that may be available to assist a cohabiting partner comes from the law governing unjust enrichment.<sup>88</sup> This is the general principle that one person should not be able

<sup>83</sup> *Zulu v Zulu & Others* 2008 (4) SA 12 (D) at 16B: "In order for the agreement of partnership to be valid all four requirements must be met. As the deceased was previously married in community of property, the contract between himself and the applicant was not lawful and the deceased must have been aware of same. Therefore not only would the contract of partnership have lacked an essential element, namely that it must be lawful, the deceased could never have intended to create a community of property or a universal partnership with the applicant."

However, in *V (also known as L) v De Wet NO* 1953 (1) SA 612 (O), a universal partnership was held to be established despite the fact that the male partner one was married to another woman throughout the cohabitation. (The *Zulu* case did not consider this prior holding.)

<sup>84</sup> *Botha NO v Deetlefs & Another* 2008 (3) SA 419 (N).

<sup>85</sup> Id at 422I-423A.

<sup>86</sup> Id at 423H-I.

<sup>87</sup> See, for example, the Botswana case of *Mogorosi v Mogorosi* (CAPP04105) [2008] BWCA 18 (30 January 2008). Sinclair at 279-280 has suggested that conservative courts may find that an implied contract is tainted with immorality, either because the cohabiting parties are 'living in sin' or because the cohabitation was an adulterous extramarital relationship for one or both of them. However, a universal partnership was established in the case of *V v De Wet NO* 1953 (1) SA 612 (O) where one of the long-term cohabitants was married to someone else.

<sup>88</sup> Sinclair at 277-278. See generally DH van Zyl "The General Enrichment Action is Alive and Well", 1992 *Acta Judicata* 115; DP Visser, "The Role of Judicial Policy in Setting the Limits of a General Enrichment Action" in Alison Kahn, ed, *The Quest for Justice: Essays in Honour of Michael McGregor Corbett, Chief Justice of the Supreme Court of South Africa*, Kenwyn: Juta & Co, 1995; Daniel Visser, "The General Enrichment Action



to benefit unfairly at the expense of another.<sup>89</sup> In theory, one cohabiting partner might be able to show that the other partner was enriched during the relationship by tangible improvements made to the property of the one partner by the other or by some other form of contribution such as services rendered.<sup>90</sup> The law on unjust enrichment has not yet been applied in this context in South Africa or Namibia, but it has been used in cohabitation and similar contexts in Zimbabwe, the Seychelles and Canada.

There is no general unjust enrichment action in South African or Namibian law, with such claims being limited to certain specific situations (*condictiones* or *actiones*) enumerated in Roman law.<sup>91</sup> However, courts may allow unjust enrichment claims in novel circumstances in which they deem it necessary for the promotion of justice.<sup>92</sup> This is arguably the case where cohabiting partners must resort to common law remedies to ensure any form of equity upon the dissolution of the relationship.

Unjust enrichment cases in Namibia have not specified the requirements for an unjust enrichment claim, but it has been held in South Africa that any enrichment action must demonstrate the following elements: “(a) *the defendant must be enriched; (b) the plaintiff must be impoverished; (c) the defendant’s enrichment must be at the expense of the plaintiff; and (d) the enrichment must be unjustified*”.<sup>93</sup>

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Cometh”, 119 (2) *SALJ* 260 (2002); Daniel Visser, *Unjustified Enrichment*, 1<sup>st</sup> edition, Cape Town: Juta Law, 2008, reviewed by Carole Lewis in 125 (2) *SALJ* 462. Amongst the key cases are *Nortje and Another v Pool NO* 1966 (3) SA 96 (A); *Kommissaris van Binnelandse Inkomste v Willers en Andere* 1994 (3) SA 283 (A); *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA); *Watson NO and Another v Shaw NO and Others* 2008 (1) SA 350 (C), on appeal *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA).

<sup>89</sup> SALRC at paragraph 3.1.63.

<sup>90</sup> See HR Hahlo “Cohabitation, Concubinage and the Common Law Marriage” in Alison Kahn, ed, *Fiat Iustitia: Essays in Memory of Oliver Deney Schreiner*, Cape Town: Juta, 1983 at 247:

*Where partners in a domestic relationship have pooled their respective means to acquire an asset which is formally registered in one party’s name, and it can be shown that the other party who formally holds no title did not intend a donation, then technically that party will be entitled to a share in the asset, or to repayment of any contribution on the grounds of unjustified enrichment.*

<sup>91</sup> *Nortje and Another v. Pool NO* 1966 (3) SA 96 (A); *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA) at paragraph 4.

<sup>92</sup> SALRC at paragraph 3.1.68, citing *Kommissaris van Binnelandse Inkomste v Willers en Andere* 1994 (3) SA 283 (A). *Nortje and Another v Pool NO* 1966 (3) SA 96 (A) seemed to imply that unjust enrichment claims could only be brought under recognised circumstances. The appellants in that case were granted exclusive rights to prospect for kaolin on the plaintiff’s property. They incurred certain expenses in order to locate and extract the kaolin in profitable quantities, which raised the market value of the plaintiff’s property. The Court found that the appellants had failed to make a proper claim because their suit did not fall under any of the recognised actions for enrichment under South African law, which includes situations involving improvements that increase a property’s value or the retention of money or goods exchanged in furtherance of a sales agreement that was never fulfilled. It was presumed after the *Nortje* decision that claims of unjust enrichment could only be brought within conditions historically recognised by Roman-Dutch law. However, *Kommissaris van Binnelandse Inkomste v Willers en Andere* 1994 (3) SA 283 (A) later clarified that the *Nortje* ruling does not expressly exclude the extension of liability in unjustified enrichment cases where liability has not been recognised before. The courts, therefore, are not barred from extending unjust enrichment liability in novel circumstances if it deems it to be “necessary or desirable” to allow this type of claim in the given situation. *Kommissaris* at 333C-E. This opens the door for the possibility that unjust enrichment could be applied to cohabitation.

<sup>93</sup> *Watson NO and Another v Shaw NO and Others* 2008 (1) SA 350 (C) at 356H, on appeal *Afrisure CC and Another v Watson NO and Another* (522/2007) [2008] ZASCA 89; [2009] 1 All SA 1 (SCA); 2009 (2) SA 127 (SCA) (11 September 2008). The appeal held that there is no general action for unjust enrichment, but proceeded to decide the case as an instance of *condictio ob turpem vel iniustam causam*. As the appeal court explained at paragraph 5, the key element of this action is that “the amount claimed must have been



Namibian courts have only heard a handful of cases involving unjust enrichment claims.

In *Ferrari v Ruch*,<sup>94</sup> the Supreme Court of Namibia established that preventing unjust enrichment can provide sufficient cause for the relaxation of the normal rule which prohibits parties to an illegal contract from seeking assistance from the courts to enforce that contract.<sup>95</sup> The plaintiff in *Ferrari*, a Swiss citizen, transferred a capital sum of 200 000 rand to the defendant, a Namibian resident, who refused to repay the loan. The transfer of money made by the plaintiff was in violation of the Namibian Exchange Control Regulations, meaning that the plaintiff would normally be barred from applying for help from the courts in enforcing an illegal contract. However, the Supreme Court held that the usual rule should be relaxed in this case to avoid unjust enrichment of the defendant, who had equally dirty hands, having solicited the plaintiff for this transfer of capital sums in order to bypass the Exchange Control Regulations. A refusal to provide the plaintiff with any legal recourse would have permitted the defendant to benefit doubly from his deceptive scheme, as he would have been allowed to disregard the proper regulations in addition to cheating the plaintiff out of the loan repayment. Therefore the Court was persuaded that the principle of avoiding unjust enrichment should take primacy in this case, and the defendant was ordered to repay the loan (albeit without interest).

It is possible that a somewhat similar approach might be taken in a case where a party is adulterously cohabiting with a married partner, or where an express or implied agreement between cohabitants is found to be illegal.

The High Court of Namibia has also found that a plaintiff's negligence in unjustifiably enriching the defendant does not prevent the plaintiff from making a claim in respect of unjust enrichment. In *Seaflower Whitefish Corporation Ltd v Namibian Ports Authority*,<sup>96</sup> the plaintiff fishing company was charged an incorrect tariff by the defendant. The plaintiff paid the tariff on the basis of the defendant's stated rate, but subsequently brought a claim of unjust enrichment when it discovered the mistake. The common law of unjust enrichment requires that where the defendant has been enriched by the plaintiff's error, such an error must be excusable in order for the plaintiff to bring a claim. The burden is on the plaintiff to establish that the error is excusable. The High Court found that the plaintiff in this case had a valid claim of action, reasoning that it had not been unreasonably negligent in paying the incorrect tariff because the defendant was a statutory body acting on behalf of the State, the tariffs were complicated and every other company using that port had accepted the defendant's tariffs in the same fashion as the plaintiff. Thus, the plaintiff's degree of negligence was found to be no bar to its action of unjust enrichment. Analogously, a cohabiting partner might be considered negligent in enriching the other partner by allowing him to obtain property titles solely in his name or allowing him exclusive control over her money without a contract. In these situations, using the logic of the *Seaflower* case, it could perhaps be argued that others in the same cohabitation situation as the plaintiff would have acted similarly and that such negligence – if it

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*transferred pursuant to an agreement that is void and unenforceable because it is illegal, ie because it is prohibited by law".*

The requirements for an unjust enrichment action are similar in many jurisdictions. See, for example, *Ah-Kon v Labiche* [2009] SCSC 50; *Goncalves v Rodrigues* [2004] ZWHHC 199; HH 197-2003.

<sup>94</sup> 1994 NR 287 (SC), appeal from *Ferrari v Ruch* 1993 NR 103 (HC).

<sup>95</sup> The avoidance of unjust enrichment was found to be a basis for relaxing the principle *in pari delicto potior est conditio defendentis*, also referred to as the *par dictum* rule, and the maxim *ex turpi causa non oritur actio* prevents courts from enforcing illegal contracts. See 296F and 296E.

<sup>96</sup> 2000 NR 57 (HC).

is in fact considered to be negligence on her part – would not prevent her from seeking a claim of unjust enrichment.<sup>97</sup>

The Namibian courts have otherwise raised the principle of unjust enrichment in business transactions in circumstances which are unlikely to have relevance to the cohabitation context.<sup>98</sup>

The Zimbabwean courts have already recognised a general action for unjust enrichment<sup>99</sup> and applied it to the context of cohabitation in *Goncalves v Rodrigues*.<sup>100</sup> In this case, a man and a woman who had lived together for ten years had spent the majority of that time in a house registered in the name of the woman. The man paid for several improvements which increased the value of the house, although the woman asserted that these improvements had been made without her consent. The parties drew up a notarial deed, which provided that in the event of the relationship becoming difficult and the parties separating, the property would be sold and the proceeds divided. The deed was not registered. However, this agreement turned out to be invalid because it failed to comply with the formalities for the acquisition of personal rights to immoveable property in the Zimbabwean Deeds Registries Act. The Court applied the principle of unjust enrichment, which required a showing of five factors:

- (a) the defendant must be enriched;
- (b) the plaintiff must have been impoverished by the enrichment of the defendant;
- (c) the enrichment must be unjustified;
- (d) the enrichment must not come within the scope of one of the classical enrichment actions; and
- (e) There must be no positive rule of law which refused an action to the impoverished person.<sup>101</sup>

The Court found that all of these elements were present in the case at hand and ordered that the defendant must pay half of the present value of the property to the plaintiff, or else the property must be sold and the proceeds equally divided.

The Supreme Court of the Seychelles applied the principle of unjust enrichment to a cohabitation situation in the case of *Ah-Kon v Labiche*.<sup>102</sup> In the Seychelles, unjust enrichment

<sup>97</sup> What a reasonable person in the cohabiting spouse's position would do and expect in a similar cohabitation situation is covered in further detail below in the discussion of *Ah-Kon v Labiche* [2009] SCSC 50.

Of course, it is perhaps problematic to equate a fishing company with a co-habiting spouse. While the logic of the *Seaflower* case is instructive and could potentially be used if an unjust enrichment claim were brought by a cohabitant, there is no guarantee that the courts would adopt parallel reasoning in the two scenarios.

<sup>98</sup> The principle of unjust enrichment was also discussed in *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others* (2) 2009 (1) NR 232 (HC), in the context of the transfer of land ownership which in terms of Namibia law takes place independently of the underlying contract of sale; the Court noted that land transferred as a result of an invalid agreement which preceded a valid transfer can only be regained from the third party who has acquired ownership of it under these circumstances on the grounds of unjust enrichment; however, this principle did not have to be applied in the case at hand because the Court found both the underlying agreement and the real agreement regarding the transfer to be invalid. In *Muller v Schweiger* 2005 NR 98 (HC), the concept of unjust enrichment arose in a case where money had changed hands in terms of a lease agreement ruled by the court to be invalid. However, the Court did not have to consider this principle in any detail, as the defendant agreed to return the money in question once the Court ruled the agreement to be illegal.

<sup>99</sup> *Industrial Equity v Walker* 1996(1) ZLR 269 (H); see also *Jongwe v Jongwe* 1999(2) ZLR 121 (H) at 130F-G (involving a customary marriage).

<sup>100</sup> High Court, Harare, Judgment No HH-197-03, 7 January 2002 & 11 February 2004.

<sup>101</sup> This case was sourced on the Internet (<[www.saflii.org](http://www.saflii.org)>) and is unpaginated.

actions are covered by the Civil Code, which is understood to require five conditions for such claims: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the impoverishment, (4) an absence of lawful cause or justification for the impoverishment and (5) the absence of any other remedy for the impoverished party.<sup>103</sup> In this case, the parties had orally agreed that they would “*engage in life, pool their income and operate their expenses as one unit for their joint benefit*”. They had during the course of their 19-year cohabitation relationship purchased two properties, both of which were registered solely in the defendant’s name. The defendant took out a loan of 400 000 rupees to build a house on one of the properties while the plaintiff took out an additional 25 000 rupee loan to help finance the same project, which she repaid from her own earnings. The furniture on the property was purchased jointly. The defendant eventually converted this site into a guesthouse and charged a daily room rental of 300 rupees, which was never shared with the plaintiff even though she provided housekeeping services at the guesthouse without pay. (The defendant asserted that he had acted independently without any investment or involvement from the plaintiff, but the Court rejected his evidence on this.) The Court found that the plaintiff had added economic benefit to the patrimony of the defendant, that she had suffered a corresponding economic loss, and that the requisite connection between these two events was present.

On the question of whether or not the plaintiff’s failure to safeguard her interests constituted a lawful cause for the unjust enrichment and the related issue of other potential remedies, the Court found that it would have been “*morally impossible*” in the circumstances for the plaintiff “*to obtain a written proof of her contribution*” or to secure “*a proper contract*”<sup>104</sup> establishing her legal rights and obligations in respect of her investments and contributions to the properties and the business in question:

*The plaintiff had been in love with the defendant, trusted him, and had been living with him as his common-law wife for a couple of decades. She had a legitimate expectation having plans for their shared future and mutual benefit... Eschewing technical rules, we need to see simply what a common-law wife would have intended, when she was making financial support and contributions to the man during their concubinage. Looking at this case, in the light of the surrounding circumstances, it seems to me quite plain that when the plaintiff was making her contributions over the period of 19 years of her cohabitation, she should have intended that all her contributions would lead to a common pool of mutual benefit and shareable future. She did not contemplate that their relationship would end one day and she would suffer economic loss for no fault of hers. Her eyes of love and trust for defendant could have been blind then, but such blindness can no way constitute a lawful cause or justification for the defendant to take advantage and make enrichment to the detriment of the plaintiff.*<sup>105</sup>

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<sup>102</sup> [2009] SCSC 50 (30 September 2009) (*per* D Karunakaran J). This case was sourced on the Internet (<[www.saflii.org](http://www.saflii.org)>) and is unpaginated.

<sup>103</sup> Article 1381-1 of the Civil Code of Seychelles reads as follows, according to the Court’s judgment:

*If a person suffers some detriment without lawful cause and another is correspondingly enriched without lawful cause, the former shall be able to recover what is due to him to the extent of the enrichment of the latter. Provided that this action for unjust enrichment shall only be admissible if the person suffering the detriment cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict; provided also that detriment has not been caused by the fault of the person suffering it.*

The interpretation supplied by the Court is based on *Antonio Fostel v Magdalena Ah-Tave and Another* SLR 1985 at 113. It also cites French jurisprudence on these points.

<sup>104</sup> [2009] SCSC 50 (30 September 2009) (*per* D Karunakaran J).

<sup>105</sup> *Id.*

The Court awarded the plaintiff 450 000 rupees, the amount she claimed as a half-share in the profits from the guesthouse, as well as an addition sum of 25 000 rupees for “*moral damage*”.<sup>106</sup>

The application of the theory of unjust enrichment to cohabitation is particularly well-developed in Canadian law, after several leading Supreme Court judgements in the late 1980s and early 1990s. The courts have developed a three-stage test: There must be (1) an enrichment of one party; (2) a corresponding deprivation of the other; and (c) no juristic reason for the deprivation.<sup>107</sup> If unjust enrichment is found, then the Court must consider the remedy, which will usually be a monetary award or the declaration of the plaintiff’s interest in some property.<sup>108</sup>

In *Pettkus v Becker*,<sup>109</sup> the plaintiff’s cause of action was based on her contribution of money and labour to her partner’s bee-keeping business over 19 years. The Supreme Court found that the plaintiff’s partner had benefited from her free labour while she had received nothing in return. In addressing the third limb of the unjust enrichment test, whether there was any juristic reason for the plaintiff’s deprivation, the Court said:

*...where one person in a relationship tantamount to spousal, prejudices herself in reasonable expectation of receiving an interest in property and the other in the relationship freely accepted benefits conferred by the first person in circumstances he knew or ought to have known of that expectation, it would be unjust to allow the recipient of the benefit to retain it.*<sup>110</sup>

The original trial judge awarded the spouse only forty beehives without bees, plus \$1500 in earnings from those hives.<sup>111</sup> However, the Supreme Court upheld the award made by the Ontario Court of Appeal that the spouse should receive a half share interest in the lands and the beekeeping business owned by her partner.”<sup>112</sup>

In another Supreme Court case, *Sorochan v Sorochan*,<sup>113</sup> the plaintiff had co-habited with the defendant for 42 years. The court had to consider whether the defendant had been unjustly

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<sup>106</sup> Id.

<sup>107</sup> *Rathwell v Rathwell* [1978] 2 SCR 436 (SCC); *Pettkus v Becker* [1980] 2 SCR 834 SCC. The plaintiff must show that there is no “juristic reason” to deny the claim from any of several categories established by case law – contract law, a disposition of law, a donative intent or “other valid common law, equitable or statutory obligations”. The defendant then has a chance to show that there is some other juristic reason to deny recovery, such as the legitimate expectations of the parties or considerations of public policy. In essence, if some juristic reason exists to deny recovery, then the enrichment in question was not unjust. *Wilson v Fotsch* 2010 BCCA 226 at paragraph 11.

See also Jamie Cassels, *The Law of Damages*, Chapter 7 at 1, as quoted in *Recent developments regarding unjust enrichment*, William E. McNally & Bottom Line Research and Communications, <[www.bottomlineresearch.ca/articles/articles/pdf/unjustenrichment.pdf](http://www.bottomlineresearch.ca/articles/articles/pdf/unjustenrichment.pdf)>, last accessed 26 October 2010: “...when one cohabitee contributes in money or services towards the acquisition of property by the other, the principle of unjust enrichment may require a restitutionary remedy in favour of the contributor. Liability in this situation does not turn on a contract between the parties, their intent, a tort committed by one against the other, or a statute. It turns simply on the autonomous principle of unjust enrichment.”

<sup>108</sup> The vehicle of a constructive trust is often used in Canada to give both parties an interest in property acquired by one or the other partner. However, in Namibia and South Africa, an intention on the part of the founder to create a trust is a central requirement – and the intention normally has to be express. The courts will generally infer an intention to create a trust only if a common intention on the part of both the founder and the trustee is clear. SALRC at paragraphs 3.1.71-ff; Sinclair at 277.

<sup>109</sup> [1980] 2 SCR 834 SCC.

<sup>110</sup> Id at 835 (*per* Dickson J).

<sup>111</sup> Id at 841.

<sup>112</sup> Id at 841 and 849-850.

<sup>113</sup> [1986] 2 SCR 38.

enriched during this period, despite the fact he owned the farm property in question before the plaintiff came to live with him. During their relationship the plaintiff had received no remuneration for doing household work, farmyard chores or selling farm goods to pay for food, clothing and schooling for their couple's children. The Supreme Court found that the plaintiff had a reasonable expectation that she would gain some benefit in return for the work she had put in and that the defendant should reasonably have known of this expectation. The Chief Justice summarised the court's finding:

*In my view, it is clear that the respondent derived a benefit from the appellant's many years of labour in the home and on the farm. This benefit included valuable savings from having essential farm services and domestic work performed by the appellant without having to provide remuneration.*<sup>114</sup>

Addressing the more problematic test of whether there was a valid juristic reason for the enrichment, the Chief Justice noted that "*Mary Soroohan was under no obligation, contractual or otherwise, to perform the work and services in the home or on the land.*"<sup>115</sup> She was awarded a one-third share in the farm property.<sup>116</sup>

In *Peter v Beblow*,<sup>117</sup> the Supreme Court considered whether the provision of 12 years' worth of domestic service could constitute an unjust enrichment of the defendant. The Court confirmed that a cohabiting partner owes no duty to the other partner in terms of providing work and service during the time they are cohabiting. The plaintiff's long period of domestic service was considered sufficient to establish that her partner had been unjustly enriched at her expense, and she was awarded title to the matrimonial home.

In one of the most recent such cases in Canada, *Wilson v Fotsch*,<sup>118</sup> the British Columbia Court of Appeal noted that the analysis of unjust enrichment claims can be challenging in marriage-like relationships which are "*infused with mutuality*" because each partner usually benefits the other by sharing love and mutual trust, sharing expenses and having a common expectation of sharing in the economic fruits of the union.<sup>119</sup> The Court here recommended a step-by-step approach. It noted that there will almost always be some benefit which has passed from one partner to another. The benefit may be positive (such as the payment of money or delivery of services to or for the benefit of the defendant) or negative (such as the saving of an inevitable expense by the defendant).<sup>120</sup> The second step is to locate the corresponding detriment:

*In a marriage-like relationship, the full-time devotion of one's labour and earnings without compensation or with less than complete remuneration can be viewed as a deprivation. Where the benefits received by the defendant are unpaid household or domestic services, the deprivation is the fact that those services were uncompensated. Where the benefits received by the defendant are money or its equivalent, the deprivation is the transfer of that value from the plaintiff to the defendant.*<sup>121</sup>

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<sup>114</sup> Id at paragraph 11 (*per* Dickson CJ).

<sup>115</sup> Id at paragraph 15.

<sup>116</sup> Id at paragraph 38.

<sup>117</sup> [1993] 1 SCR 980 (*per* Cory J)

<sup>118</sup> 2010 BCCA 226.

<sup>119</sup> Id at paragraph 4 (*per* Huddart J).

<sup>120</sup> Id at paragraph 12.

<sup>121</sup> Id at paragraph 18 (citation omitted).



The Court also provided guidance on how to quantify the award in an unjust enrichment case, which can be done with reference to “value received” (the market value of the benefits) or “value survived” (the value created in an asset by the plaintiff’s contributions).<sup>122</sup> The final step is to consider set-off (whether the unjust enrichment in question has been set off by the reciprocal benefits provided by the defendant to the plaintiff):

*To give a global example, if a plaintiff (Mr”Y”) entered the relationship with a speedboat, a truck, a small cottage, and nothing else, and he contributed to the relationship by renovating the defendant partner’s (Ms”X”) house (to which she held sole title), the court could well find that Ms X was unjustly enriched. However, when it comes time to quantify the value of the enrichment, the court must account for the fact that Ms X paid for maintenance, a new motor and winter storage costs for the boat, new tires and a carburetor for his truck, and a roof for the cottage. All of those contributions to the improvement and preservation of the plaintiff’s assets must be off-set against the defendant’s unjust enrichment to determine the final award.*<sup>123</sup>

Some cases from United States jurisdictions have relied upon similar arguments. For example, the Wisconsin Supreme Court held in **Watts v Watts**<sup>124</sup> that unmarried cohabitants may raise claims based upon unjust enrichment following the termination of their relationship where one of the parties attempts to “retain an unreasonable amount of the property acquired through the efforts of both”.<sup>125</sup> The Court of Appeals of the District of Columbia made a similar holding in **Mason v Rostad**,<sup>126</sup> where a cohabiting partner who renovated a house that was owned by the other partner was allowed to claim restitution for services and materials which increased the value of the property where they had both resided. This defendant was allowed to “recover the funds he expended, the reasonable value of work he performed, and services he rendered in renovating and improving the plaintiff’s property, reduced by the reasonable value of any counter-benefits received by him,” such as being able to live in the house without paying rent, in order to prevent the plaintiff from being unjustly enriched.<sup>127</sup>

Some jurisdictions have proposed legislative changes which would allow a cohabiting partner to make an unjust enrichment claim for domestic services, even where these services did not directly contribute to the acquisition of, or improvement in, value of an asset.<sup>128</sup> This might apply, for example, in a case where one partner contributed services which the other would otherwise have had to provide for himself, or pay to obtain from another source.<sup>129</sup>

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<sup>122</sup> Id at paragraph 52-53.

<sup>123</sup> At paragraph 85.

<sup>124</sup> 137 Wis 2d 506 (1987).

<sup>125</sup> Id at 532-533.

<sup>126</sup> 476 A2d 662 (DC 1984).

<sup>127</sup> Id at 666.

<sup>128</sup> See Council of Europe Family Policy Database, “Social Policy and Family Law: Marriage, Divorce and Parenthood”, undated, <[www.coe.int/t/dg3/familypolicy/Source/4\\_1\\_ii%20Legislation%20on%20cohabitation.pdf](http://www.coe.int/t/dg3/familypolicy/Source/4_1_ii%20Legislation%20on%20cohabitation.pdf)>, last accessed 16 July 2010 (proposing a bill in Finland that would allow a cohabiting partner to claim benefits, including services rendered in the household, under the theory of unjust enrichment).

<sup>129</sup> See Robert C Casad, “Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?”, 77 (1) *Michigan Law Review* 47 (November 1978) at 58 and 62.

## 5.5 Putative marriages

A putative marriage is a marriage which is automatically void because the basic legal requirements for a marriage were never satisfied. However, there is some legal recourse for a party to such a ‘marriage’ who believed in good faith that the ‘marriage’ was valid. Some cohabitants may fit into this category.

Some instances of cohabitation will fall within the category of “putative marriage”, which refers to a good faith marriage which is void from the beginning.

A marriage will be automatically void if the basic requirements for a valid marriage were never met. In such circumstances, as far as the law is concerned, the marriage never existed. Generally, a marriage will be void if there was an impediment or defect in terms of the formalities of the marriage, or if one spouse was not legally permitted to enter into the marriage.<sup>130</sup> This would occur if, for example, one spouse was already married or insane or a minor who did not have proper parental consent, or if the parties were too closely related.<sup>131</sup> However, the common law provides some protection to parties who have entered into a void marriage if at least one of the parties believed in good faith that the marriage was valid.<sup>132</sup> This situation is referred to as a “putative marriage”.

Although the key requirement necessary to establish a putative marriage is good faith on the part of one or both parties that the marriage was in fact valid,<sup>133</sup> it appears that there must also be some evidence of solemnization of the marriage with the required formalities. A series of cases have held that some appearance of a legal marriage, even if there were defects in formalities or the status of the person officiating, can establish a putative marriage.<sup>134</sup> For example, in *Moola v Aulsebrook NO*,<sup>135</sup> the Court held that “...all that is required is that the union be contracted openly and in accordance with rituals and ceremonies not inconsistent with our law...”.<sup>136</sup>

The courts cannot make a putative marriage into a valid marriage.<sup>137</sup> However, certain consequences of a valid marriage can attach to the putative marriage despite its invalidity

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<sup>130</sup> Sinclair at 385-386.

<sup>131</sup> Sinclair at 387-388.

<sup>132</sup> No Namibian cases involving putative marriage have been located. This discussion is therefore based only on South Africa precedent.

<sup>133</sup> *Shields v Shields* 1959 (4) SA 16 (W) at 23, 24; *Solomons v Abrams* 1991 (4) SA 437 (W); *Zulu v Zulu and Others* 2008 (4) SA 12 (D) at 14 (H). As one recent commentator explains, “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”. Bradley S Smith, “Rethinking the application of the putative spouse doctrine in South African matrimonial property law”, 24 (3) *International Journal of Law, Policy and the Family* 267 (2010) at 270. In a recent South African decision, the Durban High Court held that a putative marriage arises “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...”. *Zulu v Zulu and Others* 2008 (4) SA 12 at 14H (*per* Hugo J).

<sup>134</sup> See Sinclair at 405-406, citing *Ex parte Azar* 1932 OPD 107, *Ex Parte L* 1947 (3) SA 50 (C), *Ramayee v Vandiyar* 1977 (3) SA 50 (C) and *Moola v Aulsebrook NO*, 1983 (1) SA 687 (N). It should be noted that in *Solomons v Abrams* 1991 (4) SA 437 (W), the court held that a putative marriage cannot exist in the absence of a ceremony performed by a marriage officer.

<sup>135</sup> 1983 (1) SA 687.

<sup>136</sup> Id at 693B (*per* Friedman J).

<sup>137</sup> See id at 690.

once good faith is demonstrated on the part of at least one party.<sup>138</sup> The concept of a putative marriage is used as “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”.<sup>139</sup>

The major protection afforded in a putative marriage is the recognition of the legitimacy of any children of that marriage.<sup>140</sup> As the Court held in *Moola v Aulsebrook*,<sup>141</sup> “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”.<sup>142</sup> However, now that most of the legal disadvantages which once applied to children born outside of marriage have been removed, this result will be less important than it once was in most cases.<sup>143</sup>

In fact, the recent Namibian case of *S v S*<sup>144</sup> has questioned the continued usefulness of the doctrine of putative marriage:

*It is trite that a marriage solemnised whilst one of the parties thereto is still a party to an existing valid marriage is null and void. Over the years however the common law, with the influence of canon law, has developed and recognised the concept of a putative marriage in terms whereof certain limited legal consequences flow from an invalid marriage. Such consequences are broadly property rights and certain consequences relating to children.*

*The requirements of a putative marriage are that:*

- (i) There must be bona fides in the sense that both or one of the parties must have been ignorant of the impediment to the marriage;*
- (ii) The marriage must be duly solemnised;*
- (iii) The marriage must have been considered lawful in the estimation of the parties or of that party who allege the bona fides.*

*The concept of a putative marriage notwithstanding the fact that the above requirements are met only benefits the innocent party in the form of the division of the joint estate in cases where the parties thereto had not excluded the community of property by an antenuptial contract and further if there was no existing community of property between one of the parties to the marriage and a third party.*

*The philosophy of and the ratio behind the concept of a putative marriage are twofold namely, to serve as a device to mitigate the harshness of annulment of the marriage to the innocent party and more particularly to mitigate the harshness of annulment to children born of that marriage. It is clear from a number of authorities that the main and the most important consideration for the existence of the concept of a putative marriage has been mitigation of the harshness of the annulment to the children.<sup>8</sup> The innocent party's interest, in my opinion, has been secondary. This is ostensibly because the courts in our jurisdiction are primarily, in this context, concerned with the best interest of the children. The innocent party on the other hand can have other recourses to mitigate the harshness.*

<sup>138</sup> *Shields v Shields* 1959 (4) SA 16 (W) at 23, 24; *Solomons v Abrams* 1991 (4) SA 437 (W); *Zulu v Zulu and Others*, 2008 (4) SA 12 (D) at 14H.

<sup>139</sup> *Moola v Aulsebrook NO* 1983 (1) SA 687 (N) (per Friedman J) at 693G–H.

<sup>140</sup> *Bam v Bhabha* 1947 (4) SA 798 at 809; *Prinsloo v Prinsloo* (1958) (3) SA 759 (T); *M v M* 1962 (2) SA 114 (GW).

<sup>141</sup> 1983 (1) SA 687 (N).

<sup>142</sup> *Id* at 690 (per Friedman J).

<sup>143</sup> The position of children born outside marriage is discussed below in Chapter 7.

<sup>144</sup> (A 186/2009) [2010] NAHC 152 (12 October 2010).

*It begs a question whether in the present day Namibia the concept of putative marriage still remains relevant given the positive legislative intervention, particularly the enactment of the Children's Status Act. The Children's Status Act essentially puts children born out of wedlock on the same legal footing with the children born in wedlock. Consequently, the main socio-legal consideration for the existence of the concept of putative marriage has been rendered nugatory as children born out of wedlock are legitimate.*

*The historical approach to the concept of putative marriage, in my opinion, should fall into disuse as there are no more substantial and compelling reasons for such a concept. Public policy considerations demand, I am of the view, a relook at such an artificial legitimization of some consequences from an invalid marriage. If a marriage is found to be invalid in terms of the law, a somewhat pigmentation of certain consequences flowing therefrom with a legal colour would be confusing in legal sense. However, as the concept itself appears not to be incompatible with any statute or the Namibian Constitution, regard being had to the provisions of Article 66 thereof, it may still remain part of our common law although there appears not to be a need for such a concept any longer.*<sup>145</sup>

With respect, this view seems incorrect, since the concept of a putative marriage can also provide certain property rights to the spouse who entered the marriage in good faith. The law assumes that the parties intended to be married in community of property, and if both parties acted in good faith, then both are entitled to a share in the property of the marriage.<sup>146</sup> However, if only one of the parties acted in good faith, community of property will be recognised only if it is to the advantage of the innocent party.<sup>147</sup> For example, in *M v M*<sup>148</sup>, a South African Court held that the *bona fide* party, the wife, would have been entitled to half of the joint estate (although she did not claim for it, seeking only the return of what she had brought into the marriage).

However, it should be noted that a more recent decision suggests a possible change in the law on this point. In *Zulu v Zulu and Others*<sup>149</sup>, the South African High Court declined to recognise a putative marriage involving the second 'wife' of a man already in a pre-existing civil marriage in community of property, despite the Court's finding that the second 'wife' entered the marriage in good faith, unaware of the pre-existing marriage. The second 'wife' believed that she was entering into a marriage in community of property, and was therefore seeking a half share of the deceased 'husband's' estate. The Court awarded the joint estate to the first wife and denied any relief to the second 'wife'.

The decision of the Court in *Zulu* has been criticised on several grounds. Firstly, there is some confusion as to whether the second 'wife' actually intended to claim a half share of the 'joint estate' that allegedly existed between herself and the deceased, or a half share of the remaining 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 – which would seem to provide a more equitable outcome between the two 'spouses'.<sup>150</sup> Secondly, one

<sup>145</sup> Id at paragraphs 10-12 (*per* Namandje AJ) (footnotes omitted).

<sup>146</sup> Sinclair at 408.

<sup>147</sup> See Sinclair at 408-409, citing numerous cases including *Ex Parte L* 1947 (3) SA 50 (C) and *M v M* 1962 (2) SA 114 (GW).

<sup>148</sup> 1962 (2) SA 114 (GW).

<sup>149</sup> 2008 (4) SA 12 (D).

<sup>150</sup> Enquires to the attorneys in the case by one commentator confirmed that the second 'wife' intended to aver that no joint estate existed at all between the deceased and his legal wife, and so was claiming a half share in the deceased's entire estate. Bradley S Smith, "The Development of South African Matrimonial Law With Specific Reference to the Need For and Application Of a Domestic Partnership Rubric", doctoral thesis, University of the Free State, Bloemfontein, South Africa, 2009 at 410, note 250.

commentator has suggested that the Court could have reached a more equitable outcome by considering a “putative estate” consisting of the joint estate of the putative marriage, including the husband’s half-share from the joint estate of his first “legal” marriage; it could have divided this “putative estate” in thirds amongst the husband, the first legal wife and the second putative wife, with any adjustments as equity might require.<sup>151</sup>

The Namibian High Court has followed the *Zulu* precedent in the case of *S v S*<sup>152</sup> where the spouse in the putative marriage was given no relief because the prior legal marriage was found to be in community of property. There was a dispute of fact in this case, with the man claiming that he informed the woman of his prior marriage, whilst she denied this. Without deciding this question, the Court held that it could not “*declare the parties’ invalid marriage as putative as there was an existing community of property between the applicant and his first wife at the time of conclusion of the marriage between the parties*”.<sup>153</sup> The Court suggested that the ‘wife’ had other recourse, such as “[t]o institute a delictual claim, if he/she, suffered damages, against the party that wrongfully induced him/her to enter into an invalid marriage to his/her prejudice”.<sup>154</sup>

In contrast, the Zimbabwean case of *Muringaniza v Munyikwa*<sup>155</sup> dealt with a similar situation by giving an equitable share of property to the putative spouse. Here the male plaintiff sought to evict the female defendant from the property they had occupied as a couple for several years. There were two children born of this relationship, and the court found that the couple had shared assets. However, the plaintiff had also been married to another woman at the time that he entered a relationship with the defendant. The defendant was under the impression that the plaintiff’s other marriage was a potentially polygamous customary marriage which he was in the process of dissolving, and thus believed that she had entered into a legitimate customary marriage with the plaintiff. In fact, the previous marriage was a monogamous civil marriage which was never dissolved, meaning that no subsequent marriage to another person could be valid. The Zimbabwe High Court found that a putative marriage existed between the plaintiff and the defendant, and that the defendant, who had contributed a substantial amount to the construction of the residence, was entitled to a “fair share” in the accumulated property. (The Court did not have to decide how to divide the property between the three parties because the only question actually before the Court was the plaintiff’s application to evict the defendant from the disputed property.)

Two other Zimbabwean cases, *Makovah v Makovah*<sup>156</sup> and *Sibanda v Sibanda*,<sup>157</sup> addressed putative marriages where a man had entered a customary marriage with one woman despite having an existing civil marriage to another. Despite the existence of the prior civil marriages, in both cases the courts treated the putative marriages as being violable (rather than void from the start because of incapacity) and applied a statutory provision allowing for an equitable division of assets as part of a decree of nullity.<sup>158</sup>

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<sup>151</sup> Id at 427-432.

<sup>152</sup> (A 186/2009) [2010] NAHC 152 (12 October 2010).

<sup>153</sup> Id at paragraph 13 (*per* Namandje AJ).

<sup>154</sup> Id at note 9, citing *Snyman v Snyman* 1984 (4) SA 262 (W).

<sup>155</sup> [2003] ZWBHC 102; HB 102/03 (*per* Ndou J). This case was sourced on the Internet ([www.saflii.org](http://www.saflii.org)) and is unpaginated and without paragraph numbering.

<sup>156</sup> 1998(2) ZLR 82 (S).

<sup>157</sup> HC 6663/94 [2002] ZWHHC 90; HH 90-2002 (19 June 2002); confirmed on appeal (19/02) [2005] ZWSC 109; SC117/04 (31 January 2005).

<sup>158</sup> Matrimonial Causes Act [Chapter 5:13], section 7(1).



Cases such as these could have particular relevance in the area of cohabitation in Namibia, where customary marriage ceremonies historically used to conclude potentially polygamous customary marriages are often coupled with a church wedding which makes the marriage a monogamous civil one. An equitable approach is required to ensure that multiple wives are not punished for the dishonesty of husbands who knowingly conceal the legal consequences of their actions, and that parties who simply misunderstand the implications of customary versus civil marriage are treated fairly.

Additionally, at least one commentator has suggested that the principles of putative marriage could permit intestate inheritance by a putative spouse if the other spouse dies without leaving a will, although there has yet to be a judicial decision that considers this issue.<sup>159</sup>

## 5.6 Potential claims by cohabitants against third parties

**There is some precedent in the Seychelles for allowing cohabitants to bring actions against third parties for pain and suffering caused by the wrongful death of the partner.**

As discussed above, a cohabitant would not have a claim against a third party for loss of support after the wrongful death of a partner, because such claims must be based on a duty of support arising from law and not contract.<sup>160</sup>

However, in the Seychelles, in the 2007 case of *Joanneau and Others v Government of Seychelles and Others*,<sup>161</sup> the Seychelles Supreme Court developed that country's common law to allow a long-term cohabitant a claim against a third party for damages for mental suffering following the wrongful death of the cohabiting partner, referring to the surviving partner as an "unmarried spouse". The Court relied on the provision on protection for the family in the Seychelles Constitution,<sup>162</sup> noting that no distinction is drawn in the Constitution "between families composed of married persons and persons in a common law relationship".<sup>163</sup> The Court said:

*When moral damages are claimed in a delictual action in respect of grief and sorrow, mental agony, anxiety, and shock, there is no legal or moral jurisdiction to draw a distinction between a surviving married spouse, and an unmarried spouse.*<sup>164</sup>

<sup>159</sup> Sinclair at 409.

<sup>160</sup> See section 5.2 on express contracts at page 64.

<sup>161</sup> [2007] SCSC 20 (19 January 2007).

<sup>162</sup> Section 32 of the Seychelles Constitution states:

*Protection of families*

(1) *The state recognises that the family is the natural and fundamental element of society and the right of everyone to form a family and undertakes to promote the legal, economic and social protection of the family.*

(2) *The right contained in clause (1) may be subject to such restrictions as may be prescribed by law and necessary in a democratic society including the prevention of marriage between persons of the same sex or persons within certain family degrees.*

<sup>163</sup> (Per Perera J). This case was sourced on the Internet ([www.saflii.org](http://www.saflii.org)) and is unpaginated and without paragraph numbering.

<sup>164</sup> See note 163.

The Court concluded that “*a concubine should be entitled to moral damages even where material damage has not been established*”.<sup>165</sup>

This approach would likely be impossible in South Africa or Namibia in the absence of some law reform, given the common law precedent which holds that a surviving cohabiting partner has no action for loss of support against third parties because there is no legal duty of support between unmarried cohabitants. Given that damages for loss of support for cohabitants are not permitted under the current common law, it is hard to see how non-pecuniary damages for loss and suffering would be allowed.<sup>166</sup>

## 5.7 Potential claims by a wronged spouse against a cohabiting partner

Where one cohabiting partner is married to someone else, the wronged spouse may be able to bring legal action against the other cohabiting partner, for adultery, enticement or harbouring. There may also be some recourse for the wronged spouse under the Married Persons Equality Act.

In some cases, a partner in a cohabitation relationship will have a subsisting marriage to another person. If the subsisting marriage is a civil marriage, this could potentially make the cohabiting partner liable to claims from the spouse. Cohabiting partners who put their cohabitation on record in an effort to secure assets or some other remedy might thus open themselves up to potential lawsuits from the other partner’s spouse.

As noted above, spouses enter a *consortium omnis vitae*, which is “*a physical, moral and spiritual community of life*”.<sup>167</sup> The court will award damages to a spouse in instances where a third party causes the loss of consortium.<sup>168</sup>

There are three common law claims which might be brought by a wronged spouse against the cohabiting partner in this regard: adultery, enticement, and harbouring. All are possible only where the defendant has acted in bad faith, knowing that his or her partner in cohabitation was married at the time of the offence.<sup>169</sup> In such circumstances, in addition to damages for loss of consortium, the court may award damages for *contumelia* (or personal insult) in the form of an impairment of one’s person, dignity or reputation.<sup>170</sup>

<sup>165</sup> See note 163.

<sup>166</sup> See note 49 at page 67.

<sup>167</sup> Sinclair at 422; see also Hahlo at 109-110.

<sup>168</sup> Hahlo at 385; J Neethling, JM Potgeiter and PJ Visser, *The Law of Delict*, 5<sup>th</sup> edition, Durban: LexisNexis, 2006 (hereinafter “**Neethling et al**”) at 326; Sinclair at 483. See also ID Schäfer, “Family Law Procedures,” in Brigitte Clark, ed, *Family Law Service*, Durban: Butterworths, October 2000 (hereinafter “**Schäfer**”) at F33-30.

<sup>169</sup> RG McKerron, *The Law of Delict*, 7<sup>th</sup> edition, Cape Town: Juta & Co, 1971 (hereinafter “**McKerron**”) at 53 (citing *Whittaker v Roos*, 1912 AD 92 at 130-131; *Matthews v Young*, 1922 AD 492 at 503-504; *Jockie v Meyer*, 1945 AD 354 at 367-368).

<sup>170</sup> Hahlo at 384; Schäfer at F33-30; McKerron at 53.

To determine the quantum of damages, the court will consider all of the circumstances, including the character of the parties involved.<sup>171</sup> The court determines loss of *consortium* damages by estimating the value of the plaintiff's "loss of society, comfort and services of the guilty spouse".<sup>172</sup> Damages for loss of consortium might also take into account any failure to pay maintenance as part of the spousal duty of support.<sup>173</sup> *Contumelia* damages, on the other hand, take into account all the circumstances, including the character of the parties, the relationship between the spouses and the nature of the wrongful act.<sup>174</sup>

### 5.7.1 Adultery

A wronged spouse may bring a civil action seeking damages for adultery against the third party,<sup>175</sup> but not against the unfaithful spouse.<sup>176</sup> Both husbands and wives may sue for damages as a result of adultery.<sup>177</sup> The third party is liable for damages only if he or she knew that the partner was married at the time of the indiscretion,<sup>178</sup> or where he or she negligently arrived at the belief that a partner was unmarried (although in this situation *contumelia* damages would be excluded).<sup>179</sup> The wronged spouse does not need to bring a divorce action against the offending spouse in order to claim damages from the third party.<sup>180</sup> Traditionally, if the spouse condoned or forgave his or her unfaithful partner, then the damages against the third party are limited to *contumelia*, as *consortium* rights have been restored.<sup>181</sup> However, a South African case awarded damages for temporary loss of *consortium*, even though the wronged spouse ultimately made amends with his or her partner.<sup>182</sup>

Adultery cases are not common in Namibia, but they are certainly not obsolete. As recently as 2007, the Namibian High Court awarded damages in a suit by a wronged wife against her

<sup>171</sup> See for example, *Viviers v Kilian* 1927 AD 449 at 456-457 (noting that the particularly wanton character of the unfaithful wife warranted reduced damages). For further examples of how different circumstances influence damages, see Hahlo at 385-387.

<sup>172</sup> McKerron at 167 (citing *Viviers v Killian* 1927 AD 449).

<sup>173</sup> In *Valken v Berger* 1948 (3) SA 532 (W), in discussing the damages for loss of consortium, the court noted that "[a]lthough the husband has continued to provide substantial funds for the maintenance of his wife and children and will, no doubt, continue to do so, the plaintiff has been relegated to a lonely, husbandless life in a flat, whereas she would have been a happy wife and mistress of a house that was to be built". At 536 (emphasis added).

<sup>174</sup> McKerron at 167; see also Schäfer at F33-30.

<sup>175</sup> Graham Glover "Divorce," in Brigitte Clark, ed, *Family Law Service*, Durban: Butterworths, October 2000, at D6-12, note 1 (citing *Viviers v Kilian* 1927 AD 449 as the "leading case"); Hahlo at 383; McKerron at 166 (citing *Foulds v Smith*, 1950 (1) SA 1(AD)); Neethling et al at 326.

<sup>176</sup> Sinclair at 423 (citing *Ex parte Margolis* 1910 TPD 1332; *Rosenbaum v. Margolis* 1944 WLD 147 at 155).

<sup>177</sup> *Rosenbaum v Margolis* 1944 WLD 147 at 158; see Hahlo at 383-384.

<sup>178</sup> DSP Cronjé, *The South African Law of Persons and Family Law*, 3<sup>rd</sup> edition, Durban: Butterworths, 1994 at 186; Hahlo at 384; McKerron at 167.

<sup>179</sup> DSP Cronjé, *The South African Law of Persons and Family Law*, 3<sup>rd</sup> edition, Durban: Butterworths, 1994 at 186 & note 38: "In the event that a reasonable man under the same circumstances, should have known that the person was married, or should have made enquiries about it, the third party could have been negligent, thus enabling the plaintiff to recover damages with the action legis Aquiliae, although not satisfaction"; see also McKerron at 167, which states that "it is therefore a good defence for the defendant to show that he bona fide and reasonably believed that the plaintiff's wife was an unmarried woman" (emphasis added). However, commentators are not entirely in agreement on this point; Neethling appears to think the standard is subjective. J Neethling, JM Potgieter and PJ Visser, *Neethling's Law of Personality*, 2<sup>nd</sup> edition, Durban: LexisNexis Butterworths, 2005 at 211: "Where the defendant was unaware of the marital status of the adulterous spouse [...] such mistake excludes consciousness of wrongfulness and consequently intent, allowing the defendant to go free."

<sup>180</sup> Hahlo at 384.

<sup>181</sup> Id at 386; Schäfer at F33-30.

<sup>182</sup> *Godfrey and Others v Campbell* 1997 (1) SA 570 (C) at 581-582.

husband's lover in the case of *Matthews v Ipinge*.<sup>183</sup> Here, the plaintiff wife sued the defendant for defamation and committing adultery with her husband. The husband had admitted to the adultery in the presence of a witness, and the defendant apparently also flaunted the affair by making malicious statements about their liaisons directly to the plaintiff wife via phone and text messages. The wife sought *contumelia* damages only, as she had since condoned her husband's adultery and sought to repair their marriage. The Court awarded her N\$30 000.

Whilst the action for adultery has been criticised,<sup>184</sup> South African courts (like Namibian courts) continue to recognise claims against third parties for damages in cases of adultery, and indeed have reaffirmed it as a valid cause of action. In the 1996 case of *Van der Westhuizen v Van der Westhuizen and Another*,<sup>185</sup> a South African court awarded \$20 000 plus costs in an adultery suit by a wife against her husband's lover, declaring that while attitudes about the seriousness of adultery are changing, “[m]arriage remains the cornerstone, the basic structure of our society. The law recognises this and the Court must apply the law. I regard this as a disgraceful case of conscious and deliberate desecration of the marriage relationship, necessitating an award of damages [...] which will reflect the serious nature of the second defendant's misconduct.”<sup>186</sup> Moreover, in the recent case of *Wiese v Moolman*,<sup>187</sup> the High Court of South Africa upheld the action for damages for adultery as consistent with the Constitution, the Bill of Rights and the modern institution of marriage in South Africa.<sup>188</sup>

As these judgments illustrate, although the institution of marriage is subject to changing social values, Namibian and South African law continue to enforce the rights of wronged spouses.

## 5.7.2 Enticement

A spouse may sue a third party for loss of consortium if the third party “*by persuasion or inducement alienates one spouse from the other and convinces him or her to leave the matrimonial home*”.<sup>189</sup> Both men and women may bring this action for enticement,<sup>190</sup> which requires that

<sup>183</sup> 2007 (1) NR 110 (HC).

<sup>184</sup> See, for example *Rosenbaum v Margolis* 1944 WLD 147 at 158 (suggesting the claim for damages may be “out of harmony with modern concepts of marriage and should be abolished”, but declaring that as long as the claim remains it should be available to wives as well as husbands).

<sup>185</sup> 1996 (2) SA 850 (C).

<sup>186</sup> At 852B-C, 852I-853B.

<sup>187</sup> 2009 (3) SA 122 (T).

<sup>188</sup> The case is in Afrikaans. The headnote states: “Adultery conflicts directly with the undertaking of spouses towards one another and towards the outside world to have sexual intercourse only within marriage. The convictions of the community are that the exclusive sexual relations of marriage have to be respected and that it is unlawful to interfere with them. In terms of legal policy it is necessary to protect the exclusivity of sexual relations to which spouses have bound themselves from interference by third parties. It is therefore incorrect that the view that adultery constitutes an *iniuria* is incompatible and ‘not in harmony with the modern concept of marriage’. The *actio iniuriarum* for damages for adultery does not clash with the Bill of Rights in Ch 2 of the Constitution of the Republic of South Africa, 1996, in particular ss 9, 10, 15 and 18 thereof. Such action is still maintainable in South African law and should not be abolished. (At 125G-H, 126E, 127I-J and 128H- 129J, paraphrased.)”

<sup>189</sup> Neethling et al at 327 (citing *Gower v Killian* 1977 2 SA 393 (E) 395; *Smit v Arthur* 1976 3 SA 378 (A) 387). See also Hahlo at 419 (citing *De Wet v De Villiers* (1832) 1 Menz 250; *Le Roex v Van Wyk* (1839) 1 Menz 253; *Kramarski* 1906 TS 937; *Pearce v Kevan* 1954 (3) SA 910 (D); *Van den Berg v Jooste* 1960 (3) SA 71 (W); *Grobbelaar v Havenga* 1964 (3) SA 522 (N)); Graham Glover “Divorce,” in Brigitte Clark, ed, *Family Law Service*, Durban: Butterworths, October 2000 at D6-12; Schäfer at F34-32 (citing *Valken v Berger* 1948 3 SA 532 (W); *Grobbelaar v Havenga* 1964 (3) SA 522 (N) 525); McKerron at 168 (citing *Pearce v Kevan* 1954 (3) SA 910 (N); *Woodiwiss v Woodiwiss* 1958 (3) SA 609 (N); *Van den Bergh v Jooste* 1960 (3) SA 71 (W)).

<sup>190</sup> Schäfer at F34-32 (citing *Van den Berg v Jooste* 1960 (3) SA 71 (W)).



the third party have both knowledge of the marriage and an intent to deprive the innocent spouse of his/her *consortium* rights.<sup>191</sup> This is a difficult burden of proof to meet, as it must be shown that the third party “*actually induced and caused*” the unfaithful spouse to leave the marriage partner, with an “*element of persuasion or coaxing*” on the part of the third party that goes beyond the lovers’ mutual desire.<sup>192</sup> *Contumelia* damages are not traditionally available in an enticement action,<sup>193</sup> although it has been suggested by a South African court that this is possible in theory.<sup>194</sup> An action for enticement will fail if the defendant enticed the spouse in good faith<sup>195</sup> (for example, persuading the spouse to leave an abusive relationship).

### 5.7.3 Harboursing

The third common-law claim available to a wronged spouse, though “*seemingly outmoded*”,<sup>196</sup> is an action for harboursing, or “*giving accommodation to a spouse who has left the matrimonial home against the will of the other spouse*”.<sup>197</sup> Harboursing does not require evidence of persuasion or coaxing.<sup>198</sup> *Contumelia* damages are not normally available in a harboursing action,<sup>199</sup> although this could change.<sup>200</sup> As in the case of enticement, if the defendant has acted in good faith (for example, by harboursing a spouse who has fled the marital home because of domestic abuse), then no damages are available.<sup>201</sup>

<sup>191</sup> Schäfer at F34-32 (citing *Pearce v Kevan* 1954 (3) SA 910 (D) *Van den Berg v Jooste* 1960 (3) SA 71 (W)). See also Hahlo at 419.

<sup>192</sup> *Smit v Arthur*, 1976 (3) SA 378 (A) (dismissing a claim for enticement stating, “*What the evidence shows is that they were attracted to one another and came together, each by [their] own inclination and desire.*”); *Woodiwiss v Woodiwiss* 1958 (3) SA 609 at 617 (*per Milne J*):

*It would not be enough for the plaintiff to prove that the first defendant left him after frequent and continued association with the second defendant, or even in consequence of such association, for a wife might leave her husband of her own will in order to make herself more accessible to the other man especially if he had, up till then; had some scruples about “breaking up a happy home.” It seems that the plaintiff in these cases must prove that the third party has acted, and done so successfully, with the deliberate object of enticing the wife to leave her husband and thus deprive him of her consortium (*Pearce v Kevan*, at pp 914, 915 *Best v Samuel Fox & Co*, 1952 (2) AER 394 (HL)).*

See also Neethling et al at 327.

<sup>193</sup> See Hahlo at 19 (citing *Pearce v Kevan* 1954 (3) SA 910 (D)); Sinclair at 483 & note 258.

<sup>194</sup> Neethling et al at 328 & note 335 (citing *Peter v Minister of Law and Order* 1990 (4) SA 6 (E) at 10 “*where the court opined that enticement may found the actio iniuriarum*”).

<sup>195</sup> Hahlo at 419 (citing *Abner Major v Makettra* 1880 (1) EDC 47; *Kramarski v Kramarski* 1906 TS 937).

<sup>196</sup> Schäfer at F35-32.

<sup>197</sup> Neethling et al at 327 (citing *Woodiwiss v Woodiwiss* 1958 (3) SA 609 (D) at 616).

<sup>198</sup> See *Woodiwiss v Woodiwiss* 1958 (3) SA 609 at 616 (*per Milne J*) (citing *Place v Searle*, 1932 (2) KB at 499): “*The action apparently lies even where the wife has left her husband without any persuasion or enticement on the part of the third party but the defendant would, it appears, only be, liable for harboursing after he had had notice that she was absenting herself from her husband without his approval.*”

<sup>199</sup> *Id* at 228.

<sup>200</sup> Neethling et al at 328 & note 335 consider harboursing and enticement together. Should *contumelia* damages become available for enticement, presumably they could be extended to harboursing as well.

<sup>201</sup> For example, in *Abner Major v John Mekketra* 1880 (1) EDC 47, a husband sued his wife’s brother for harboursing, but the court found that he had a defence because there was no evidence that he had acted in bad faith. In this case, the husband had insulted his wife by saying she was barren, told her to leave and go to her mother’s house, and had locked her out of the house on three consecutive nights. The court also reasoned that the brother could not be held liable if he believed the wife’s statement that she had reason to leave her husband and acted from motives of humanity. In *Kramarski v Kramarski* 1906 TS 937, the court found that no action for harboursing could lie against a wife’s brothers where she sought shelter in their home due to “*continual severe ill-treatment*” and a disagreement with her husband. Hahlo states at 419 (in reference to *Kramarski*) that “*There will be no claim if the defendant acted in the bona fide belief that the ‘enticed’ spouse was justified in leaving his or her spouse.*” See Schäfer at F35-32.



## 5.7.4 Cases involving claims against cohabitants

There are some examples of adultery cases in which the guilty parties were living together ‘as husband and wife’. For example, in the 1948 case of *Valken v Berger*,<sup>202</sup> a wronged wife sued her husband’s lover for specific instances of adultery, as well as for a period of time where they set up house together and, in all respects, acted as husband and wife. The judge, noting the third party’s “*wanton and flagrant disregard for the rights and feelings of the plaintiff*”<sup>203</sup>, awarded 1000 pounds in damages.<sup>204</sup> In the 1996 case of *Van der Westhuizen v Van der Westhuizen and Another*,<sup>205</sup> the Court listed many aggravating factors, including that the third party “*actually moved into the common home after plaintiff had found the position to be intolerable and moved out*”<sup>206</sup> as reasons for awarding heightened damages totalling R20 000 for adultery, alienation of affection, loss of consortium and *contumelia*.<sup>207</sup> This suggests that a cohabiting relationship may warrant an award of damages far greater than in a simple case of adultery. Conversely, in a case where the spouses have voluntarily separated, damages could actually be reduced, as it will be more difficult for the plaintiff to show actual injury from the adultery.<sup>208</sup>

In the event that the wronged spouse is unable to allege a particular act of adultery between the cohabiting partners, South African precedent allows a court to infer adultery from the circumstances of cohabitation. In *Van der Walt v Viviers*,<sup>209</sup> a husband sued his wife and a third party, alleging that they had “*lived together in adultery*”.<sup>210</sup> When the defendant demanded more detail, the Court upheld the husband’s pleadings as sufficient, stating that the allegation does not have to be of a specific instance of adultery, but may be made as a general claim that the accused was living with the other spouse in an adulterous relationship.<sup>211</sup> Later, in *Louw v Louw*<sup>212</sup>, the Court upheld a wronged wife’s pleadings, which relied on “*inferences to be drawn from the relationship*” between her husband and another woman, “*coupled with the fact that they were at a place where, and under circumstances when, adultery may be found, on a balance of probabilities, to have taken place*”.<sup>213</sup> At least one case indicates that simply providing the cohabitants’ address and a general time period for the cohabitation will

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<sup>202</sup> 1948 (3) SA 532 (W)

<sup>203</sup> Id at 536.

<sup>204</sup> Note that this was substantially more money in 1948 than today. See also *Millward v Glaser*, 1949 (4) SA 931 (A) at 936-937 (the wife’s complaint included an allegation that her husband lived “*openly*” in adultery with another woman for an extended period of time; she was awarded 1000 pounds for *injuria* and loss of consortium, in the lower court; the appeal involved another issue).

<sup>205</sup> 1996 (2) SA 850 (C).

<sup>206</sup> Id at 852F.

<sup>207</sup> id at 853B.

<sup>208</sup> See Neethling et al at 209 & note 125, explaining that the “personality” of the plaintiff must be injured and stating that “[t]his may be a problem where the spouses are living apart from one another (whether in terms of an order for judicial separation or otherwise)”; see also McKerron at 168: “During the subsistence of the marriage, **unless the spouses are judicially separated or voluntarily living apart**, the husband has a right to the comfort, society and services of his wife.”

<sup>209</sup> 1955 (4) SA 10 (T)

<sup>210</sup> At 12C.

<sup>211</sup> At 12-13 (applying dicta from *Clarke v Clarke* 1914 TPD 17 at 18).

<sup>212</sup> 1965 (3) SA 852 (E).

<sup>213</sup> At 856G-H (*per* Addleson AJ, concurring).

be sufficient to uphold a claim.<sup>214</sup> However, the pleadings must state a claim that the parties are “*actually living together in the normal sense of the expression*”.<sup>215</sup>

In sum, if the wronged spouse can allege either (1) a specific instance of adultery, or (2) that the cohabitants “*lived together in a state of adultery*”, providing the time period and address, the claim will almost certainly stand. In addition to upholding a case at the pleadings stage, an inference of adultery may be sufficient basis for a final judgment. For example, in *Smit v Arthur*, the court used inference to establish that the alleged adultery had taken place, and awarded damages of \$1500 plus costs.<sup>216</sup>

While adultery is the most straightforward claim against a third-party cohabitant, enticement and harbouring actions could also apply. As discussed above, enticement is particularly hard to prove because the claimant must show that the defendant actually persuaded the errant spouse to leave his or her partner. However, the harbouring action could conceivably be revived from its current dormant state and used against cohabitants when adultery cannot be proved or inferred, although modern courts may be reluctant to allow an action based on such old-fashioned ideas of marriage. A 1987 Lesotho case, *Mojau v Kuena*,<sup>217</sup> entertained claims for both enticement and harbouring against a cohabiting partner. Here the plaintiff husband claimed that his wife and the defendant (who was also a married man) had hatched a plan to move away to South Africa together while the plaintiff was overseas for further studies. The High Court of Lesotho found no enticement since the wife had moved to South Africa of her own volition, even if she was inspired to do this by a wish to be closer to the defendant. But the Court did find that the defendant had harboured the plaintiff’s wife after becoming aware that she had left her husband without his approval, holding that this warranted an award of damages for loss of *consortium*. The Court held, further, that the damages were by the defendant’s cohabitation with the plaintiff’s wife.<sup>218</sup>

This range of possible actions shows that any person who interferes with the marriage relationship is potentially liable to the wronged spouse for damages, with a cohabiting partner being particularly vulnerable to suit because the court will likely infer adultery from a cohabiting relationship. Furthermore, in instances where one cohabiting partner is married to someone else, considerations of potential liability could dissuade the cohabiting partners from acknowledging or registering their relationship in order to take advantage of legal protections for cohabitation which might be enacted.

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<sup>214</sup> *Van der Walt v Viviers* 1955 (4) SA 10 (T) at 12. Here the plaintiff’s pleadings provided the specific period of cohabitation and the address of the shared dwelling. This case also provides some guidance as to what sort of time period may be sufficient for the allegation of “living in adultery” – here the defendant lived with the plaintiff’s wife for only 20 days.

<sup>215</sup> *Born v Born* 1970 (4) SA 560 (C) at 564C-D (citing *L v L* 1968 (1) PH F41 (C)). Here the defendant alleged that his wife was committing adultery with the defendant in their home while he was away at work, without giving further particulars. The court stated that the husband’s claim was not a true claim of “*living in adultery*” and thus refused to allow the case to go forward. The court explained: “*An unfaithful wife does not ‘live in adultery’ with her paramour in her own home while her husband is also still living there; she takes advantage of her husband’s absence at work. She cannot in such circumstances be said to be ‘living with’ her paramour.*” At 564C.

<sup>216</sup> 1976 (3) SA 378 (A) at 386-387. The judge explained: “[a] review of all the evidence and circumstances shows decisively that it is more probable than any other reasonably conceivable conclusion”, and the adulterous relationship was established on the balance of probabilities. At 386C-D. The circumstantial evidence in this case was particularly compelling.

<sup>217</sup> [1987] LSCA 51 (16 April 1987).

<sup>218</sup> This case was sourced on the Internet ([www.saflii.org](http://www.saflii.org)) and is unpaginated and without paragraph numbering.

### 5.7.5 ***Claims in terms of the Married Persons Equality Act***

The wronged spouse may also have a claim under the Married Persons Equality Act 1 of 1996. Generally, marriages in community of property require the consent of both spouses to dispose of property that is part of the joint estate.<sup>219</sup> Thus, if the adulterous spouse uses jointly-held resources for the benefit of the cohabiting partner without the other spouse's consent, the wronged spouse may seek a remedy under the Act. If the cohabiting third party knows (or has reason to know) that the other spouse has not and will not consent, the cohabitant will probably be liable to the wronged spouse for damages.<sup>220</sup>

A claim will also lie against the adulterous spouse, as the wronged spouse can ask the High Court for an adjustment to restore his or her half-share of the value of the lost property while the marriage is ongoing or when the estate is divided.<sup>221</sup> It would also be possible for the wronged spouse to get a court order stripping the adulterous spouse of power over marital assets in general, or in relation to particular acts.<sup>222</sup>

For marriages out of community of property, spouses are liable to contribute to the necessary expenses of the household *pro rata*, according to their respective means; if the wronged spouse is forced to contribute more than a fair *pro rata* share (for example, because the adulterous spouse is spending resources on the cohabiting third party), the adulterous spouse would be liable for damages.<sup>223</sup>

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<sup>219</sup> Married Persons Equality Act of 1996 (Act 1 of 1996), section 7.

<sup>220</sup> Section 8(1)(a) of the Act states that if the third party “*does not know and cannot reasonably know that the transaction is being entered into without such consent or leave or in contravention of that order, as the case be, such transaction shall be deemed to have been entered into with the required consent*”. Whilst the Act does not explicitly address the consequences for a third party who does know or should reasonably have known that the other spouse has not consented, this section implies that the wronged spouse would have a cause of action against the third party in such a case.

In a 2010 South African case, *Visser v Hull and Others* 2010 (1) SA 521 (WCC), a wronged wife brought suit against third parties and her then-deceased husband's estate after her husband (in community of property) sold a piece of property without her consent to third parties (his relatives) at below market value. The court found that the third parties should have known that the husband was married, and did not make an adequate inquiry into whether or not he had received the necessary consent. Ultimately, the property in question was returned to the deceased's estate and the court awarded costs to the wife – half of which were paid by the third parties and half from the deceased estate. The language of the provision on third party knowledge of lack of consent in the South African *Matrimonial Property Act 88 of 1984* (section 15(9)(a)), is nearly identical to that in the *Married Persons Equality Act*; it protects a third party who “*does not know and cannot reasonably know*” that consent is lacking.

<sup>221</sup> Married Persons Equality Act 1 of 1996, section 8(1)(b).

<sup>222</sup> *Id.*, section 11.

<sup>223</sup> *Id.*, section 15.

# Chapter 6

## COHABITATION IN EXISTING NAMIBIAN STATUTES

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This chapter looks at the treatment of cohabitants in current statute law. One way of analysing whether cohabitants are catered for in legislation is to look at the definition sections of statutes, with reference to the definitions of dependants, spouses, marriage or partners. We could locate only five Namibian statutes which make express provision for cohabiting partners: the Combating of Domestic Violence Act, the Criminal Procedure Act, the Employees' Compensation Act, the Insolvency Act and the Anti-Corruption Act. However, several other statutes contain broad, fact-based definitions of “dependant” which could cover cohabiting partners. None of these statutes incorporate specific time periods in respect of cohabitation or dependency. Amendments to a number of existing Namibian statutes would be required for consistency with law reforms on cohabitation giving certain basic rights and duties to cohabiting partners.

### 6.1 Statutes with express provision for cohabiting partners

**There are five Namibian statutes which already make some express provision for cohabiting partners:**

- the Combating of Domestic Violence Act
- the Criminal Procedure Act
- the Employees' Compensation Act
- the Insolvency Act and
- the Anti-Corruption Act.

**However, two of these – the Insolvency Act and the Anti-Corruption Act – include cohabiting partners as a protection against collusion and corruption, and not in an effort to protect their interests.**

Three of the statutory provisions which expressly include cohabitants are designed to give some protection to vulnerable partners.

The **Combating of Domestic Violence Act 4 of 2003** applies to “domestic relationships”, which are defined to include persons “of different sexes” who are or were living together in “a relationship in the nature of marriage”.<sup>1</sup> Thus, it explicitly covers opposite-sex cohabitation whilst excluding same-sex cohabitation.

**Combating of Domestic Violence Act 4 of 2003, section 3(1):**

3. (1) For the purposes of this Act a person is in a “domestic relationship” with another person if...

- (a) they are or were married to each other, including a marriage according to any law, custom or religion, or are or were engaged to be so married;
- (b) they, being of different sexes, live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other...
- (c) they have, have had or are expecting a child together...

However, cohabiting partners would probably be excluded from the related provisions on maintenance in the Combating of Domestic Violence Act. A protection order issued under the Act can include a provision temporarily directing the respondent to make periodic payments in respect of the maintenance of the complainant, and of any child of the complainant, “if the respondent is legally liable to support the complainant or the child”.<sup>2</sup> The Act similarly amends the provisions on conditions of bail in the Criminal Procedure Act 51 of 1977 to provide that a court which releases someone accused of an offence that takes place in the context of a domestic relationship must impose a bail condition requiring the accused to support the complainant and any child or other dependant of the complainant. This financial support must be at the same or greater level as before the arrest, but is available only if the accused “is legally liable” to maintain the complainant or any such child or other dependant (and if there are no special circumstances which would make such a condition appropriate).<sup>3</sup> Since the principles of legal liability derive from the common law, cohabitants would be excluded from these provisions even if they are factually dependant on financial support from the accused, which seems inconsistent with the aim of the act to protect cohabiting partners; it would make more sense to premise the provisions on temporary maintenance on factual dependency rather than on legal liability to maintain.

The provisions on special arrangements for vulnerable witnesses added to the **Criminal Procedure Act 51 of 1977** in 2003 are consequential to the Combating of Domestic Violence Act, as they equate spouses and cohabiting partners for the purpose of applying these provisions in domestic violence cases; the special arrangements are available to any person against whom “any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship”.<sup>4</sup> However, the wording in the

<sup>1</sup> Combating of Domestic Violence Act 4 of 2003, section 3(1)(b).

<sup>2</sup> Id, section 14(2)(h).

<sup>3</sup> Section 62(3) of the Criminal Procedure Act 51 of 1977, as amended by the Second Schedule to the Combating of Domestic Violence Act 4 of 2003. See also Criminal Procedure Act 25 of 2004, section 65(3)(iii) (passed by Parliament but not in force).

<sup>4</sup> Criminal Procedure Act 51 of 1977, section 158A(3)(c) (added by Criminal Procedure Amendment Act 24 of 2003).

The Criminal Procedure Act 25 of 2004 replaces this wording with a reference to any person “against whom an offence of a sexual or indecent nature or a domestic violence offence has been committed” (section 189(1)(b)), but the reference to “domestic violence offence” would have a similar effect. However, the



Criminal Procedure Act is broader than that in the Combating of Domestic Violence Act in that it would seem to include same-sex partners.<sup>5</sup>

The **Employees' Compensation Act 30 of 1941** (as amended by the Employees' Compensation Amendment Act 5 of 1995) clearly makes cohabiting partners eligible to claim compensation in the case of injury, death or disablement of an employee. The definition of "dependant" refers to "any person... with whom the employee was... living as man and wife at the time of the accident",<sup>6</sup> and so extends eligibility for employees' compensation payments to dependants in cohabiting relationships resembling marriages. Cohabiting partners are not put on an entirely equal footing with spouses, as the same provision specifies that surviving spouses and children of the employee who are under age 18 will be deemed to be dependent on the employee for "the necessities of life" unless there is proof to the contrary, while a cohabiting partner (or any other person who claims to be a dependant) will be required to prove that he or she was actually dependent on the employee in whole or in part for "the necessities of life". The wording of the provision also excludes same-sex cohabiting partners.<sup>7</sup>

**Employees' Compensation Act 30 of 1941, section 4:**

(1) Subject to the further provisions of this section and unless inconsistent with the context, "dependant" in this Act means –

- (a) the surviving spouse, if married to the employee at the time of the accident;
- (b) if there is no surviving spouse who, at the time of the accident, was wholly or partly dependent upon the employee for the necessities of life any person with whom the employee was in the opinion of the Commission living as man and wife at the time of the accident;
- (c) any child: Provided that in the case of an adopted child the Commission is satisfied that the child was adopted prior to the accident;
- (d) a parent or step-parent or an adoptive parent who adopted such employee if the Commission is satisfied that the employee was in fact adopted and in either case that the employee was adopted prior to the accident;
- (e) a son or daughter (other than a child as defined): a brother, sister, half-brother, or half-sister: a sister or brother of a parent: a grand-parent or grand-child; or
- (f) any other person who, in the opinion of the commissioner, was at the time of the accident wholly or partly dependent upon the workman for the necessities of life.

Provided that –

- (i) a dependant other than one referred to in paragraph (f) shall not be entitled to compensation unless, at the time of the accident, he or she was wholly or partly dependent upon the employee for the necessities of life;

wording in the Criminal Procedure Act 25 of 2004 would match the Combating of Domestic Violence Act by excluding same- sex partners, since a "domestic violence offence" is defined in section 1 of the Criminal Procedure Act 25 of 2004 with reference to the Combating of Domestic Violence Act 4 of 2003 – and section 21 of that Act describes a "domestic violence offence" with reference to "domestic relationships" as described by section 3 of the same Act.

<sup>5</sup> Discussions around the law at the time of its proposal indicate that this outcome was probably unintentional as coverage of same-sex couples was not discussed in Parliament at all. See Legal Assistance Centre (LAC), *Rape in Namibia: An Assessment of the Combating of Rape Act 8 of 2000*, Windhoek: Legal Assistance Centre, 2006 at 145.

<sup>6</sup> Employees' Compensation Act 30 of 1941, section 4(1).

<sup>7</sup> The definition is silent on the possibility of multiple spouses in polygamous marriages even though section 4(3) specifies that the term "spouse" includes a surviving partner in a customary marriage.

- (ii) *any right to compensation shall ipso facto cease upon the death of the dependant to whom such compensation was payable; and*
- (iii) *unless the contrary is proved, the surviving spouse or child of an employee or a person referred to in the second proviso to section 40(1)(c) who would, if under eighteen years of age, be the child of the employee, shall be deemed to be dependent for the necessities of life upon such employee...*
- (3) *For the purposes of this section, “surviving spouse” includes a surviving partner in a marriage by customary law;*

Surviving spouses and children take preference for compensation under this Act when an employee dies, with other dependants eligible for compensation only if there are no spouses or children eligible to receive compensation.<sup>8</sup> However, for this purpose the term “*surviving spouse*” includes an opposite-sex cohabiting partner, if there was no other surviving spouse who was dependent on the deceased employee for the necessities of life at the time of the accident.<sup>9</sup> Thus, an opposite-sex cohabiting partner is treated as a spouse so long as there is no other surviving spouse who was factually dependent on the employee, and given precedence along with children over other persons may have been dependent on the deceased employee. This is a sensible approach to the situation where there may be someone who is technically a spouse but who has been living a separate life from the employee in question for many years – which is a situation encountered in practice in Namibia.<sup>10</sup>

To contextualise this point, it should be noted that the definition of dependant in this law is generally very broad and focused on factual dependence more than definitional categories; for example, it includes step-parents and step-children, which is unusual in Namibia. Furthermore, in granting employees’ compensation to “*any other person*” who was dependent on the employee, subsection 4(1)(f) goes even further than most other laws in extending rights and obligations based on the concept of dependency, potentially making compensation available to those outside of intimate or parental relationships, such as siblings, informal foster children or extended family members.

The **Insolvency Act 24 of 1936** includes cohabiting partners, not for their own protection, but for the protection of their creditors. When the separate estate of an insolvent spouse is sequestrated, the estate of the solvent spouse also vests in the Master of the High Court as if the two separate estates were one.<sup>11</sup> The solvent spouse can secure the release of his or her separate property only by proving its independent status.<sup>12</sup> The intent of the provision is to

<sup>8</sup> Id, section 40(1).

<sup>9</sup> Id, section 40(5): “(5) In this section ‘surviving spouse’ includes a person referred to in paragraph (b) of subsection (1) of section 4.” Section 4(1)(b) reads: “if there is no surviving spouse who, at the time of the accident, was wholly or partly dependent upon the employee for the necessities of life any person with whom the employee was in the opinion of the Commission living as man and wife at the time of the accident”.

<sup>10</sup> See Chapter 10 below.

<sup>11</sup> The estate of an insolvent would logically include a joint estate where the insolvent was married in community of property. See HR Hahlo, *The South African Law of Husband and Wife*, 4<sup>th</sup> edition, Wynberg: Juta & Co, Ltd, 1975 at 239-240. But sequestrating the separate estate of solvent spouses or cohabiting partners would seem to undermine some of the very reasons why they may have wished to keep their financial life independent.

<sup>12</sup> Insolvency Act 24 of 1936, sections 16 and 21. There are various procedural matters which are consequential to these rules. Section 140 accordingly makes it an offence for the spouse of an insolvent to fail to appear to give evidence in any proceedings instituted by or against the trustee of the insolvent estate. Id, section 140.

prevent collusion between the spouses to prevent property from being attached by creditors.<sup>13</sup> For this purpose, the Act provides 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.*<sup>14</sup>

(The Act does potentially provide some small protection for cohabiting partners; it refers to allowances for the support of the insolvent and his or her “dependants”, without defining the term, so that it could include factual dependants such as cohabitants.<sup>15</sup>)

The **Anti-Corruption Act 8 of 2003** covers cohabiting partners in its attempt to cast the net very wide for the offence of corruptly using an office or position in a public body to obtain gratification. For this purpose, “*proof that a public officer in a public body has made a decision or taken action in relation to any matter in which the public officer, or any relative or associate of his or hers has an interest, whether directly or indirectly*” is rebuttable evidence of the offence.<sup>16</sup> The definition of “relative” here has one of the broadest references to cohabitation of any found, covering “*a partner living with the public officer on a permanent basis as if they were married or with whom the public officer habitually cohabits*”.<sup>17</sup> However, the reference to marriage probably excludes opposite-sex cohabiting couples from the definition. (The other categories of persons included as “relatives” are also broadly inclusive, unusually covering foster parents, foster children and fiancés; see the box below.)

**Anti-Corruption Act 8 of 2003, section 43(3)(a)**

*In relation to the offence of “corruptly using office or position for gratification”*

(a) “relative” includes –

- (i) *a spouse or fiancé, including a partner living with the public officer on a permanent basis as if they were married or with whom the public officer habitually cohabits;*
- (ii) *a child, including a stepchild or fosterchild;*
- (iii) *a parent, including a step-parent or fosterparent;*
- (iv) *a brother or sister of the public officer or of his or her spouse; or*
- (v) *the spouse of any of the persons mentioned in subparagraphs (ii), (iii) or (iv).*

In South Africa, it has been asserted that the “*increased legislative recognition being given to cohabitation suggests that cohabitation has achieved a particular status of its own. This status gives it something of a marriage-like character, without equating it for all purposes to marriage*”.<sup>18</sup> Recent statutes in South Africa are generally more inclusive than those in Namibia,

<sup>13</sup> In South Africa, the Constitutionality of this provision was challenged in the case of *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) (*per* Goldstone J). The majority of the Court upheld the provision, while the dissenters argued that it constitutes unfair discrimination because it affects only “spouses” and not other persons in equally close relations to the insolvent such as family members or business associates.

<sup>14</sup> Insolvency Act 24 of 1936, section 21(13).

<sup>15</sup> Insolvency Act 24 of 1936, sections 23(12) and 79.

<sup>16</sup> Anti-Corruption Act 8 of 2003, section 43(1)-(2).

<sup>17</sup> *Id.*, section 43(3)(a)(i).

<sup>18</sup> *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at paragraph 179 (*per* Sachs J).

in that they often specifically apply to cohabitants, usually by providing for “*partners*” or “*life partners*” in addition to “*spouses*”.<sup>19</sup>

However, it can certainly be said that Namibian legislation has in at least a few instances recognised the vulnerability of cohabiting partners, and has in particular sought to give them protection analogous to that of surviving spouses in terms of compensation when their partners are injured or die, and when they suffer domestic violence.

## 6.2 Position of cohabiting partners under other statutes

Other statutes are inconsistent in their treatment of dependants, with some using this term without defining it. However, some include a definition of “*dependant*” of “*family*” which is broad enough to cover cohabitants who are in fact dependent on their partners. These include:

- the Veterans Act
- the Pension Funds Act
- the Government Service Pension Act
- the Medical Aid Fund Act
- some provisions in the Labour Act
- the Social Security Act.

It is useful to this discussion to examine the statutory context more broadly to ascertain what legal distinctions between married and unmarried persons, and between various categories of “dependants”, might be relevant to a law reform on cohabitation.

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<sup>19</sup> Examples of some of these South African legislative provisions are the following:

- Special Pensions Act 69 of 1996-refers to “*continuous cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years*”;
- Lotteries Act 57 of 1997-refers to “*life partner*”;
- Basic Conditions of Employment Act 75 of 1997-refers to “*spouse or partner*”;
- Housing Act 107 of 1997-extends benefits to “*a person with whom member lives as though they were married or with whom the member habitually cohabits*”;
- Employment Equity Act 55 of 1998-introduces the notion of “*family responsibility*” in relation to a “*spouse or partner*” and includes “*their dependent children or other members of their immediate family who need their care and support*”;
- Medical Schemes Act 131 of 1998-requires that benefits be extended to a “*spouse or partner*”.

South African Law Reform Commission (SALRC), *Project 118: Report on Domestic Partnerships*, Pretoria: SALRC, March 2006 at paragraph 3.2.97; Victoria Mayer Consulting, “Developing Strategies for Litigation and Law Reform: Domestic Partnerships”, Cape Town: Women’s Legal Centre, 2000 at 15.

## 6.2.1 Issues related to lawful presence in Namibia

Although we recommend that the right to citizenship and refugee status should remain limited to spouses because of the potential for fraud, we suggest that certain provisions relating to domicile, various immigration permits and provisions pertaining to the effect of temporary absences from Namibia should be expanded to include cohabiting partners.

### Citizenship

Article 4(3) of the Namibian Constitution (as amended in 2010)<sup>20</sup> and the **Namibian Citizenship Act 14 of 1990**<sup>21</sup> make Namibian citizenship available to spouses after ten years of residence in Namibia as the spouse of a Namibian citizen. This applies to spouses in both civil marriage and customary marriage.<sup>22</sup> The recent extension of the residency requirement from 5 to 10 years for acquisition of Namibian citizenship by marriage was inspired by concerns about fraudulent marriages.<sup>23</sup> Therefore, it would seem unwise to extend this right to cohabiting spouses, as well as being inconsistent with the scheme proposed by the Namibian Constitution.<sup>24</sup>

However, there are two references to “spouses” in the Act which probably should be amended to include cohabiting partners. Firstly, the section of acquisition of Namibian citizenship by naturalisation provides that the requisite period of residence in Namibia shall include “[a]ny period during which an applicant for naturalisation has been employed outside Namibia in the service of the Government of Namibia or on a ship or aircraft or any public means of transport registered or licensed in and operating from Namibia, and any period during which a person who is an applicant for naturalisation has been resident outside Namibia with his or her spouse while the latter was so employed”.<sup>25</sup> Secondly, the provision on loss of citizenship states that Namibian citizens by registration or naturalisation lose their Namibian citizenship if they take up permanent residence in any foreign country and absent themselves from Namibia for a period exceeding two years without the written permission of the Minister; however this period excludes any period during which a “spouse” or minor child is absent along with a Namibian citizen who is outside Namibia in the service of the Government of Namibia or an international organization of which the Government of Namibia is a member.<sup>26</sup> It would make sense for both of these references to spouses to be expanded to include persons in established cohabitation relationships.

There are no other distinctions between married and unmarried persons with respect to citizenship.<sup>27</sup>

<sup>20</sup> Article 4(3) was amended by the Namibian Constitution Second Amendment Act 7 of 2010.

<sup>21</sup> Namibian Citizenship Act 14 of 1990, section 3.

<sup>22</sup> Namibian Constitution, Article 4(3)(b).

<sup>23</sup> See, for example, Brigitte Weidlich, “Namibian women victims of ‘quick-fix weddings’”, *The Namibian*, 30 March 2009.

<sup>24</sup> Following on the rules on citizenship by marriage, the Act states in section 6 that a grant of honorary Namibian citizenship does not entitle “the spouse, child or any other family relation of the honorary citizen to become a Namibian citizen”. This reference to spouse should remain consistent with the provision on citizenship by marriage.

<sup>25</sup> Namibian Citizenship Act 14 of 1990, section 3.

<sup>26</sup> Namibian Citizenship Act 14 of 1990, section 7.

<sup>27</sup> Namibian Citizenship Act 14 of 1990, section 27: “A married woman shall, subject to the provisions of this Act or any other law, be capable of acquiring, losing or being deprived of Namibian citizenship, in all respects as if she were an unmarried person.”



## Domicile and immigration

There is no distinction in respect of the identification of domicile for married and unmarried persons, since the **Married Persons Equality Act 1 of 1996** provides that married women no longer automatically acquire the domicile of their husbands but rather have domicile determined “*by reference to the same factors as apply in the case of any other individual capable of acquiring a domicile of choice*”.<sup>28</sup> There is also no longer any distinction between the identification of the domicile of children of married or unmarried parents.<sup>29</sup> Therefore, this area of law already caters adequately for cohabiting couples.

However, in terms of the **Immigration Control Act 7 of 1993**, one route to the acquisition of domicile in Namibia is through marriage to a Namibian citizen,<sup>30</sup> with a corresponding loss of domicile two years after the marriage is dissolved by divorce (but not death).<sup>31</sup> There is no possibility of acquiring Namibian domicile by virtue of cohabitation, which seems unduly harsh for couples in a genuine cohabitation relationship.

Persons who acquire a domicile in Namibia under any of the routes described in the Act will lose their domicile if they are continuously absent from Namibia for more than two years. The exceptions are persons who are absent in the service of the government, in the course of work with a Namibian employer or association, in the service of an international organization of which Namibia is a member, because of ill health or disability or to attend any educational institution. These exceptions also apply to “*the spouse or dependent child*” of someone who is absent for these reasons.<sup>32</sup> The exceptions for loss of domicile through absence should include cohabiting partners along with spouses (as this could affect people who had acquired Namibian domicile by some route other than marriage).

The Immigration Control Act 7 of 1993 also sets forth other legal ways to be present in Namibia – several of which involve “*spouses*”. In addition to other avenues to permanent residence, permanent residence is available to “*the spouse or dependent child, or a destitute, aged or infirm parent of a person permanently resident in Namibia who is able and undertakes in writing to maintain him or her*”.<sup>33</sup> Also, where an employment permit is issued by the Immigration Selection Board, “*it may authorize in that permit the spouse and dependent child of that person, if the spouse or child accompanies or resides with him or her, to enter and reside in Namibia with that person*”.<sup>34</sup> Similarly, where the Chief of Immigration issues a student’s permit, “*he or she may authorize in that permit the spouse and dependent child of that person, if the spouse or child accompanies or resides with him or her, to enter and reside in Namibia with that person*”;<sup>35</sup> and, when an immigration officer issues a visitor’s entry permit to anyone, that immigration officer “*may issue a similar permit to the spouse, dependent child or any other person who is in the employ of such person, if such spouse, child or employee accompanies or*

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<sup>28</sup> Married Persons Equality Act 1 of 1996, section 12.

<sup>29</sup> Married Persons Equality Act 1 of 1996, section 13. The domicile of all children is “*the place with which that child is most closely connected*”. Where a child resides a child resides with one or both parents, the law presumes that the child’s domicile is where the child resides; the provision explicitly includes both married and unmarried parents (as well as adoptive parents).

<sup>30</sup> Immigration Control Act 7 of 1993, section 22(1)(c).

<sup>31</sup> Id, section 23(1)(c).

<sup>32</sup> Id, section 23(2).

<sup>33</sup> Id, section 26(3)(g).

<sup>34</sup> Id, section 27(5).

<sup>35</sup> Id, section 28(4).

*resides with such person*".<sup>36</sup> Consideration should be given to defining spouse for these purposes to include persons who would fall into the category of cohabiting partner in terms of the Namibian law reforms on this topic.

## Refugees

A related issue concerns refugees. In terms of the Namibia Refugees (Recognition and Control) Act 2 of 1999, a "*member of the family*" in relation to any refugee means –

- (a) *any spouse of such refugee; or*
- (b) *any unmarried child of such refugee under the age of 18 years; or*
- (c) *any person who is related to such refugee by affinity or consanguinity and who is dependent upon such refugee.*<sup>37</sup>

"Spouse" for this purpose includes a party to a customary union.<sup>38</sup> These definitions are relevant because members of the family of a recognised refugee are permitted to enter and remain in Namibia.<sup>39</sup> Although cohabiting partners are not included, as in the case of immigration, the potential for fraud (and the fact that different countries have vastly different rules on cohabitation) may justify the limitation of this provision to spouses.

### 6.2.2 *Issues related to duty of support*

Consequential law reforms will be needed in this area if cohabitants are given a general duty of support. However, even if no general duty of support is enacted, we suggest the following:

- Pension benefits should be payable to cohabiting partners who can show factual dependency at the time of the death of the pension recipient, or alternatively, the pension recipient should be given the opportunity to designate a beneficiary to receive the benefits upon his or her death.
- Cohabiting partners who were factually dependent on a deceased partner should be eligible to make claims from the Motor Vehicle Accident Fund.
- Medical aid schemes should be required to allow the inclusion of cohabiting partners as dependants, rather than leaving this to the discretion of individual schemes as is now the case.

The definition of "*dependant*" in other statutes should be examined for greater consistency, with an emphasis on factual dependency rather than the legal duty of support where necessary to prevent unfair hardship.

Many exclusions of cohabiting partners from the coverage of various statutes stem from the fact that cohabitants, in contrast to spouses, do not owe each other a legal duty of support.<sup>40</sup>

<sup>36</sup> Id, section 29(4).

<sup>37</sup> Namibia Refugees (Recognition and Control) Act 2 of 1999, section 1.

<sup>38</sup> Ibid.

<sup>39</sup> Id, section 17.

<sup>40</sup> The normal common-law liability to spouses and dependents is limited by section 60(2) of the **Marine Resources Act 27 of 2000**, which might need amendment if the duty of support were expanded by law reform on cohabitation:

## Maintenance

Cohabiting partners are clearly not covered by the **Maintenance Act 9 of 2003**, although it does provide that there is a duty of maintenance between husbands and wives in both civil and customary marriages, and between all parents and children.<sup>41</sup> Otherwise, maintenance is dependent upon legal liability to pay maintenance, thus excluding cohabitants.<sup>42</sup> (As discussed below, however, all parents are legally liable to maintain their children regardless of their marital status.<sup>43</sup>)

## Pensions and veterans benefits

The **Pension Funds Act 24 of 1956** (as amended) takes a broad approach to the definition of “*dependant*”, with references to both legal and factual dependants for the purposes of distribution of pension benefits.<sup>44</sup>

### ***Pension Funds Act 24 of 1956, section 1:***

*“dependant”, in relation to a member, means –*

- (a) a person in respect of whom the member is legally liable for maintenance;*
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person –*
  - (i) was, in the opinion of the person managing the business of the fund, upon the death of the member in fact dependent on the member for maintenance;*

*The State, the Minister or a person in the employment of the State shall not, except in the case of any intentional act or omission on the part of the State, the Minister or any such person, be liable –...*

- (b) to the spouse or a dependant [not defined in the Act] of any person referred to in paragraph (a), for any loss or damage resulting from any loss of life or bodily injury, or loss of, or damage to, any property caused by or arising out of or in any manner connected with –*
  - (i) the use by the person referred to in paragraph (a) of any aircraft, vessel or vehicle referred to in paragraph (a)(i);*
  - (ii) the presence of any person referred to in paragraph (a) in any harbour or on an island; or*
  - (iii) the leaving by the person referred to in paragraph (a) of any fishing or other vessel or any other property in a harbour or the use by such person of a harbour or facilities in a harbour.[emphasis added].*

<sup>41</sup> Maintenance Act 9 of 2003, section 28. See also Former Presidents’ Pension and Other Benefits Act 18 of 2004, section 6(b), which makes reference to maintenance orders in respect of spouses or minor children.

<sup>42</sup> Id, section 2, “**Legal duty to maintain**”: “This Act (a) applies where a person has a legal duty to maintain another person, regardless of the nature of the relationship which creates the duty to maintain; and (b) must not be interpreted so as to derogate from the law relating to the duty of persons to maintain other persons.” See also section 5, which states that “A maintenance court must not make a maintenance order unless it is satisfied that the person against whom the order is sought (a) is legally liable to maintain the beneficiary...”.

<sup>43</sup> See Chapter 7 below.

<sup>44</sup> Pension Funds Act 24 of 1956, sections 1 and 37C. Spouses and dependants are treated slightly differently for the purpose of certain investments in section 19(5)(a):

*A registered fund may, if its rules so permit, grant a loan to a member by way of investment of its funds to enable the member –*

- (i) to redeem a loan granted to the member by a person other than the fund, against security of immovable property which belongs to the member or his or her spouse and on which a dwelling has been or will be erected which is occupied or, as the case may be, will be occupied by the member or a dependant of the member;*
- (ii) to purchase a dwelling, or to purchase land and erect a dwelling on it, for occupation by the member or a dependant of the member; or*
- (iii) to make additions or alterations to or to maintain or repair a dwelling which belongs to the member or his or her spouse and which is occupied or will be occupied by the member or a dependant of the member.*

- (ii) *is the spouse of the member, including a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion;*
- (c) *a person in respect of whom the member would have become legally liable for maintenance, had the member not died;*

A similar definition of “*dependant*” is used in the **Government Service Pension Act 57 of 1973** in relation to a dependant’s right to collect government service pensions in respect of pre-independence government employees; here, “*dependant*” is defined *in relation to any member or any person entitled to an annuity or benefits means the widow or minor child of such member or person, including his minor stepchild or a minor child who has been legally adopted by him, and also any person who, in the opinion of the Director-General, was totally or partially dependant on such member*”.<sup>45</sup>

In practice, cohabiting partners are often provided for as dependants under the **Government Institutions Pension Fund (GIPF)**, which (like some of the statutes cited above) takes account of factual dependence rather than limiting concepts of dependency to strict categories of persons. Where there is both a cohabiting partner and a spouse, the benefits are generally divided on the basis of degrees of dependency, taking the interests of any children into account.<sup>46</sup>

Interestingly, in contrast to the broad definitions in respect of pension benefits under other statutes, the **Former Presidents’ Pension and Other Benefits Act 18 of 2004** provides for payment of the pension benefits of a former President only to a “*surviving spouse*” (which includes “*a wife or husband of a marriage under customary law*”) or in the absence of a surviving spouse to a “*dependent child*”, defined to include a child, an adopted child or a step-child who is “*under the age of 21 years and was wholly or substantially dependent upon the deceased former President for his or her livelihood immediately preceding the death of the former President*”.<sup>47</sup>

The **Judges’ Pensions Act 28 of 1990** similarly provides for payment of certain benefits only to a judge’s “*widow or widower*” (with these benefits not passing to anyone else in the absence of a surviving spouse). There is an additional “*gratuity*” payable to the “*widow or widower*” or otherwise to a “*dependant*” defined for this purpose as “*any minor child, including any step-child, legally adopted child or child born out of a marriage by customary law, of such judge, who is not self-supporting, or any such a child who is not a minor, but who is not self-supporting by reason of any permanent physical or mental disability*”. However, judges have the option of designating that the gratuity be paid to another beneficiary (which could be an avenue for designating a cohabitant) – although the Minister has discretion as to whether to respect such a wish.<sup>48</sup>

The **Veterans Act 2 of 2008** defines “*dependants*” broadly for purposes of eligibility to receive assistance from the Veterans Fund or to benefit from projects initiated under the Act.<sup>49</sup>

<sup>45</sup> Government Service Pension Act 57 of 1973, section 1.

<sup>46</sup> Personal information from former legal advisor to GIPF, August 2009.

<sup>47</sup> Former Presidents’ Pension and Other Benefits Act 18 of 2004, sections 1, 3 and 4.

<sup>48</sup> Judges’ Pensions Act 28 of 1990, sections 1, 3 and 4. The Members of Parliament and Other Office-Bearers Pension Fund Act 20 of 1999 leaves the specifics regarding pension payments to the rules of the pension fund.

<sup>49</sup> The Veterans Act 2 of 2008 omits the category of persons whom the deceased would have become legally liable to support had he or she not died. Since a separate category included here is “a child of the veteran”, there is no need for the omitted category if it is intended primarily to cover children who were not born at the time of the veteran’s death. In contrast, the other components of the definition of “dependent” in the Social Security Act are structured around the concept of legal liability to maintain – which could not apply to an unborn foetus if the member of the social security fund died before the child was born.

**Veterans Act 2 of 2008, section 1:**

*“dependant”, in relation to a veteran, means –*

- (a) any child of such veteran;*
- (b) any widow or widower of such veteran;*
- (c) a person, other than a person included in paragraph (a), in respect of whom such veteran is, or was at the time of his or her death, legally liable for maintenance; or*
- (d) a person in respect of whom such veteran is, or was at the time of his or her death, not legally liable for maintenance, if, in the opinion of the Board, such person is, or was at the time of death of a veteran, in fact dependant on such veteran for maintenance;*

## MVA claims

One potentially serious issue for cohabiting partners is their ineligibility for payments from the Motor Vehicle Accidents Fund in respect of the loss of financial support in the event that a partner is killed in an accident. Benefits are available to dependants, but “*dependent*” [sic] is defined “*in relation to a person involved in a motor vehicle accident*” as “*any person being a spouse or a minor child of such person or a disabled or indigent person legally entitled, other than in terms of contract, to monetary maintenance from such person and includes a spouse in a customary law union and child of such union*”.<sup>50</sup> This would exclude cohabiting partners, even where factual dependency could be proved – and even where there was a contractual agreement of mutual support. This could leave a cohabiting partner in dire straits if the major income-earner of the couple were to be killed in a car accident. If the definition of dependant were broadened to include cohabiting partners, the caps already contained in the statute on payment for loss of support could apply as in the case of spouses to limit the Fund’s liability,<sup>51</sup> and the amount could be appropriately apportioned if there were both a spouse and a cohabiting partner who could show factual dependence.

**Motor Vehicle Accidents Fund Act 10 of 2007:**

**25 Benefits**

- (1) The benefits to be provided by the Fund are confined to the following categories –*
  - (b) reimbursement of financial support lost by a **dependent** [sic] as a result of the death of a person caused by a motor vehicle accident which benefit is an aggregate of a capital sum, together with interest accruing on any unpaid portion, and if –*
    - (i) the dependent [sic] is a **spouse** and the benefit is to reimburse future support lost, it is payable by instalments until the dependent [sic] attains the age of 60 years or dies, whichever occurs first, which instalments are –*
      - (aa) calculated and paid as such portion of the benefit as can be paid over the period over which the dependent [sic] attains the age of 60 years; and*

<sup>50</sup> Motor Vehicle Accidents Fund Act 10 of 2007, section 1. See also section 2(2)(c) which states that one of the purposes of the MVA Fund is to “*fairly and reasonably provide assistance and benefits to a person who suffers loss as a dependent [sic] of a person killed in a motor vehicle accident*”.

<sup>51</sup> Id, section 24(4)(d).



- (bb) *escalated annually by the rate of inflation as set by the Consumer Price Index at the time of the accident;*
- (ii) *the dependent [sic] is a **minor** and the benefit is to reimburse future support lost, it is payable by instalments until the dependent [sic] attains the age of majority or completes his or her course of education after attainment of the age of majority, becomes financially self sufficient or dies, whichever occurs first, which instalments are –*
  - (aa) *calculated and paid as such portion of the benefit as can be paid over the period over which the dependent [sic] attains the age of majority; and*
  - (bb) *escalated annually by the rate of inflation as set by the Consumer Price Index at the time of the accident;*
- (iii) *the dependent [sic] dies before attaining the stipulated age of majority, payment by instalment ceases and the Fund is not liable to make any further payments in respect of the benefit....*<sup>52</sup>

## Medical aid schemes

Under the **Medical Aid Fund Act 23 of 1995**, a cohabiting partner may be able to claim benefits as a dependant of a member of a registered fund, contingent upon the rules of that particular fund.<sup>53</sup> Some medical aid funds do in fact allow registration of a cohabiting partner as a dependant in the same manner as a spouse.<sup>54</sup>

### **Medical Aid Fund Act 23 of 1995, section 1**

*dependant, in relation to a member of a registered fund, means –*

- (a) *the spouse of such member;*
  - (b) *any minor child (including any stepchild or adopted child) of such member who is not self-supporting; and*
  - (c) *any other person who, under the rules of the fund, is recognized as a dependant of such member and is entitled to receive benefits under the fund by virtue of such member's membership,*
- and who is not a member of that fund or any other registered fund;*

On the other hand, under the **Medical Scheme for Members of the National Assembly, Judges and Other Office-Bearers Act 23 of 1990**, eligibility for membership in this scheme is limited to certain officer-bearers and judges and the “*widow or widower*” of such persons.<sup>55</sup> Similarly, the **Public Service Act 13 of 1995** provides for regulations which can authorise the “*surviving spouses*” of certain persons to become members of the medical aid scheme established for the public service.<sup>56</sup>

<sup>52</sup> Motor Vehicle Accidents Fund Act 10 of 2007, section 25(1)(b).

<sup>53</sup> Medical Aid Fund Act 23 of 1995, section 1. But see article 4 of the Schedule to the Former Presidents' Pension and Other Benefits Act 18 of 2004, which provides medical aid coverage only for “*the spouse and dependent children*” of former Presidents.

<sup>54</sup> The Legal Assistance Centre's medical aid scheme is one example.

<sup>55</sup> Medical Scheme for Members of the National Assembly, Judges and Other Office-Bearers Act 23 of 1990, section 2(1)9(f).

<sup>56</sup> Public Service Act 13 of 1995, section 34(3):

## Missing police and defence force members

There are provisions related to the duty of support in the **Defence Act 1 of 2002** and the **Police Act 19 of 1990**, with both of these laws referring to “dependants” without defining the term. The Defence Act provides for the payment of the salary, wages or allowances of a missing member or a member who have been taken prisoners of war, to that member’s “spouse”, or, if there is no spouse, to “other legal dependants”.<sup>57</sup> In the absence of a duty of support imposed by law (as opposed to contract), this would appear not to include cohabitants. However, the wording of a similar provision in the Police Act on missing members provides for payments to a “spouse” or, if there is no spouse, to “other dependants”.<sup>58</sup> This less restrictive wording might be interpreted to include cohabitants who were factually dependant on the member in question. This inconsistency should be addressed.<sup>59</sup>

### 6.2.3 Succession

Cohabiting partners are currently excluded from intestate succession, whilst neither surviving spouses nor cohabiting partners may claim maintenance from a deceased estate. This is a major issue which will be discussed further in Chapter 11.

Surviving spouses currently have certain priority rights in respect of the procedure for administration of estates which might sensibly be extended to cohabiting partners named in wills, and perhaps also in respect of intestate succession depending on the law reforms decided upon.

## Intestate succession

Cohabiting partners are excluded from intestate succession in terms of the **Intestate Succession Ordinance 12 of 1946** which applies to persons other than “blacks”, the **Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941**, which applies to “Basters” and the **Native Administration Proclamation 15 of 1928** which regulates “black” estates. These

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*The regulations contemplated in subsection (1)(d) may also provide for membership of the medical aid scheme established thereunder for – ...*

*(a) any person appointed under section 3 of the Water Act, 1956 (Act 54 of 1956);*

*(b) members of the services;*

*(c) the surviving spouse of a person who was a staff member or a member of the services or a person referred to in paragraph (a) on the date of his or her death;*

*(d) a person who was a staff member or a member of the services or a person referred to in paragraph (a) on the date immediately before the date on which he or she in terms of the Rules of the Government Institutions Pension Fund became entitled to a pension;*

*(e) the surviving spouse of a person who was a person referred to in paragraph (d) on the date of his or her death.*

<sup>57</sup> Defence Act 1 of 2002, sections 82 and 83.

<sup>58</sup> Police Act 19 of 1990, section 28.

<sup>59</sup> Other provisions in both of these statutes eliminate state liability to a “spouse, parent, child or other dependant” resulting from for “any loss or damage resulting from any bodily injury, loss of life or loss of or damage to property” resulting from transport in a state vehicle of any kind, unless the problem occurred in connection with the official State functions of the person in question. Defence Act 1 of 2002, section 88; Police Act 19 of 1990, section 40. This wording would appear to be sufficiently broad to cover cohabitants even if a legal duty of support which could support claims against third parties were established in respect of such relationships.

laws and their accompanying regulations provide only for surviving spouses in civil marriages, and partners in customary unions.<sup>60</sup>

In Namibia, neither spouses nor cohabiting partners are eligible to claim maintenance from a deceased estate, although children may do so, whether born inside or outside marriage. This differs from the situation in South Africa, where spouses but not cohabiting partners are eligible to claim maintenance from the estate – a distinction which was the subject of the seminal *Volks* case that has been extensively discussed in this report.<sup>61</sup>

Law reform aimed at replacing the race-based system of intestate inheritance with a unified statute for all Namibians is already under discussion in Namibia. The Legal Assistance Centre has asserted that cohabiting partners should be taken into consideration in any new statute on this topic:

*We do not recommend at this stage that cohabiting partners be automatically equated with spouses. However, we do recommend that giving long-term partners in relationships which resemble marriages in form and function the possibility of making application for an equitable portion of the estate. This would be an appropriate remedy, for instance, in a case where there was a cohabitation relationship of long duration where the surviving partner had made contribution of money, labour or child care but where the bulk of the property accumulated during the course of the relationship was in the name of the deceased.*<sup>62</sup>

The Legal Assistance Centre has also recommended that all persons who were factually dependent on a deceased at the time of his or her death should be eligible to claim maintenance from the estate, as a way to minimise disruption to families and households as a result of the death:

*We submit that provision should be made for dependants, based on their reasonable maintenance needs, to apply for maintenance within a prescribed period. Maintenance should be available to all dependents of the deceased whose reasonable maintenance needs are not adequately provided for by will or in terms of intestate succession rules. Dependants should be defined broadly to include the surviving spouse and children, as well as any other person who was actually dependant on the deceased at the time of the deceased's death. Providing maintenance for dependents in this way would ensure that the most needy family members are provided for, and would probably avert many disputes about inheritance.*<sup>63</sup>

There are several references to spouses in the **Administration of Estates Act 66 of 1965**. A surviving spouse has responsibility to give a death notice and inventory to the Master of the High Court – but if there is no surviving spouse, this duty falls upon the deceased's “nearest relative or connection”.<sup>64</sup> Thus, these duties could conceivably pass to a cohabiting partner in the absence of

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<sup>60</sup> In the same vein, section 48B of the Friendly Societies Act 25 of 1956 protects benefits due from such societies against the claims of creditors upon the death of a member if there are competing claims from a surviving spouse, parent, child or stepchild in terms of a will or from a surviving spouse, parent or child in respect of intestate inheritance.

<sup>61</sup> See pages 33-38 and pages 47-50.

<sup>62</sup> Legal Assistance Centre submission to Master of the High Court in respect of proposed Intestate Succession Bill, 2010.

<sup>63</sup> Ibid.

<sup>64</sup> Administration of Estates Act 66 of 1965, section 7(1)(a) (applies to those residing in the district in which the death has taken place) and 9(1) (applies to those residing in the district where the deceased was ordinarily resident at the time of death).

a spouse. Where there is no executor of an estate, the Master may call upon “*the surviving spouse (if any), the heirs of the deceased and all persons having claims against the estate*” to make a recommendation;<sup>65</sup> whilst this would include a cohabiting partner who was named in a will as an “*heir*”, cohabiting partners would otherwise be excluded from this provision. If there are competing nominations for executor, a surviving spouse enjoys precedence.<sup>66</sup> A “*parent, spouse or child of the deceased*” is exempt from the usual requirement that executors must furnish security to the Master.<sup>67</sup> There are also rules allowing surviving spouses to take over the property of the deceased under certain conditions.<sup>68</sup> These rules are clearly limited to persons in the defined categories,<sup>69</sup> but could logically be extended to surviving cohabitants.

In terms of the **Wills Act 7 of 1953**, the only right which is particular to a spouse concerns wills made by soldiers on active service, which may be made without the normal prescribed formalities and are still valid if the soldier dies on active service or within a year thereafter; in applications concerning such wills, notice must be given to the “*spouse and intestate heirs of the deceased and also on any person who may be entitled to claim under any previous will made by the deceased, if such previous will is known to exist*”.<sup>70</sup> Although this is probably a provision which is seldom invoked, it could also logically be extended to cohabiting partners.

## 6.2.4 Labour and social security

The Labour Act takes different approaches to the definition of “*family*” and “*dependants*” for different purposes; these inconsistencies should be harmonised to include cohabiting partners. The Social Security Act already takes account of cohabiting partners.

### Labour issues

The **Labour Act 11 of 2007** takes different approaches to the definition of “*family*” and “*dependants*” for different purposes, although “*spouse*” is defined throughout the statute as meaning “*a partner in a civil marriage or a customary law union or other union recognised as a marriage in terms of any religion or custom*”.<sup>71</sup>

For example, the Act forbids discrimination on the basis of “*family responsibilities*”, which are defined as “*the responsibility of an employee to an individual (i) who is a parent, spouse, son, daughter or dependant of the employee; and (ii) who, regardless of age, needs the care and support of that employee*”.<sup>72</sup> The definition of “*family responsibilities*” would appear to include responsibilities to any person who is factually dependent on the employee.

In contrast, “*family*” is defined more narrowly for the purposes of compassionate leave. Employees are entitled to five working days leave each year “*if there is a death or serious*

<sup>65</sup> Id, section 18(1).

<sup>66</sup> Id, section 19.

<sup>67</sup> Id, section 23(1)-(2).

<sup>68</sup> Id, section 38.

<sup>69</sup> There is no definition of “*spouse*” in the statute.

<sup>70</sup> Wills Act 7 of 1953, section 7.

<sup>71</sup> Labour Act 11 of 2007, section 1.

<sup>72</sup> Id, section 5(1)(c).

*illness in the family*". The Act defines family for the purpose of such leave as being a child, including a child adopted in terms of any law, custom or tradition; a spouse, a parent, grandparent, brother or sister of the employee; or a father-in-law or mother-in-law of the employee – thus illogically excluding cohabiting partners.<sup>73</sup>

Yet another provision concerns the definition of dependant in respect of employees who reside on agricultural land. In such cases, the employer must provide sufficient facilities – including food, payment for food or land for the employee's own livestock and cultivation – to meet the reasonable needs of the employee and the employee's "*dependants*", defined for this purpose as "*the spouse and the dependant children of the employee or of the spouse*".<sup>74</sup> This definition could sensibly be expanded to include a cohabiting partner.

Another provision of relevance in the Labour Act concerns severance pay. Here, there is no right to severance pay if an employee refuses to accept comparable employment with "*the surviving spouse, heir or dependant of a deceased employer*".<sup>75</sup> – with the undefined term "*dependant*" probably including some cohabiting partners even though the term "*spouse*" does not. The term "*heir*" would also probably include some cohabiting partners now – and more if law reforms give them some right to intestate succession. The same section of the Act also provides for the payment of severance pay in the case of an employee who is deceased to "*(a) the employee's surviving spouse; or (b) if there is no spouse, to the employee's children; (c) if there are no children, to the employee's estate.*"<sup>76</sup> The inclusion of cohabiting partners should be considered here, as well as what to do in the case of conflicting claims between a spouse and a cohabitant of the deceased employee.

## Social security

The **Social Security Act 34 of 1994** contains a definition of "*dependant*" to identify persons who can claim the one-off death benefits available under the Act in respect of members who have died; this definition could also be relevant in future to the payment of pension benefits, depending on the rules of the National Pension Fund which has not yet been established under this Act.

The statute defines "*dependants*" broadly and in factual terms, to include spouses, children, persons whom the member is legally liable to maintain and "*a person in respect of whom the member is not legally liable for maintenance, if such person was, in the opinion of the Commission, upon the death of the member in fact dependent on the member for maintenance*".<sup>77</sup> Many cohabiting partners would be catered for in terms of this definition, which appears to cover anyone who was in fact dependent on a deceased member of the fund.<sup>78</sup> This definition could even be expansively interpreted to cover cohabitants whose relationship does not mirror a traditional marriage, such as homosexual cohabitants.

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<sup>73</sup> Id, section 25.

<sup>74</sup> Id, section 28.

<sup>75</sup> Id, section 35(1)(c)(i). See also consequential section 35(4)(a).

<sup>76</sup> Id, section 35(6).

<sup>77</sup> Social Security Act 34 of 1994, section 1.

<sup>78</sup> It is possible that some cohabiting partners might fall under subsection 1(1)(c), which covers persons whom the member would have become legally liable to maintain if the member had not died, if there was a future intention to marry which was not realised before the member's death. However, this seems unlikely, as it would be difficult if not impossible to prove that an intended marriage would have taken place but for the death of the member. A better fit for this category would be children of the member who were born only after the death of the member.



In practice, the Commission pays anybody who can provide satisfactory evidence that he or she was wholly dependent upon the deceased for the necessities of life – but only in the absence of any dependants in the named categories, such as spouses or children. Whilst it may be theoretically possible to divide a widow's pension between two partners, this is not currently standard procedure.<sup>79</sup> This means that in a situation where there is both a spouse and cohabiting partner, the cohabitant would in most cases be ignored.

**Social Security Act 34 of 1994, section 1:**

*“dependant”, in relation to a member of any fund, means –*

- (a) a person in respect of whom the member is legally liable for maintenance, including the spouse, natural children or adopted children of the member;*
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person was, in the opinion of the Commission, upon the death of the member in fact dependent on the member for maintenance; or*
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.*

## 6.2.5 Tax and duties

**There is no direct distinction between single persons and married persons in terms of Namibian income tax law in terms of the Income Tax Act 24 of 1981, but some exemptions under various laws on taxes and duties should be re-examined to see if cohabiting partners should be included in a manner similar to spouses.**

### Income tax

There is no direct distinction between single persons and married persons in terms of Namibian income tax law. Post-independence amendments to the **Income Tax Act 24 of 1981** removed all distinctions between men and women, and between single and married persons; now all individuals in Namibia are treated identically for tax purposes regardless of sex or marital status.<sup>80</sup>

However, it is relevant to note that maintenance paid in terms of a divorce order or a judicial order or a written agreement of separation is tax exempt;<sup>81</sup> if similar maintenance is associated with cohabitation in terms of any law reform made, it will be important to ensure that it will also fall within this provision.

It is also relevant to note that the definitions of “benefit fund”, “pension fund”, “provident fund” and “retirement annuity fund” – which are relevant to certain tax exemptions – are defined broadly to include funds which pay “*benefits for the spouses, children, dependants or nominees*” of members.<sup>82</sup> This would be useful to cohabiting couples, because it would include funds which would pay out to dependent cohabitants or cohabitants nominated as beneficiaries. However,

<sup>79</sup> Personal communication, Social Security Commission, June 2010.

<sup>80</sup> See Income Tax Amendment Acts 12 of 1991, 33 of 1991 and 25 of 1992.

<sup>81</sup> Income Tax Act 24 of 1981, section 16(q).

<sup>82</sup> Income Tax Act 24 of 1981, section 1 (emphasis added). See also section 16 on exemptions.

“annuity funds”, which are to a certain extent tax exempt, are limited to funds which pay benefits to the purchaser or the purchaser’s “spouse” or “surviving spouse”.<sup>83</sup> This should be re-examined to see if such funds should also include those payable to cohabitants.

It would also be advisable to examine the following provisions to see if any changes would be appropriate to put cohabiting couples on a similar footing as married couples:

- the references to “relatives”, “spouses” and “a man or his wife” in the provision of the statute dealing with the classification of companies into public and private companies for certain tax purposes;<sup>84</sup>
- the reference to “relatives” in the provision which is concerned with tax deductions in respect of farming operations;<sup>85</sup>
- the references to “married persons” and “spouses” in the provision which is concerned with the allocation of income from enterprises involving both spouses.<sup>86</sup>

## Value-Added Tax (VAT)

The concept of “connected persons” is relevant to some transactions, valuations and exemptions under the **Value-Added Tax Act 10 of 2000**. The lengthy definition of this term of art includes

*any natural person and –*

*(i) any relative of that natural person; or*

*ii) any trust in respect of which any such relative is or may be a beneficiary.*<sup>87</sup>

“Relative”, in turn, is defined to mean, in relation to any natural person, –

*(a) the spouse of that person; or*

*(b) any person related to that person or his or her spouse within the third degree of consanguinity; or*

*(c) any spouse of any person referred to in paragraph (b),*

*and for the purposes of this definition, any adopted child shall be deemed to be related to his or her adoptive parent within the first degree of consanguinity.*<sup>88</sup>

This statute should be examined in detail, in light of its logic and purpose, to see if the definition of “relative” should be broadened to encompass cohabitants.

## Transfer duties

The **Transfer Duty Act 14 of 1993** deals with the payment of fees to the State in respect of transfers of land and certain rights in land. The section on exemptions from this duty includes

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<sup>83</sup> Income Tax Act 24 of 1981, section 16B.

<sup>84</sup> Income Tax Act 24 of 1981, section 38; see, in particular, section 38(4)(a)(ii) and (v).

<sup>85</sup> Income Tax Act 24 of 1981, Schedule 4, article 10(7). “Relative” is defined in section 1 as “the spouse of such person or anybody related to him or his spouse within the third degree of consanguinity, or any spouse of anybody so related...”.

<sup>86</sup> Income Tax Act 24 of 1981, Schedule 4, article 2.

<sup>87</sup> Value-Added Tax Act 10 of 2000, section 1.

<sup>88</sup> Ibid.

(g) *a surviving spouse in respect of property acquired in any manner from the estate of the deceased spouse;*

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(j) *a surviving or divorced spouse who acquires the sole ownership in the whole or any portion of property registered in the name of his or her deceased or divorced spouse to whom he or she was married in community of property, in respect of so much of the value of the property in which sole ownership is acquired as represents his or her share in that property by virtue of the marriage in community of property.*<sup>89</sup>

If the law reform on cohabitation provides for intestate succession and redistribution of property between cohabitants, then these exceptions should logically extend to cohabiting partners as well.

## 6.2.6 Land rights

Cohabiting partners have no rights in respect of private land or communal land which is in the name of their partner. We recommend that cohabiting partners should have equal rights with surviving spouses in respect of communal land tenure, particularly since cohabitation may be replacing formal polygamy in some communities.

Spouses married in community of property have strong protection under the **Deeds Registries Act 47 of 1937**. Every deed registered must state the marital status of the person registering it, and whether or not the marriage is in community of property; if it is, and if the property in question is part of the joint estate, then it must be registered in the names of both husband and wife.<sup>90</sup> This protects either spouse from being able to dispose of a key asset in the joint estate without the knowledge and consent of the other spouse. There are also special rules pertaining to the sequence of deeds when property goes to a divorced or surviving spouse,<sup>91</sup> and on taxes and transfer duty when land is settled on or donated to an “*intended spouse*”.<sup>92</sup> Cohabiting partners have no corresponding protection in respect of privately-owned land. The question of whether or not cohabiting partners should be included here depends on whether other law reforms give them joint property rights or any right to security of tenure in the shared home (something which this report does not recommend).

Spouses also have strong protection under the **Communal Land Reform Act 5 of 2002**, which defines “*spouse*” to include “*the spouse or partner in a customary union, whether or not such customary union has been registered*”.<sup>93</sup> Where communal land has been registered in the name of a person, it must be re-allocated upon his or her death to the surviving spouse –

<sup>89</sup> Transfer Duty Act 14 of 1993, section 9(1)(g) and (j). .

<sup>90</sup> Deeds Registries Act 47 of 1937, section 17. See also section 21 pertaining to the procedure when a spouse with a joint estate dies, the procedural matters in sections 45-45ter and the definition of “*owner*” in section 102. See further section 67 and section 6A(1)(b) of the Subdivision of Agricultural Land Act 70 of 1970 on registration of servitudes in respect of joint estates, and the definition of “*owner*” in the Sectional Titles Act 2 of 2009.

<sup>91</sup> Id, section 14.

<sup>92</sup> Id, section 92.

<sup>93</sup> Communal Land Reform Act 5 of 2002, section 1.

who has a right to remain on the land even in the event of re-marriage.<sup>94</sup> The statutes on land are currently being consolidated, and the Legal Assistance Centre has suggested that the revised law should cover multiple wives in polygamous marriages and cohabiting partners as well as surviving spouses for this purpose:

*While there is provision for children born outside marriage, there is no corresponding provision for informal cohabiting partners who are in a position similar to spouses – regardless of the length of the cohabitation. This is significant since research data suggest that cohabitation may be taking the place of formal polygamy in some instances. We propose that long-term life partners in cohabitation relationships should have the right to petition to the traditional authority to be treated like spouses in terms of this section, after substantiating the nature and length of the cohabitation. This can be especially important if the cohabiting partner has been living with the person who has rights to the land for many years and has children with the rights-holder.*<sup>95</sup>

If the forthcoming new laws on land currently under discussion do not make provision for cohabiting partners in respect of communal land tenure, then law reforms on cohabitation should include this.

## 6.2.7 Insurance

**The special protections provided to life insurance policies made in favour of spouses and children under the Long-Term Insurance Act should be extended to cohabiting partners.**

Married persons and single persons essentially have the same rights in respect of life insurance policies.<sup>96</sup> However, the **Long-term Insurance Act 5 of 1998** gives some special protection to insurance policies in favour of spouses and children against attachment as part of a civil judgment or inclusion in an insolvent estate,<sup>97</sup> and some special rules for protecting life policies in respect of spouses or children where the policy-holder is struggling to pay the premiums.<sup>98</sup> It would be advantageous to cohabiting partners to be covered by the same protections.

<sup>94</sup> Id, section 26. If there is no surviving spouse, or if the surviving spouse does not consent to the re-allocation, then the land goes to a child of the deceased determined by the traditional authority. Surviving spouses and children were also allowed to complete the process of registering existing land rights if the rights-holder died before the registration process was complete. Id, section 28.

<sup>95</sup> Dianne Hubbard & Rachel Coomer, “Gender Issues in the Draft Land Bill”, Windhoek: Legal Assistance Centre, 12 July 2010.

<sup>96</sup> Long-term Insurance Act 5 of 1998, sections 43–45.

<sup>97</sup> Id, section 47.

<sup>98</sup> Id, section 50.

## 6.2.8 *Married Persons Equality Act*

As part of law reforms recognising cohabitation, we recommend that cohabiting partners should have joint responsibility for household necessities in the same way as couples married out of community of property under the Married Persons Equality Act.

The **Married Persons Equality Act 1 of 1996** requires the consent of both spouses married in community of property for major transactions involving the joint estate.<sup>99</sup> The issue of property rights between cohabiting partners will be discussed in detail in Chapter 11, but we do not propose establishment of a joint estate by any route other than marriage.

The same statute makes spouses married out of community of property jointly and severally liable for household necessities with both being obliged to contribute according to their respective means.<sup>100</sup> This seems a more appropriate analogy for the situation of cohabiting partners. As explained in Chapter 11, we would recommend making joint responsibility for household necessities part of the proposed law reforms pertaining to cohabitation.

## 6.2.9 *Legal disabilities of married women*

Once the proposed Recognition of Customary Marriage Bill becomes law, there will be no remaining legal disabilities for married women which would give an advantage to women in cohabitation relationships.

Until recently there were some legal disabilities for married women that may have given women in cohabitation relationships an advantage over married women, but many of these have been removed since independence.

The removal of a husband's marital power by the **Married Persons Equality Act 1 of 1996**<sup>101</sup> has removed one crucial legal disability which may have previously inspired some women to prefer cohabitation over marriage. Prior to the enactment of this statute, couples could not contract out of the common-law principle which gave husbands power to administer the property of the marriage, regardless of the marital property regime chosen. The husband's marital power previously also restricted the legal ability of married women to contract or litigate.<sup>102</sup>

A similar law reform in respect of customary marriage has been proposed by the Law Reform and Development Commission; the proposed **Recognition of Customary Marriage Bill** would remove all legal disabilities for women associated with customary marriage.<sup>103</sup> Once this law reform is enacted, there would be no differences between the legal capacities of married and unmarried men or women.

<sup>99</sup> Married Persons Equality Act 1 of 1996, section 7.

<sup>100</sup> *Id.*, section 15.

<sup>101</sup> Married Persons Equality Act 1 of 1996, sections 1-2.

<sup>102</sup> See also *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC).

<sup>103</sup> Recognition of Customary Marriage Bill, section 11, in Law Reform and Development Commission (LRDC), *Report on Customary Law Marriages* (LRDC 12), Windhoek: LRDC, 2004.



## 6.2.10 Criminal law and inquests

Some of the provisions which refer to surviving spouses in the criminal law context should be re-examined for possible inclusion of cohabiting partners, including in particular:

- the provision on marital privilege (in both criminal and civil cases); and
- the provisions on victim impact statements and compensation in the Criminal Procedure Act 25 of 2004.

### Marital privilege

There is a marital privilege which protects spouses from being compelled to testify against each other in criminal cases. This privilege is protected by the Constitution, which states that “No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law...”.<sup>104</sup> Some more specific privileges are protected by the Criminal Procedure Act 51 of 1977 – which are not entirely consistent with the Constitution on this topic.<sup>105</sup>

#### **Criminal Procedure Act 51 of 1977**

##### ***195 Evidence for prosecution by husband or wife of accused***

*(1) The wife or husband of an accused shall not be competent to give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with –*

- (a) any offence committed against the person of either of them or of a child of either of them;*
- (b) any offence under Chapter III of the Children’s Act, 1960 (Act 33 of 1960), committed in respect of any child of either of them;*
- (c) any contravention of any provision of section 11(1) of the Maintenance Act, 1963 (Act 23 of 1963), or of such provision as applied by any other law;*
- (d) bigamy;*
- (e) incest;*
- (f) abduction;*
- (g) any contravention of any provision of section 2, 8, 9, 10, 11, 12, 12A, 13, 17 or 20 of the Immorality Act, 1957 (Act 23 of 1957), or, in the case of the territory, of any provision of section 3 or 4 of the Girls’ and Mentally Defective Women’s Protection Proclamation, 1921 (Proclamation 28 of 1921), or of section 3 of the Immorality Proclamation, 1934 (Proclamation 19 of 1934);*
- (h) perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by the one of them against the other, or in connection with or for the purpose of criminal proceedings in respect of any offence included in this subsection;*

<sup>104</sup> Namibian Constitution, Article 12(1)(f).

<sup>105</sup> The exclusion of customary marriage from section 195 is problematic.

- (i) *the statutory offence of making a false statement in any affidavit or any affirmed, solemn or attested declaration if it is made in connection with or for the purpose of any such proceedings as are mentioned in paragraph (h),*

*and shall be competent but not compellable to give evidence for the prosecution in criminal proceedings where the accused is charged with any offence against the separate property of the wife or of the husband of the accused or with any offence under section 16 of the said Immorality Act, 1957, or, in the case of the territory, section 1 or 2 of the said Immorality Proclamation, 1934.*

(2) *Anything to the contrary in this Act or any other law notwithstanding, any person married in accordance with Bantu law or custom shall, notwithstanding the registration or other recognition under any law of such a union as a valid and binding marriage for the purposes of the law of evidence in criminal proceedings, be deemed to be an unmarried person.*

### **196 Evidence of accused and husband or wife on behalf of accused**

(1) *An accused and the wife or husband of an accused shall be a competent witness for the defence at every stage of criminal proceedings, whether or not the accused is charged jointly with any other person: Provided that –*

- (a) *an accused shall not be called as a witness except upon his own application;*
- (b) *the wife or husband of an accused shall not be called as a witness for the defence except upon the application of the accused.*

(2) *The evidence which an accused may, upon his own application, give in his own defence at joint criminal proceedings, shall not be inadmissible against a co-accused at such proceedings by reason only that such accused is for any reason not a competent witness for the prosecution against such co-accused.*

(3) *An accused may not make an unsworn statement at his trial in lieu of evidence but shall, if he wishes to give evidence, do so on oath or, as the case may be, by affirmation.*

**[section 197 deals with other matters]**

### **198 Privilege arising out of marital state**

(1) *A husband shall not at criminal proceedings be compelled to disclose any communication which his wife made to him during the marriage, and a wife shall not at criminal proceedings be compelled to disclose any communication which her husband made to her during the marriage.*

(2) *A person whose marriage has been dissolved or annulled by a competent court, shall not at criminal proceedings be compelled to give evidence as to any fact, matter or thing which occurred during the subsistence of the marriage or putative marriage, and as to which such person could not have been compelled to give evidence if the marriage was subsisting.*

### **199 No witness compelled to answer question which the witness's husband or wife may decline**

*No person shall at criminal proceedings be compelled to answer any question or to give any evidence, if the question or evidence is such that under the circumstances the*

*the husband or wife of such person, if under examination as a witness, may lawfully refuse and cannot be compelled to answer or to give it.*<sup>106</sup>

The same policy considerations would seem to apply to cohabitants as to spouses on this issue. Even though the Constitution covers only spouses, there is no bar to extending the protection to others who are similarly situated. An argument against extending the privilege to cohabitants might be that the informal nature of cohabitation could make it easier for person who has committed a crime to block incriminating testimony fraudulently via this route (by cohabiting with the potential witness for this purpose alone).

<sup>106</sup> The corresponding provisions of the Criminal Procedure Act 25 of 2004 (passed by Parliament but not in force) similarly apply only to spouses, with a spouse being defined as “a person’s partner in marriage”, including “a partner in a marriage by customary law”. Criminal Procedure Act 25 of 2004, section 1. They read as follows:

**219 Evidence for prosecution by spouse of accused**

*The spouse of an accused is competent but not compellable to give evidence for the prosecution in criminal proceedings.*

**220 Evidence for defence by accused and spouse of accused**

*(1) Every accused and spouse of an accused is a competent witness for the defence at every stage of criminal proceedings, whether or not the accused is charged jointly with any other person, but –*

- (a) an accused may not be called as a witness except on his or her own application;*
- (b) the spouse of an accused is not a compellable witness where a co-accused calls that spouse as a witness for the defence.*

*(2) The evidence that an accused may, on his or her own application, give in his or her own defence at joint criminal proceedings, is not inadmissible against a co-accused at such proceedings by reason only that the accused is for any reason not a competent witness for the prosecution against that co-accused.*

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**223 Privilege arising out of marital status**

*(1) A husband is not at criminal proceedings compelled to disclose any communication that his wife made to him during the marriage, and a wife is not at criminal proceedings compelled to disclose any communication that her husband made to her during the marriage.*

*(2) Subsection (1) also applies to a communication made during the subsistence of a marriage or a putative marriage that has been dissolved or annulled by a competent court.*

**224 No witness compelled to answer question that the witness’s spouse may decline**

*No person is at criminal proceedings compelled to answer any question or to give any evidence, if the question or evidence is such that under the circumstances the spouse of that person, if under examination as a witness, may lawfully refuse and cannot be compelled to answer or to give it.*

Presumptions of paternity apply both where a putative mother and father were married or cohabiting at the approximate time of conception. Children’s Status Act 6 of 2006, section 9(1)(a)-(b). The Criminal Procedure Act 51 of 1977 contains a specific provision relating to evidence of spouses regarding their sexual relations with each other for the purpose of rebutting the presumption that a child to whom a married woman has given birth is the offspring of her husband; the provision is presumably necessary because of the marital privilege. Criminal Procedure Act 51 of 1977, section 256; Criminal Procedure Act 25 of 2004, section 256. If the privilege were extended to cohabiting couples, then this provision would have to be accordingly extended. See also the related provision in the Children’s Status Act 6 of 2006, in the section dealing with presumptions of paternity: “The mother or putative mother and the father or putative father of a person whose parentage is in question are competent and compellable witnesses in any proceedings in which the issue of parentage is raised, but nothing in this section is to be construed as compelling a person to testify against his or her spouse.” (section 8(3)).

There is a similar marital privilege in respect of civil cases under the Civil Proceedings and Evidence Act 25 of 1965<sup>107</sup> which should be similarly extended to cohabiting partners if the marital privilege in the criminal context is extended.

## Victim impact statements and compensation

The Criminal Procedure Act 25 of 2004 (passed by Parliament but not in force) introduces the innovation of a victim impact statement which is relevant for sentencing of convicted criminals and for compensation for crime victims. If a victim is incapable of preparing the victim impact statement, it can be done by (amongst others) the victim's spouse or any dependant or other relative of the victim.<sup>108</sup> The definition of "*dependant*" would not cover cohabiting partners,<sup>109</sup> who should logically be included in this provision. Similarly, compensation in respect of a deceased victim may be paid to the victim's dependants, including a spouse but not a cohabiting partner.<sup>110</sup>

## Private prosecutions

Amongst the people who are authorised to conduct a private prosecution if the state declines to prosecute a crime are

- a husband, if the said offence was committed in respect of his wife;
- the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence.<sup>111</sup>

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<sup>107</sup> Civil Proceedings and Evidence Act 25 of 1965, sections 10-12:

**10 Husband and wife not compellable to disclose communications between them**

*No husband shall be compelled to disclose any communication made to him by his wife during the marriage and no wife shall be compelled to disclose any communication made to her by her husband during the marriage.*

**11 Dissolution of marriage does not affect privilege which existed during marriage**

*No person whose marriage has been dissolved or annulled shall be compelled to give evidence as to any fact, matter or thing which occurred during the subsistence of the marriage or supposed marriage, and as to which he or she could not have been compelled to give evidence if the marriage were subsisting.*

**12 No witness compellable to testify if husband or wife not compellable**

*No person shall be compelled to answer any question or to give any evidence which the husband or wife of such person, if under examination as a witness, could not be compelled to answer or give.*

<sup>108</sup> Criminal Procedure Act 25 of 2004, section 39(2).

<sup>109</sup> Section 1 of Criminal Procedure Act 25 of 2004 states:

*"dependant", in relation to a deceased victim, means –*

- (a) the spouse of that victim;*
- (b) a child of that victim, including a posthumous child, an adopted child and an illegitimate child, who, at the time of the victim's death, was in fact dependent on the victim; or*
- (c) any other person in respect of whom that victim was legally liable for maintenance.*

Unless the law reform on cohabitation makes cohabiting partners legally liable to maintain each other, this definition would not cover them.

<sup>110</sup> Section 1 of Criminal Procedure Act 25 of 2004 states that the term "*victim*" includes "*for the purposes of awarding compensation under this Act... where the victim is deceased, also a dependant of the victim*". This definition must be read together with section 326.

<sup>111</sup> Criminal Procedure Act 51 of 1977, section 7(1)(b)-(c). The corresponding provision of the Criminal Procedure Act 25 of 2004 (passed by Parliament but not in force) removes the sex discrimination but remains limited to spouses in civil or customary marriage. Criminal Procedure Act 25 of 2004, section 5(1)(b)-(c) and definition of spouse in section 1.

In addition to incorporating sex discrimination by giving husbands more power than wives, this provision is limited to spouses. Although it is seldom-used, it should perhaps be extended to include cohabiting partners.

## Other aspects of criminal procedure

There are a few other references to “*spouses*” or “*marriage*” in the two Criminal Procedure Acts (the 1977 one in force and the 2003 one which is still dormant), but amendments to these to include cohabitants would be inappropriate in the contexts in question.<sup>112</sup>

## Inquests

The **Inquests Act 9 of 1992** provides that notice of an inquest will be given to “*the surviving spouse of the deceased person*” or if there is no spouse or the spouse’s whereabouts are unknown, to “*any relative of the deceased person, if the whereabouts of such a relative is known to the judicial officer*”.<sup>113</sup> These terms are not defined in the statute, but appear to exclude cohabiting partners who could sensibly be included here.

### 6.2.11 Conflicts of interest

The provisions on conflicts of interest in various statutes are in need of general harmonisation and would benefit from being drawn broadly to include a wide range of associates, including cohabiting partners. Similarly, statutory provisions which extend the consequences of actions by one spouse to the other should be examined with a view to considering the inclusion of cohabiting partners. The general rule should be that extension of protections to cohabitants should be accompanied by the extension of legal responsibilities pertaining to such relationships.

One context in which many statutes refer to “spouses” concerns conflicts of interest and their disclosure. (Although many of these statutes refer to “partners”, the context in most cases indicates that this refers to business partners and not domestic partners.) There are also various statutory provisions which extend the consequences of actions by one spouse to the other spouse – such as in the case of exemptions, presumptions and limitations of liability. All of the statutory provisions we have located which fall into these two categories are listed in

<sup>112</sup> Another reference to marriage concerns the crime of bigamy. It is possible to establish *prima facie* proof of the existence of the first marriage with evidence –

- (a) *that shortly before the alleged bigamous marriage the accused had been cohabiting with the person to whom he is alleged to be lawfully married;*
- (b) *that the accused had been treating and recognizing such person as a spouse; and*
- (c) *of the performance of a marriage ceremony between the accused and such person.*

Criminal Procedure Act 51 of 1977, section 237(3); Criminal Procedure Act 25 of 2004, section 269(3). This provision does not require any change in respect of cohabitation; we do not recommend that the law require cohabitation be required to be monogamous in nature since it often takes the form of informal polygamy in practice.

The references to marriage in connection with the common-law crime of incest probably also need no change. See Criminal Procedure Act 51 of 1977, section 226; Criminal Procedure Act 25 of 2004, section 270.

<sup>113</sup> Inquests Act 9 of 1992, section 9(1).



the charts below, with the ones which may already be sufficiently broad to cover cohabiting partners indicated with shading. These provisions should be re-examined to consider the consistent inclusion of cohabiting partners.

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## CONFLICTS OF INTEREST

### (emphasis added throughout)

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Insolvency Act 24 of 1936, sections 53(2)(d) and 82(7)

53(2) ...no creditor shall vote by any agent being –  
 (d) the **spouse** of or a person related to such trustee or the person referred to in paragraph (a) [the trustee or a person nominated for election as trustee in the estate concerned] **by consanguinity or affinity within the third degree...**

**82(7)** The trustee or an auctioneer employed to sell property of the estate in question, or the trustee's or the auctioneer's **spouses**, partner, employer, employee or agent shall not acquire any property of the estate unless the acquisition is confirmed by an order of the court.

Wills Act 7 of 1953, sections 5 and 6

5. Witnesses cannot benefit under a will: A person who attests the execution of any will or who signs a will in the presence and by direction of the testator or the person who is the **spouse** of such person at the time of attestation or signing of the will or any person claiming under such person or his **spouse**, shall be incapable of taking any benefit whatsoever under that will.

6. Witness cannot be nominated as executor, etc: If any person attests the execution of a will or signs a will in the presence and by direction of the testator under which that person or his **spouse** is nominated as executor, administrator, trustee or guardian, such nomination shall be null and void.

Administration of Estates Act, 66 of 1965, sections 6(4), 49 and 81 (intended meaning of "partner" here is unclear)

6(4) No appraiser shall act in connection with any property in which or in the valuation of which –  
 (a) he or his **spouse** or partner has any pecuniary interest other than his remuneration as appraiser; or  
 (b) his principal or employer or any person related to him within the third degree has any pecuniary interest.

49(1) If any executor or his **spouse, parent, child**, partner, employer, employee or agent purchases any property in the estate which he has been appointed to liquidate and distribute, the purchase shall, subject to the terms of the will (if any) of the deceased, and, in the case of an executor who is the surviving spouse of the deceased, to the provisions of section *thirty-eight* [concerning instances where a surviving spouse may validly take over property of the deceased], be void, unless it has been consented to or is confirmed by the Master or by the Court.

81. If any tutor or curator or the **spouse, parent, child**, partner, employer, employee or agent of any tutor or curator, purchases any property which he has been appointed to administer, the purchase shall, subject to the terms of any will or written instrument by which he has been nominated, be void, unless it has been consented to or is confirmed by the Court or the Master.

Water Research Act 34 of 1971, section 7(6)

7(6) A member of the commission (including a co-opted member) shall not be present at or take part in the discussion of or vote upon any matter before the commission, in which he or his **spouse** or his partner or employer or the partner or employer of his **spouse** has, directly or indirectly, any pecuniary interest, unless –  
 (a) he has previously in writing informed the commission of such interest; and  
 (b) the commission has approved that he may be so present or so take part or so vote.

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| Livestock Improvement Act 25 of 1977, section 3(20)            | <p>3(20)(a) If a member of the board or his or her <b>spouse</b> or any company or partnership of which he or she is a director or shareholder or partner is in anyway directly or indirectly interested in a matter being considered by the board and whereby his or her private interest may conflict with his or her duties as a member of the board he or she shall disclose the nature of his or her interest at the meeting of the board at the first opportunity it is possible for him or her to do so.</p> <p>(b) A member of the board who has an interest in a matter as contemplated in paragraph (a), shall not be present during any deliberation, or take part in any decision, of the board with respect to that matter.</p>  |
| Boxing and Wrestling Control Act 11 of 1980, section 5(2)(a)   | <p>5(2) The Administrator-General may at any time remove any member of the board from office –</p> <p>(a) if the Administrator-General is satisfied that such member directly or indirectly by himself or through his <b>spouse</b>, partner or business associate has any financial interest in boxing or wrestling at tournaments;</p>  |
| Namibian Broadcasting Act 9 of 1991, sections 10(1) and 11(3)  | <p>10(1) A member shall, subject to the provisions of subsection (2), submit to the Minister a statement in writing of any directorship, office, post, shareholding or other financial interest, directly or indirectly, held or acquired by such a member or the member's <b>spouse</b> in a company or firm which carries on broadcasting services or deals in receivers or manufacturers, assembles, imports or sells apparatus or equipment for use in broadcasting services.</p> <p>***</p> <p>11(3) Any reference to an interest in a contract contemplated in the relevant provisions of the Companies Act, 1973, as applied by subsection (1), shall be deemed to include any interest which the <b>spouse</b> of a member of the board or an officer or employee of the Corporation, as the case may be, has in a contract referred to in section 234(2) of the said Companies Act, 1973, as applied by the said subsection (1).</p>   |
| Namibian Communications Commission Act 4 of 1992, section 4(1) | <p>4(1)(a) A member shall, upon his or her appointment, submit to the Minister and to the Commission a statement in writing of any directorship, office, post, shareholding or other financial interest, directly or indirectly, held or acquired by such a member or his or her <b>spouse</b> in a company or firm which carries on a broadcasting service or deals in, receives or manufactures, assembles, imports or sells apparatus or equipment for use in a broadcasting service.</p> <p>(b) In the event that a member or his or her <b>spouse</b> acquires any interest referred to in paragraph (a) during his or her tenure of office, he or she shall within a period of seven days after such acquisition submit a written statement as contemplated in that paragraph.</p>  |
| Regional Councils Act 22 of 1992, section 16                   | <p>16 (1) If –</p> <p>(a) a member of a regional council; or</p> <p>(b) any other person –</p> <p>(i) who is <b>related to such member, whether by affinity or consanguinity</b>;</p> <p>(ii) who is a <b>member of the household</b> of such member;</p> <p>(iii) with whom such member is in terms of the traditional laws and customs a partner in a <b>customary union</b>; or</p> <p>(iv) who is a partner, agent or business associate of such member, is materially interested or intends to become so interested in any contract which the regional council in question has entered into or considers entering into or in any other matter administered by or under the control of such regional council, such member shall forthwith and in writing –</p> <p>(i) table full particulars of the nature and extent of his or her interest or intended interest; or</p> <p>(ii) disclose his or her relation to any such person who is so interested or intends to become so interested, to the extent known to him or her, at a meeting of the regional council.</p> |

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| Local Authorities Act<br>23 of 1992, sections<br>9(1) and 57(2)   | <p>9(1) If –</p> <ul style="list-style-type: none"> <li>(a) a member of a local authority council; or</li> <li>(b) any other person – <ul style="list-style-type: none"> <li>(i) who is <b>related to such member, whether by affinity or consanguinity</b>;</li> <li>(ii) who is a <b>member of the household</b> of such member;</li> <li>(iii) with whom such member is in terms of the traditional laws and customs a partner in a <b>customary union</b>; or</li> <li>(iv) who is a partner, agent or business associate of such member, is materially interested or intends to become so interested in any contract which the local authority council in question has entered into or considers entering into or in any other matter administered by or under the control of such local authority council, such member shall forthwith and in writing – <ul style="list-style-type: none"> <li>(i) table full particulars of the nature and extent of his or her interest or intended interest; or</li> <li>(ii) disclose his or her relation to any such person who is so interested or intends to become so interested, to the extent known to him or her,</li> </ul> </li> </ul> </li> </ul> <p>at a meeting of the local authority council.</p> <p>57(2) A loan shall not, without the prior approval in writing of the Minister, be granted under subsection (1)(b) to any person who is the owner of a house or dwelling which is fit for human occupation or whose <b>spouse</b> is the owner of any such house or dwelling.</p> |
| Namibian Ports<br>Authority Act 2 of<br>1994, section 8(1)  | <p>(1) If a director or an alternate director or his or her <b>spouse</b>, or any company or partnership of which he or she or his or her spouse is a director or shareholder or partner, is in any way directly or indirectly interested in a contract entered into or proposed to be entered into by the Authority, or in any other matter which is the subject of consideration by the board and whereby his or her private interest may conflict with his or her duties as a director or alternate director, he or she shall disclose the nature of such interest at a meeting of the board at the first opportunity it is possible for him or her to do so.</p>  |
| Casinos and<br>Gambling Houses<br>Act 32 of 1994,<br>section 10   | <p>10. A member of the board, or the alternate of a member when acting in the place of a member, shall not take part in the consideration of any application which the board is in terms of this Act required to consider, if he or she or his or her <b>spouse or child</b> –</p> <ul style="list-style-type: none"> <li>(a) has or will have any direct or indirect interest in the accommodation establishment or retail liquor business or bookmaking business in respect of which the application is made;</li> <li>(b) is the owner or lessor or mortgagee of any premises in relation to which the application is made, or is a director, member, partner, employee or agent of such owner, lessor or mortgagee;</li> <li>(c) is a director, member or partner of, or is otherwise associated with, any person objecting to the application.</li> </ul>  |
| Social Security Act<br>34 of 1994, section<br>13(1)   | <p>13(1) A member or employee of the Commission who or whose <b>spouse</b> in any way has a material interest in an agreement entered into or to be entered into by the Commission, or who or whose <b>spouse</b> acquires such interest after such agreement has been entered into, shall disclose to the Commission full particulars of such interest.</p>  |
| Banking Institutions<br>Act 2 of 1998,<br>sections 41(10) read<br>together with<br>definition of “close<br>relative” in section 1 | <p>41(10) No director of a banking institution or a member of a committee of the board of directors established for the purpose of granting credit to customers, and no principal officer or a manager of a division or a branch, shall take part in the discussion or consideration of, or the taking of a decision relating to, any matter –</p> <ul style="list-style-type: none"> <li>(a) in which – <ul style="list-style-type: none"> <li>(i) he or she or any of his or her <b>close relatives</b>;</li> <li>(ii) any company in which he or she or any of his or her <b>close relatives</b> is a substantial shareholder; or</li> </ul> </li> </ul>   |

- (iii) any other organisation in which he or she or any of his or her **close relatives** is a partner or member, has any personal or economic interest; or
- (b) which is, subject to subsection (11), of particular economic interest to a municipality, company, association or any other public or private institution towards which he or she has, in his or her capacity as mayor, board member, manager or representative, a duty to protect the economic interests of such municipality, company, association or institution.

1 “close relative”, in relation to a person, means –

- (a) the **spouse** of such person, or any other person who has a relationship with such person as a **spouse in a union in terms of the customary law**;
- (b) such person’s **child, step-child, adopted child, brother, sister, step-brother, step-sister, parent or step-parent**; or
- (c) the **spouse**, or any person who has a relationship as a **spouse in a union in terms of the customary law**, of **any of the persons mentioned in paragraph (b)**

Liquor Act 6 of 1998,  
section 24(4)

- 24(4) No –
- (a) holder of a licence;
  - (b) manager appointed under section 18; or
  - (c) employee, partner, agent or **spouse** of any person referred to in paragraph (a) or (b), [*ex officio* and appointed members]
- shall be a member of a Committee.

Namibia National  
Reinsurance  
Corporation Act 22 of  
1998, section 11

- 11(1) In this section –  
“**associate**”, in relation to a director, means –
- (a) a person who –
    - (i) is a **close relative** of the director; or
    - (ii) is a partner, employee or employer of the director; or
    - (iii) is a debtor, mortgager, creditor or mortgagee of, or otherwise has direct, material or commercial dealings with, the Director; or
  - (b) any company or any body of persons, whether corporate or unincorporated, of which the director is also a director or in which the director holds any office or position or in which the director holds a controlling interest;

“**close relative**”, in relation to a director, means –

- (a) his or her **spouse**; or
- (b) his or her **child, stepchild, parent or stepparent, or any descendant of such parent or stepparent**; or
- (c) the **spouse of any of the persons mentioned in paragraph (b)**;

“partner”, in relation to a director, means any person associated in any kind of partnership with the director;

“**spouse**” includes a party to a customary union.

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(6) A director shall not take part in any consideration of, or cast his or her vote on, a matter relating to any business or contract or any proposed business or contract with the Corporation, or any other matter connected with the interests of the Corporation, in which he or she or any of his or her **associates** has an interest.

Roads Contractor  
Company Act 14 of  
1999, section 13(7)

- 13(7) For the purposes of this section –
- (a) an interest of a director of the Company includes an interest of such director’s **spouse, parent, child** or business partner; and
  - (b) a reference to a director of the Company includes a reference to the chief executive officer appointed in terms of section 6 and an alternate director of the Company.

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| Roads Authority Act 17 of 1999, section 10(1)                        | 10(1) If a director or an alternate director or a member of a committee, not being a director or alternate director, or his or her <b>spouse</b> , or any company, close corporation or partnership of which he or she or his or her spouse is a director, shareholder, member or partner, is in any way directly or indirectly interested in a contract entered into or proposed to be entered into by the Authority, or in any other matter which is the subject of consideration by the board and which may cause a conflict of interests in the performance of his or her duties as director, alternate director or committee member, he or she shall fully disclose the nature of such interest as soon as possible after the commencement of the meeting of the board or a committee at which that contract, proposed contract or other matter is a subject of consideration, and that director, alternate director or member of the committee shall not take part in the consideration of, or vote on, any question relating to that contract, proposed contract or matter.      |
| Road Fund Administration Act 18 of 1999, section 10(1)               | 10(1) If a director or an alternate director or a member of a committee, not being a director or alternate director, or his or her <b>spouse</b> , or any company, close corporation or partnership of which he or she or his or her spouse is a director, shareholder, member or partner, is in any way directly or indirectly interested in a contract entered into or proposed to be entered into by the Administration, or in any other matter which is the subject of consideration by the board and which may cause a conflict of interests in the performance of his or her duties as director, alternate director or committee member, he or she shall fully disclose the nature of such interest as soon as possible after the commencement of the meeting of the board or a committee at which that contract, proposed contract or other matter is a subject of consideration, and that director, alternate director or member of the committee shall not take part in the consideration of, or vote on, any question relating to that contract, proposed contract or matter. |
| Road Traffic and Transport Act 22 of 1999, section 6(9)              | 6(9) If a member of the Commission or his or her <b>spouse, including a spouse in a customary union, or his or her child or any other member of his or her household</b> , or his or her partner, agent or business associate, has a material interest in any matter to be considered at any meeting of the Commission, he or she shall –<br>(a) forthwith disclose the nature and extent of such interest at a meeting of the Commission; and<br>(b) withdraw from the meeting during the discussion of and voting on the matter.  |
| Namibia Library and Information Service Act 4 of 2000, section 18(6) | 18(6) If a member of the Council or <b>his or her spouse, including a spouse in a customary union or his or her child or any other member of his or her household</b> , or his or her partner, agent or business associate, has a direct or indirect financial interest in any matter to be considered at any meeting of the Council, that member shall forthwith disclose the nature and extent of the financial interest at a meeting of the Council and thereafter the Council shall determine whether or not the member can participate in discussions relating to that matter.   |
| National Art Gallery of Namibia Act 14 of 2000, section 10(1)        | 10(1) If a trustee or a member of a committee, not being a trustee, or his or her <b>spouse</b> , or any company, close corporation or partnership of which he or she or his or her <b>spouse</b> is a trustee, shareholder, member or partner, is in any way directly or indirectly interested in any matter which is the subject of consideration by the board or a committee and which may cause a conflict of interests in the performance of his or her duties as a trustee, he or she shall fully disclose the nature of such interest as soon as possible after the commencement of the meeting of the board or of the committee at which that matter is the subject of consideration, and that trustee or member of a committee shall not take part in the consideration of, or vote on, any question relating to that matter.  |



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| Trust Fund for Regional Development and Equity Provisions Act 22 of 2000, section 13(6) | 13(6) For the purposes of this section, a financial interest of a member in any agreement includes a financial interest of such member's <b>spouse, parent, child</b> or business partner, as the case may be, in such agreement.   |
| National Housing Development Act 28 of 2000, sections 4(9) and 28(9)                    | <p>4(9) For the purposes of this section –</p> <p>(a) a financial interest of a member of the Advisory Committee in any transaction or matter includes a financial interest of such member's <b>spouse, parent, child</b> or business partner, as the case may be, in such transaction or matter...</p> <p>28(9) For the purposes of this section a financial interest of a member of a Decentralised Build Together Committee in any transaction or matter includes a financial interest of such member's <b>spouse, parent, child</b> or business partner, as the case may be, in such transaction or matter.</p>   |
| Meat Corporation of Namibia Act 1 of 2001, section 9(11)                                | <p>9(11) If a director or his or her <b>spouse, including a spouse in a customary union, or his or her child or any other member of his or her household</b>, or his or her partner, agent or business associate, has a material interest in any matter to be considered at any meeting of the Board, he or she shall –</p> <p>(a) forthwith disclose the nature and extent of such interest at a meeting of the Board; and</p> <p>(b) withdraw from the meeting during the discussion of and voting on the matter.</p>   |
| Forest Act 12 of 2001, section 6(8)   | 6(8) Where a member of the Council or a <b>spouse</b> , partner or business associate of the member has a direct or indirect financial interest in a matter which involves the Council, the member shall, at or before the meeting where the matter is to be discussed, advise the Council of the nature and extent of the financial interest, and thereafter the Council shall determine whether or not the member can participate in discussions relating to that particular matter.  |
| Lotteries Act 15 of 2002, section 5(1)  | <p>5(1) A person is not eligible for appointment as a member of the board or as an alternate member if he or she...</p> <p>(f) whether personally or through his or her <b>spouse</b> or business partner or associate has any interest in any business conducted by an agent that may conflict or interfere with the proper performance of his or her functions as a member of the board.</p>  |
| Medicines and Related Substances Control Act 13 of 2003, section 9(2)                   | 9(2) If a member of the Council or of a committee, or his or her <b>spouse</b> , is in any way directly or indirectly interested in a matter, which is the subject of consideration by the Council or a committee and which may cause a conflict of interests in the performance of his or her duties as a member of the Council or as a member of any such committee, he or she must fully disclose the nature of that interest as soon as is practicable after the commencement of the meeting of the Council or of any such committee at which that matter is a subject of consideration and that member of the Council or of any such committee, may not take part in the consideration of, or vote on, a question relating to that matter. |
| Research, Science and Technology Act 23 of 2004, section 28(1)                          | 28(1) Unless the Commission otherwise decides, a commissioner or a member of the executive committee or of a committee, may not participate in the deliberations or vote on any matter which is the subject of consideration at a meeting if, in relation to such matter, such commissioner or member, or the <b>spouse, parent, child</b> or business partner of such commissioner or member, has any direct or indirect interest, which prevents or is likely to prevent such commissioner or member from performing his or her functions in a fair, unbiased and proper manner.  |

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| Companies Act 28 of 2004, section 19(11)  | 19(11) Where a member of the SAC [Standing Advisory Committee] or a <b>spouse</b> , partner or business associate of the member has a direct or indirect financial interest in a matter which involves the SAC, the member must, at or before the meeting where the matter is to be discussed, advise the SAC of the nature and extent of the financial interest, and thereafter the SAC must determine whether or not the member can participate in discussions relating to that particular matter.  |
| Accreditation Board of Namibia Act 8 of 2005, section 24(5)   | 24(5) For the purposes of this section, a financial interest of a member of the Board or the executive committee or any other committee in an application for accreditation or other matter referred to in subsection (1), includes a financial interest of the <b>spouse, parent, child</b> or business partner of that member in the application for accreditation or other matter.   |
| Standards Act 18 of 2005, section 27(5)   | 27(5) For the purposes of this section, a financial interest of a member of the NSC or the executive committee or any other committee in an application for the granting of a licence or other matter referred to in subsection (1), includes a financial interest of the <b>spouse, parent, child</b> or business partner of that member in that application or other matter.  |
| Electricity Act 4 of 2007, section 9(1)   | <p>9(1) If a member or his or her spouse, or any company, close corporation or partnership of which the member or his or her <b>spouse</b> is a director, shareholder, member or partner, is in any way directly or indirectly interested in a contract entered, or proposed to be entered, into by the Board or a committee, or in any other matter which is the subject of consideration by the Board or committee, and which may cause a conflict of interests in the performance of his or her duties as member, that member must –</p> <ul style="list-style-type: none"> <li>(a) forthwith fully disclose the nature of such interest at the meeting of the Board or committee at which such contract or other matter is the subject of consideration; and</li> <li>(b) withdraw from the meeting so as to enable the remaining members to discuss the matter and determine whether the member is precluded from participating in such meeting by reason of a conflict of interests.</li> </ul> |
| Motor Vehicle Accident Fund Act 10 of 2007, section 18(2)   | <p>18(2) If a member or his or her <b>spouse</b>, or any company, close corporation or partnership of which the member or his or her <b>spouse</b> is a director, shareholder, member or partner, is in any way directly or indirectly interested in a matter which is the subject of consideration by the Board or a committee, and which may cause a conflict of interests in the performance of his or her functions as member, the member must –</p> <ul style="list-style-type: none"> <li>(a) forthwith fully disclose the nature of such interest at the meeting of the Board or committee at which such matter is the subject of consideration; and</li> <li>(b) withdraw from the meeting so as to enable the remaining members to discuss the matter and determine whether the member is precluded from participating in such meeting by reason of a conflict of interests.</li> </ul>  |
| Vocational Education and Training Act 1 of 2008, section 16(1)<br>(The term “partner” here, appearing between spouse and close family member, may refer to a life partner.) | <p>16(1) A member of the Board must –</p> <ul style="list-style-type: none"> <li>(a) disclose to the Board any direct or indirect personal or private business interest that the member or any <b>spouse, partner or close family member</b> may have in any matter before the Board...</li> </ul>  |

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## DISQUALIFICATION, RESPONSIBILITY OR EXEMPTION BY ASSOCIATION

(emphasis added throughout)

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Abuse of  
Dependence-  
Producing Substances  
and Rehabilitation  
Centres Act 41 of  
1971, section 10(1)(c)

10(1)(c)(c) If in any prosecution for an offence under section 2(c) it is proved that the accused was found in possession of a quantity of dangerous dependence-producing drugs which exceeds the quantity of such dependence-producing drugs prescribed in writing by a medical practitioner, dentist or veterinarian during a period of thirty days immediately preceding the date on which such dangerous dependence-producing drugs were found in his possession, for use by the accused or his **spouse or child under the age of eighteen years** or by any animal of which he or his spouse or such child is or was the owner or which is or was in the care of the accused, it shall be presumed that the accused dealt in such drugs, unless the contrary is proved.

Nature Conservation  
Ordinance 4 of 1975,  
section 77(3)

77(1) Subject to any provisions to the contrary in this Ordinance contained, no person shall pick any indigenous plant on land of which he is not the owner or lessee, unless he has the written permission thereto from the owner or lessee of the land.

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(3) The provisions of this section shall not apply to the **parent, spouse or child** of or employee permanently employed by the owner or lessee of land on which indigenous plants are being picked.

Estate Agents Act  
112 of 1976, section  
19(4)

19(4) No right of action shall lie against the board in respect of any loss suffered by –

- (a) the **spouse** of an estate agent by reason of any theft committed by such estate agent; or
- (b) any estate agent by reason of any theft committed –
  - (i) by his partner; or
  - (ii) if such estate agent is a company, by any director of such company; or
  - (iii) if he is a director of a company, by any co-director in such company; or
  - (iv) by any person employed by him as an estate agent.

Combating of Immoral  
Practices Act 21 of  
1980, section 2(2)(g)  
(entire section declared  
unconstitutional by  
*Hendricks & Others v  
Attorney General,  
Namibia, & Others*  
2002 NR 353 (HC))

*With respect to the offence of “keeping of brothel”:*

2(2) The following persons shall for purposes of subsection (1) be deemed to keep a brothel, namely–...

- (g) any person whose **spouse** keeps or lives in or manages or assist in the management of a brothel, unless such person proves that he or she was ignorant thereof or that he or she lives apart from the said spouse and did not receive all the money or any share of the money taken therein.

Legal Practitioners  
Act 15 of 1995,  
section 72(1)(b)

72(1) The fund shall not be liable to pay, nor pay, an amount in respect of loss suffered...

- (b) by the **spouse** of a legal practitioner as a result of theft committed by that legal practitioner;

Arms and Ammunition  
Act 7 of 1996, section  
8(1) and (4)

8(1) Any person other than a person under the age of 18 years or a disqualified person may, with the prior consent of the holder of a licence to possess an arm, whether or not such consent was granted in pursuance of an agreement of lease, and for such period as such holder may permit, have such arm in his or her possession for his or her lawful personal protection or benefit, including the hunting of game or for the purpose of keeping custody of the arm, without holding any licence, provided –

- (a) (i) the permission of the licence holder is contained in a statement in writing signed by him or her and setting forth the period for which permission has been granted and particulars sufficient for identifying the arm; and
- (ii) if such person is not the **spouse** of such holder and the said period exceeds 21 days, the said statement has been endorsed by a person acting under the authority of the Inspector-General...

(4) For the purposes of subsection (1), “**spouse**” includes a person who is, in terms of the traditional laws and customs, a partner in a customary union.

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| Casinos and Gambling Houses Act 32 of 1994, section 15   | <p>15. No casino licence or gambling house licence shall be granted to any person who –</p> <ul style="list-style-type: none"> <li>(a) is under the age of 21 years;</li> <li>(b) is an unrehabilitated insolvent;</li> <li>(c) has at any time during the period of 10 years preceding his or her application served a sentence of imprisonment for a period longer than 12 months for any offence without having been given the option of a fine in respect of such offence unless the Minister upon recommendation by the board, rules that such offence was of a nature which does not imply that he or she is an unsuitable person to hold a licence;</li> <li>(d) has been convicted of an offence under this Act and, within a period of 5 years after that conviction, has again been convicted for an offence under this Act;</li> <li>(e) is an officer;</li> <li>(f) is the <b>spouse, parent or child</b> of any person referred to in paragraph (b), (c), or (d); or</li> <li>(g) is a body corporate or an association of persons of which any director, member or partner is disqualified in terms of paragraph (a), (b), (c), (d), (e) or (f).</li> </ul> |
| Banking Institutions Act 2 of 1998; see definition of “deposit” and “substantial shareholder” in section 1 and sections 20(6) and 36(1)(d) | <p><i>Several provisions of this statute refer to transactions and shareholding by a “close relative” of a person, as being the same as transactions or shareholding by the person in question.</i></p> <p>“close relative”, in relation to a person, means –</p> <ul style="list-style-type: none"> <li>(a) the <b>spouse</b> of such person, or any other person who has a relationship with such person as a <b>spouse in a union in terms of the customary law</b>;</li> <li>(b) such person’s <b>child, step-child, adopted child, brother, sister, step-brother, step-sister, parent or step-parent</b>; or</li> <li>(c) the <b>spouse</b>, or any person who has a relationship as a <b>spouse in a union in terms of the customary law</b>, of <b>any of the persons mentioned in paragraph (b)</b></li> </ul>  |
| Companies Act 28 of 2004, section 147(2)   | <p><i>Regarding disclosure of beneficial interests in securities:</i></p> <p>147(2) A person is deemed to have a beneficial interest in a security if –</p> <ul style="list-style-type: none"> <li>(a) the <b>spouse of the person married in community of property or the minor children of that person</b> have a beneficial interest in that security;</li> </ul>  |
| Anti-Corruption Act 8 of 2003, section 43  | <p>43(1) A public officer commits an offence who, directly or indirectly, corruptly uses his or her office or position in a public body to obtain any gratification, whether for the benefit of himself or herself or any other person.</p> <p>(2) For the purposes of subsection (1), proof that a public officer in a public body has made a decision or taken action in relation to any matter in which the public officer, or any relative or associate of his or hers has an interest, whether directly or indirectly, is, in the absence of evidence to the contrary which raises reasonable doubt, sufficient evidence that the public officer has corruptly used his or her office or position in the public body in order to obtain a gratification.</p> <p>(3) For the purposes of subsection (2) –</p>   |

- (a) “**relative**” includes –
  - (i) a **spouse or fiancé**, including a **partner living with the public officer on a permanent basis as if they were married or with whom the public officer habitually cohabits**;
  - (ii) a **child, including a stepchild or fosterchild**;
  - (iii) a **parent, including a step-parent or fosterparent**;
  - (iv) a **brother or sister of the public officer or of his or her spouse**; or
  - (v) the **spouse of any of the persons mentioned** in subparagraphs (ii), (iii) or (iv); and
- (b) “**associate**” includes –
  - (i) an employee, agent or nominee of the public officer;
  - (ii) a business partner or any company or other corporate body of which the public officer is a director or is in charge or control of its business or affairs, or in which the public officer, alone or together with any nominee of his or her, has or have a controlling interest;
- (iii) a trust controlled and administered by the public officer.

## **6.2.12 Court challenges by cohabiting partners**

There are no reported cases where a cohabitant has challenged the definition of spouse or dependant in a statute to enforce his or her rights to claim a benefit. There was, however, reportedly a challenge to the definition of “spouse” in the rules of a Namibian pension fund which resulted in a settlement before it reached court. This case involved a same-sex couple who had cohabited for 15 years; one partner worked for a Namibian-based mining company whilst the other was responsible for the household chores. The employed cohabitant named his partner as his beneficiary under a company pension fund. When the employed cohabitant died and the surviving partner tried to claim the pension benefits, he was told that he was not a “spouse” as defined in the fund rules and so could not claim the money. The case settled before reaching court, with the surviving partner being given what was due to him under the fund.<sup>114</sup>

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<sup>114</sup> Personal communication to researchers.



# Chapter 7

## CURRENT LAW ON COHABITATION AND CHILDREN

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There is little difference between the legal position of children born inside and outside marriage because of previous law reforms – particularly the Maintenance Act and the Children’s Status Act.

One way in which differences are manifested, however, is that children of unmarried parents are treated similarly to children of divorced parents; no special provision is made for children of cohabiting parents even though their situation is, in many respects, more similar to that of children whose parents are married.

Another problem is that, even though these reforms overrule customary law to the contrary, they are probably not yet sufficiently protecting children in practice.

In the past few years, several legislative and judicial developments have affected the rights of cohabiting parents and their children, with the result that only a few differences between married and unmarried parents remain. Under the new legislation, unmarried parents living separately are treated in the same way as divorced parents, which seems sensible. Unfortunately unmarried *cohabiting* parents are treated in the same way as unmarried parents who are living separately, although the family situation of such cohabiting parents is actually more akin to that of married parents. This makes it difficult for cohabiting parents to share joint rights and responsibilities towards their children.

### 7.1 Maintenance

Marital status makes no difference to maintenance responsibilities for children. All parents have a legal duty to maintain their children in accordance with their financial resources.

The marital status of parents is irrelevant to maintenance responsibilities for children. The **Maintenance Act 9 of 2003** is based on a set of guiding principles which make it clear that all children are to be treated equally, regardless of the marital status of their parents, the order

of their birth or any contrary provisions of customary law. The law provides that both parents of a child are liable to maintain that child regardless of whether the child is born inside or outside marriage, or born of a first, current or subsequent marriage. The mutual duty of all parents and children to maintain each other applies to all persons in Namibia, regardless of whether they are subject to any system of customary law which omits such a duty. Thus, the Maintenance Act explicitly overrules customary law on the issue of child maintenance.

The parental duty to maintain a child includes reasonable provision for food, accommodation, clothing, medical care and education. The other guiding principles are as follows, in all cases:

- (a) *both parents of the child are primarily responsible for the maintenance of that child;*
- (b) *the parents must, in accordance with their respective means, fairly share the duty to maintain their child or children;*
- (c) *the parental duty to maintain one particular child does not rank any higher than the duty to maintain any other child of that parent or any other person;*
- (d) *where a parent has more than one child, all the children are entitled to a fair share of that parent's resources; and*
- (e) *the duty of a parent to maintain a child has priority over all other commitments of the parent except those commitments which are necessary to enable the parent to support himself or herself or any other person in respect of whom the parent has a legal duty to maintain.*<sup>1</sup>

The last remaining distinction between children born inside and outside marriage was addressed by the Children's Status Act 6 of 2006, which states that "*despite anything to the contrary contained in any law, a distinction may not be made between a person born outside marriage and a person born inside marriage in respect of the legal duty to maintain a child or any other person*".<sup>2</sup> This provision was necessary because, although the father of a child born outside of marriage already had a duty to maintain this child, in terms of the common law the duty was not transferable to the father's relatives as it would be if the child had been born inside marriage. This provision places children born outside marriage in the same position as children born inside marriage on this point. It also places children born outside marriage in the same position as children born inside marriage in respect of the reciprocal duty of support which falls upon children (usually after they become adults); the child also has an obligation to support both parents and other members of their immediate families if they need assistance and the child is in a position to provide it.<sup>3</sup>

Children born outside marriage have the same right as children born within marriage to apply for maintenance from the estate of a deceased parent.<sup>4</sup>

<sup>1</sup> Maintenance Act 9 of 2003, sections 3-4.

<sup>2</sup> Children's Status Act 6 of 2006, section 17.

<sup>3</sup> The Children's Status Act makes an exception to the reciprocal duty of maintenance in the case of a child conceived through rape. A rapist has a duty to maintain a child born of the rape, but a person conceived as a result of rape has no legal duty to maintain a parent who was convicted of the rape, nor any legal duty to maintain that parent's relations (section 17(2)).

<sup>4</sup> In *Glazer v Glazer NO 1963 (4) SA 694 (A)*, the Court held that it was "*settled law*" that "*a child is entitled to maintenance out of the estate of the deceased parent*". Steyn CJ stated at 706H-707A that:

*In a number of cases, such as Carlese v Estate de Vries, (1906) 23 S.C. 532, Davis' Tutor v Estate Davis, 1925 WLD 168, In re Estate Visser 1948 (3) SA 1129(C), and Christie NO v Estate Christie and Another, 1956 (3) SA 659 (N), our Courts have held that a child is entitled to maintenance out of the estate of the deceased parent. LUDORF, J, pointed out in the Court below, and it is conceded by counsel for the applicant, that these cases are founded mainly on a mistaken reading of Groenewegen,*

Thus, the position of children born inside and outside of marriage is now completely identical with respect to maintenance.

## 7.2 Parental rights and duties

The Children's Status Act has placed unmarried parents in a situation which is analogous to divorced parents. While this is appropriate for unmarried parents living apart, cohabiting parents are in a situation which is more similar to married parents. The law as it now stands is not very suitable for facilitating co-parenting by cohabiting parents.

The **Children's Status Act 6 of 2006**, which came into force in November 2008,<sup>5</sup> has removed most remaining discrimination against children born outside marriage, but without making any distinction between cohabiting parents and non-cohabiting parents. It places children born outside marriage on a similar footing to children of divorced parents, which fits the typical situation of unmarried parents who live apart from each other but is not as suitable for cohabiting parents.<sup>6</sup>

Where children are born inside marriage, the common law read together with the Married Persons Equality Act 1 of 1996 provides that married parents have joint custody and equal guardianship.<sup>7</sup> However, there are five decisions which require the consent of both parents:

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*De Leg Abr, ad Dig 34.1.15, who there deals with alimenta under contract or legacy and not with maintenance generally. (Cf Prof Beinart, supra, p. 96). I shall assume that, this error notwithstanding, these decisions have passed into settled law.*

Nothing was said in *Glazer* on the issue of whether this entitlement was applicable equally to legitimate and illegitimate children.

However, in *Main NO v Van Tonder NO and Another* [2005] NAHC 42 (9 November 2005), Damaseb JP, at paragraph 20 of the judgement, found *Carlese* to be good authority for the proposition that “[a]t common law...an indigent minor child (legitimate or illegitimate) can claim support from the estate of a deceased parent subject to proof of the need for support”. He went on to say, at paragraph 26, that “[i]t cannot be in the public interest that the offspring of a deceased should be left without support and rely on the community or on charity, while the estate of the deceased parent is possessed of sufficient means to support such child”. Indeed *Main* went further than *Glazer* by holding (at paragraph 27) that the common law also supports “an obligation on a deceased parent’s estate to maintain a major child of a deceased parent, as long as the estate has the means to do so and the child is in need of maintenance” (emphasis added). This extension was made by way of upholding the claimant’s contention that the deceased’s estate was liable to maintain the deceased’s daughter who, though no longer a minor, was mentally disabled and in need of maintenance.

<sup>5</sup> Government Notice No 266 of 2008, Commencement of the Children’s Status Act, 2006 (Act No 6 of 2006), Government Gazette 4154.

<sup>6</sup> Presumptions of paternity apply both where a putative mother and father were married or cohabiting at the approximate time of conception. Children’s Status Act 6 of 2006, section 9(1)(a)-(b).

<sup>7</sup> According to June D Sinclair assisted by Jacqueline Heaton, *The Law of Marriage, Volume 1*, Kenwyn: Juta & Co, Ltd, 1996 at 112: “[I]n our law the parental power is made up of two distinct elements – guardianship and custody. The common law provides that the natural guardian of a child born in wedlock (a marital child, a legitimate child) is its father, while that of a child born out of wedlock (an extra-marital child, an illegitimate child) is its mother. A guardian is empowered to make decisions regarding both the child’s property and its person. A custodian has control over the day to day life of the child...At common law a mother of a legitimate child was said to share the parental power with the child’s father, ‘although the rights of the father [were] superior to those of the mother’. For the mother, sharing was confined to custody and the need for her consent to be obtained for the adoption of the child or its marriage while it was a minor.” (footnotes omitted). Married parents now have equal guardianship by virtue of section 14(1) of the Children’s Status Act 6 of 2006, whilst the common law continues to govern custody by married parents.

- (a) the contracting of a marriage by the minor child;
- (b) the adoption of the minor child;
- (c) the removal of the minor child from Namibia by either of the parents or any other person;
- (d) the application for the inclusion of the name of the minor child in the passport issued or to be issued to any one of the parents;
- (e) the alienation or encumbrance of immovable property or any right to immovable property vesting in the minor child.<sup>8</sup>

When married parents divorce, it is common for one parent to be granted sole custody, with the other parent usually retaining guardianship and access rights.<sup>9</sup>

Prior to the enactment of the Children's Status Act, the relationship between children born outside of marriage and their parents was governed by the common law. Mothers of such children had sole custody and guardianship, while fathers had no clear rights. Furthermore, children born outside marriage could not inherit from their fathers without a written will specifically naming them.

In terms of the Children's Status Act, one parent must be the primary custodian of a child born outside of marriage; if the parents cannot agree on who this will be, then the court must decide. The guiding principle is the best interests of the child.<sup>10</sup> The custodian is also the guardian.<sup>11</sup> However, the guardian must consult the other parent on two major decisions – giving the child up for adoption or taking the child out of Namibia for longer than one year.<sup>12</sup>

The statute is silent on what happens if the parents have made no agreement on custody and guardianship, and yet no one approaches a court to request a decision in the matter. This means that the surviving common law position must fill the gap in such a case.

The Children's Status Act caters for the constitutional principle that all children have a right to know and be cared for by both of their parents, subject to the legislation enacted in their best interests,<sup>13</sup> by providing that children born outside of marriage have a right to maintain contact with both parents. The parent without custody has an automatic right of reasonable access to the child unless a court decides that such access would be contrary to the child's best interests, and there are a range of safeguards to ensure that this right is not abused.<sup>14</sup>

The Act also provides simple and inexpensive procedures for approaching a children's court to resolve disputes between unmarried parents about custody, guardianship and access.<sup>15</sup>

These provisions apply to all children born outside marriage, regardless of any customary law to the contrary.<sup>16</sup>

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<sup>8</sup> Children's Status Act 6 of 2006, section 14(2).

<sup>9</sup> Legal Assistance Centre (LAC), *Proposals for Divorce Law Reform in Namibia*, Windhoek: LAC, 2000, at 29.

<sup>10</sup> Children's Status Act 6 of 2006, section 11.

<sup>11</sup> Children's Status Act 6 of 2006, section 13(1).

<sup>12</sup> Children's Status Act 6 of 2006, section 13(7).

<sup>13</sup> Namibian Constitution, Article 15(1).

<sup>14</sup> Children's Status Act 6 of 2006, section 14. Perpetrators of rape which results in pregnancy have no rights in terms of access, custody or guardianship. Children's Status Act 6 of 2006, section 15.

<sup>15</sup> See Children's Status Act 6 of 2006, sections 12-14.

<sup>16</sup> This is stated explicitly only in section 11(4), which says that the principles on custody apply "[d]espite... anything to the contrary in any law". But the provisions on guardianship and access flow from those on custody, so the entire framework set out in the Act would appear to apply to all children born outside marriage.

An early draft of the Children's Status Bill would have given cohabiting partners the option of making a written agreement that would put them in the same position as married partners for the duration of the cohabitation. As equal guardians, they would have been able to make most legal decisions on behalf of the child independently of the other parent; as joint custodians, they would both have been responsible for the day-to-day care of the child. However, the draft provided that any such agreement would have to be examined by a court to see if it protected the best interests of the child before it could become legally binding. If the cohabitation ended, there would be no "divorce" proceeding to make decisions regarding the children, so the situation would automatically revert to that of other single parents, unless a court order stipulated otherwise.<sup>17</sup> This provision would have essentially recognised that some cohabitation relationships are very similar to marriage, and should therefore attract some of the rights and responsibilities of marriage. On the other hand, by requiring that the written agreement be examined by a court to gain legal force, the proposed provision also acknowledged that the bonds of cohabitation are weaker than those of marriage.<sup>18</sup>

The provisions that would have provided the option of co-parenting to cohabitants were deleted without explanation in the version of the bill that was presented to Parliament. As passed, the Act makes no special arrangements for cohabiting couples who wish to cooperate in parenting their children. Instead, cohabitants are simply treated in the same way as all other unmarried parents.<sup>19</sup>

Whilst the statutory scheme makes sense for unmarried parents who are not sharing a common household, cohabiting parents could argue that it constitutes discrimination on the basis of their social status since they are not being treated in similar fashion with respect to their children as similarly-situated married parents. They could also argue that the failure to make laws appropriate to their family situation infringes Article 14(3) of the Constitution, which states that "*the family*" is entitled to "*protection by society and the State*", and Article 15(1) which states that children shall "*have ...as far as possible the right to know and be cared for by their parents*".

A **Child Care and Protection Bill** currently being prepared for presentation to Parliament contains provisions which could have implications for cohabiting couples. A parenting plan would be a written agreement between co-holders of parental rights and responsibilities, confirmed by two witnesses, about matters such as

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<sup>17</sup> "Submissions to the Committee on Human Resources, Social and Community Development on the Children's Status Bill", Legal Assistance Centre joined by 15 other organisations and individuals, May 2004, at 21.

<sup>18</sup> Id at 26.

<sup>19</sup> Id at 21.

The Legal Assistance Centre recommended the following provision on cohabitation, but was not successful in lobbying for its inclusion:

- (a) *The parents of a child born outside of marriage who are cohabiting may make a written agreement between themselves before or after the birth of the child which establishes joint custody between themselves for the duration of their cohabitation, and may petition the children's court to make this agreement an order of court if the court is of the opinion that it will be in the best interests of the child.*
- (b) *Where the parents are sharing a common home, there shall be a rebuttable presumption for the purposes of subsection (a) that joint custody is in the best interests of the child.*
- (c) *If the parents of the child cease to cohabit, sole custody of the child shall be determined in accordance with this section, as if there had been no agreement between the parents, unless a competent court directs otherwise.*

Legal Assistance Centre, Technical Memorandum on the Children's Status Bill, February 2004 at 18.



- where and with whom the child will live
- maintenance
- contact with various persons
- schooling and religious upbringing
- medical care, medical expenses and medical aid coverage.<sup>20</sup>

In terms of the draft bill, such plans could not actually *transfer* parental rights and duties, but they could provide details about the exercise and delegation of such rights and duties.<sup>21</sup> They are envisaged as voluntary agreements which are intended to help prevent disputes, although provision is made for getting assistance to mediate a plan where there is disagreement. Parenting plans could be registered with the children's court, or made into a court order – optional steps which would give the plans increased legal power. Disputes concerning registered plans or plans which have been made into court orders could be taken to a children's court for resolution. The idea is that parenting plans between co-holders of parental rights and responsibility

<sup>20</sup> It is doubtful that agreements between parents about the exercise of their parental rights and responsibilities would be enforceable in court under the common law in the absence of these legislative provisions. The South African Law Reform Commission cited this as a key reason why legislative reform was needed in South Africa on this point:

*From the comments and submissions received it would appear that the majority view was that parents and others sharing parental responsibility should have contractual autonomy to regulate the manner in which they plan to exercise their parental responsibilities....*

*Given that at common law 'private' contractual agreements between parents regarding the custody, access to or guardianship of their children are unenforceable, unless made an order of court, and as it appears that such private agreements are in any event being made, it seems clear that parenting plans must receive statutory recognition in the new children's statute.*

South African Law Commission (as it was then known), *Discussion Paper 103, Project 110: Review of the Child Care Act*, 2002, Chapter 8 at section 8.6.4 (footnotes and boldface type omitted).

Under the common law, a parent cannot transfer or delegate parental powers to the other parent or a third party. *Id* at section 8.6.1, citing *Van der Westhuizen v Van Wyk* 1952 (2) SA 119 (GW), *Sibiya v Commissioner for Child Welfare (Bantu)*, Johannesburg 1967 (4) SA 347 (T) at 348H, *Ex parte Van Dam* 1973 (3) SA 182 (W) at 185C-D, *Girdwood v Girdwood* 1995 (4) SA 698 (C) at 708-709, *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 167C, *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (E) at 155.

<sup>21</sup> The South African Law Commission emphasised the need for flexibility in respect of such plans:

*It should be remembered that parenting plans... form part of the overall legislative policy to encourage parents to settle rather than litigate over child issues. If this is the underlying premise of introducing parenting plans in South Africa, and if the concept that parental relationships should survive divorce or separation and should in no way depend on a continued marital or other relationship between parents is accepted... then it seems clear that parents should be given a much freedom as possible to devise and draw up a parenting plan that best suits the needs of their child. Indeed, the Commission believes parents should be trusted to act in the best interests of their children and should therefore be encouraged to agree about matters concerning their child rather than to seek court orders...*

*... it would seem more appropriate to stay away from a standardised formal system where all parenting plans must be scrutinised beforehand by the courts or some other body.*

*The Commission recommends that parents must be given the option to register their parenting plans with the court (or Family Advocate) should they wish to do so. In so doing, the court may make the parenting plan an order of court. It is in this context that the court should scrutinise the parenting plan to ensure that it is in the best interests of the child concerned.<sup>21</sup> In the majority of cases, however, the Commission believes parents should simply be encouraged to prepare parenting plans, where appropriate in consultation with the child involved, and to agree about matters concerning the child rather than to seek court orders. The Commission therefore does not recommend that all parenting plans be lodged or registered with some authority or court, or that all such plans be scrutinised by such authority or court.*

South African Law Commission (as it was then known), *Discussion Paper 103, Project 110: Review of the Child Care Act*, 2002, Chapter 8 at section 8.6.4 (footnotes and boldface type omitted).

could facilitate the smoother exercise of those rights – in much the same way that some divorce orders specify visiting arrangements to prevent disputes.<sup>22</sup>

Although parenting plans would be available to all parents, they could be particularly useful for cohabitants and former cohabitants who wish to designate the role each parent will play in the child's upbringing.

## 7.3 Inheritance

**Children born inside and outside marriage are treated identically with respect to inheritance in the eyes of the law. The Children's Status Act removed discrimination in respect of children born outside marriage for purposes of inheritance. This principle overrules any customary law to the contrary, but this is perhaps not yet well-known and observed in practice.**

The **Children's Status Act 6 of 2006** also provides that all children must be treated equally with respect to inheritance regardless of any contrary rule in any statute, common law or customary law. This means that children born outside of marriage can inherit from both parents without a will, and general terms like "children" or "issue" in wills will be deemed to include children born outside of marriage if there is no indication of a contrary intention.<sup>23</sup>

This statutory change must be considered in combination with the case of *Frans v Paschke & Three Others*,<sup>24</sup> where the High Court held that children born outside of marriage have a right to inherit intestate from their unmarried parents. The Court held that the previous common law position excluding such children from instate succession is unconstitutional because it discriminates on the grounds of social status. Accordingly, it was therefore invalidated when the Namibian Constitution came into force on 21 March 1990.

In fact, by the time that the court decided the *Frans* case, Parliament had already overruled the common law rule by passing the Children's Status Act, but although the Act had been passed by Parliament, it had not at that stage come into force.<sup>25</sup> Furthermore, although the Children's Status Act is generally retroactive,<sup>26</sup> the statutory provision on inheritance by children born outside marriage applies only "*to estates in which the deceased person died after the coming*

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<sup>22</sup> Ministry of Gender Equality and Child Welfare, Legal Assistance Centre and UNICEF, "Draft Child Care and Protection Act – Issues for Public Debate: Parenting Plans", 2009.

<sup>23</sup> Children's Status Act 6 of 2006, section 16. An exception is again made for children born of rape: "With respect to rape which results in the conception of a person born outside marriage, the person who committed the crime has no right to inherit intestate from the person born as a result of the rape, but the person born as a result of the rape may inherit intestate from the perpetrator, and will be deemed to be included in the terms "children" or "issue" or any similar term used in a testamentary disposition." Section 16(5).

<sup>24</sup> 2007 (2) NR 520 (HC).

<sup>25</sup> The *Frans* case was heard in 11 July 2007, while the Children's Status Act did not come into force until 3 November 2008. Government Notice No 266 of 2008, "Commencement of the Children's Status Act, 2006 (Act No 6 of 2006)", Government Gazette 4154.

<sup>26</sup> Section 26(1) of the Children's Status Act 6 of 2006 states that the Act "*applies to all children or persons, where applicable, and to all matters relating to children or persons, where applicable, irrespective of whether the children or persons, where applicable, were born or the matters arose before or after the coming into operation of the Act*" (emphasis added).

into operation of this Act”.<sup>27</sup> The practical effect of the *Frans* judgment is to nullify this limiting provision by changing the underlying common law.<sup>28</sup>

*Frans* is also an important case because it adds to the dialogue surrounding the rights of children born outside of marriage. It protects the rights of children who were previously discriminated against by law and explicitly acknowledges that “*loving partners and parents, have the right to live together as a family with their children without being married*”.<sup>29</sup>

### CHILDREN BORN OUTSIDE MARRIAGE UNDER CUSTOMARY LAW

Although the Maintenance Act and Children’s Status Act explicitly overrule customary laws which make any distinction between children born inside and outside marriage for the purposes of maintenance, parental rights and responsibilities and inheritance, it is far from clear that this has been sufficient to protect children whose parents follow customary law against discrimination. As the field research makes clear,<sup>30</sup> many people determine family issues under customary law, without reference to the general law of Namibia. Furthermore, the Children’s Status Act is not yet generally well-known or much used.<sup>31</sup> Thus, it should not be assumed that children of cohabiting parents are fully protected by the recent law reforms as yet. This will require continuing community education.

## 7.5 Presumptions of paternity

The law on presumptions of paternity already takes the relevance of cohabitation into account.

Presumptions of paternity apply both where a putative mother and father were married or cohabiting at the approximate time of conception, by virtue of the **Children’s Status Act 6 of 2006**.<sup>32</sup> The Criminal Procedure Act 51 of 1977 contains a specific provision relating to evidence of spouses regarding their sexual relations with each other for the purpose to rebutting the presumption that a child to whom a married woman has given birth is the offspring of her husband; the provision is presumably necessary because of the marital privilege.<sup>33</sup> If the

<sup>27</sup> Children’s Status Act 6 of 2006, section 26(2).

<sup>28</sup> In practice, the *Frans* case will be relevant only to those persons born outside marriage whose father died intestate between 21 March 1990 and 3 November 2008, and whose claim has not been prescribed – since the Children’s Status Act would in any event have served to protect the intestate inheritance rights of children born outside marriage after 3 November 2008. The judgement would of course also be relevant in the event of the Act or its provisions on inheritance being repealed or declared invalid or unconstitutional.

<sup>29</sup> At paragraph 17(ii).

<sup>30</sup> Discussed in Chapter 10.

<sup>31</sup> Feedback from social workers and magistrates during consultations around the draft Child Care and Protection Bill.

<sup>32</sup> Children’s Status Act 6 of 2006, section 9(1)(a)-(b).

<sup>33</sup> Criminal Procedure Act 51 of 1977, section 256; Criminal Procedure Act 25 of 2004, section 256.

marital privilege were extended to cohabiting couples, then this provision would have to be accordingly extended.<sup>34</sup>

## 7.6 Birth registration

The law on birth registration provides generally-appropriate avenues to register the birth of children born inside and outside marriage which are probably adequate for cohabiting parents.

The **Births, Marriages and Deaths Registration Act 81 of 1963** provides generally appropriate birth registration procedures for children born inside and outside marriage.

Where the parents are married, both will be registered as the child's parents in the birth certificate if either parent presents a marriage certificate.<sup>35</sup> Where the parents are unmarried, the mother can register the child's birth in her name without any cooperation from the father (and without providing any information about his identity), whilst both mother and father can be listed as parents on the birth certificate if both consent to this.<sup>36</sup>

No changes to this system would appear to be needed to cater for cohabiting parents in particular, although this law needs a procedure whereby unmarried fathers who can prove paternity can arrange to be registered as a child's father even if the mother withholds consent. in order to conform with the principle of gender equality.

## 7.7 Adoption

Unmarried persons cannot adopt a child jointly even if they are cohabitating. In practice, such couples utilise adoption by one partner as a single parent, but this leaves the other partner without any legal rights over the adopted child.

The current provisions on adoption in the **Children's Act 33 of 1960** allow only husbands and wives to adopt a child jointly, but also allow single persons to adopt.<sup>37</sup> When unmarried couples want to adopt, one of them must apply for the adoption as a single person.<sup>38</sup> This approach leaves the partner who is not an adoptive parent with complete insecurity regarding his or her association with the child.

<sup>34</sup> See the discussion of this above at pages 116-119. See also the related provision in the Children's Status Act 6 of 2006, in the section dealing with presumptions of paternity: "*The mother or putative mother and the father or putative father of a person whose parentage is in question are competent and compellable witnesses in any proceedings in which the issue of parentage is raised, but nothing in this section is to be construed as compelling a person to testify against his or her spouse.*"(section 8(3)).

<sup>35</sup> Information from Ministry of Home Affairs and Immigration, 2010.

<sup>36</sup> Births, Marriages and Deaths Registration Act 81 of 1963, section 10.

<sup>37</sup> Children's Act 33 of 1960, section 70(1). References to husbands, wives, spouses and related terms include marriages under customary law. Id, section 82A. The same approach to adoption is taken by the draft Child Care and Protection Bill which is under discussion at the time of writing.

<sup>38</sup> Personal communications with social workers.

One argument against allowing cohabiting couples to adopt is that such relationships may be less committed than marriages, and therefore less likely to last long-term. But the counterargument is that social workers could assess the stability of the relationship as they assess the general fitness of the applicants to adopt.

Since the Children's Status Act 6 of 2006 has introduced accessible procedures for resolving disputes about custody, guardianship and access with respect to children born outside marriage, these procedures would seem adequate to protect children adopted jointly by cohabiting partners. Therefore, it would make sense to allow partners in long-term, stable cohabiting relationships to adopt children jointly. This would be of particular benefit to same-sex couples who wish to adopt.

On the flip side of the coin, the **Children's Status Act 6 of 2006** now provides that both parents of a child must consent to that child's adoption, regardless of whether or not they are married – with some exceptions to prevent uninvolved parents from blocking adoptions which would be in the child's best interests.<sup>39</sup> Thus, cohabiting parents who have children are sufficiently protected in this regard.

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<sup>39</sup> Children's Status Act 6 of 2006, section 13(7)-(9). The draft Child Care and Protection Bill under discussion at the time of writing is expected to streamline the provisions on exceptions, but will preserve the basic principle that both parents must consent to a child's adoption.



# Chapter 8

## COHABITATION AND CUSTOMARY MARRIAGE

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In contexts where a customary marriage is not recognised by law as a “marriage”, a law on cohabitation might usefully apply to such relationships – at least until such time as the proposed law reform recognising customary marriages for all purposes is in place.

Historically, in both South Africa and Namibia, neither the legislature nor the courts gave full recognition to customary marriages.<sup>1</sup> The key basis for this distinction was the Christian nature of civil marriage, which led to its definition as a monogamous institution – “the voluntary union for life of one man and one woman to the exclusion of all others”.<sup>2</sup> The term “*customary union*” was used in laws and other official contexts to differentiate unrecognised customary marriages from civil marriages.

In Namibia, the Constitution fails to define marriage overall, although it treats customary marriages in the same manner as civil marriages for some purposes. For example, Article 4(3)(b), which sets forth the qualifications for obtaining Namibian citizenship by marriage, states that “*a marriage by customary law shall be deemed to be a marriage*” for this purpose, and Article 12(1)(f) provides that spouses shall not be forced to give testimony against their respective spouses, “*who shall include partners in a marriage by customary law*”.

In both Namibia and South Africa, individual statutes passed both before and after the advent of new constitutional regimes have recognised customary marriages as marriages for specific purposes.<sup>3</sup> For example, some of the provisions of the Married Persons Equality Act 1 of 1996

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<sup>1</sup> TW Bennett, *Application of Customary Law in Southern Africa*, Cape Town: Juta, 1985 at 138, 172-173. According to the South African Law Reform Commission, “so far as the common law of South Africa is concerned, customary unions are not deemed valid marriages. While they have recognition in certain statutes for special purposes, they had no general currency in the legal system.” [footnote omitted]. South African Law Commission (SALC), *Project 90: The Harmonisation of the Common Law and the Indigenous Law, Discussion Paper 74: Customary Marriages*, Pretoria: SALC, 1997 at 43, available at <[www.justice.gov.za/salrc/Dpapers/Dp74\\_Prj90\\_Cstmar\\_1998.Pdf](http://www.justice.gov.za/salrc/Dpapers/Dp74_Prj90_Cstmar_1998.Pdf)>, last accessed 30 November 2010. See also South African Law Commission (SALC), *Issue Paper 3, Project 90: Harmonisation of the Common Law And The Indigenous Law (Customary Marriages)*, Pretoria: SALC, 1996 at ix, available at <[www.justice.gov.za/salrc/ipapers/ip03\\_prj90\\_1997.pdf](http://www.justice.gov.za/salrc/ipapers/ip03_prj90_1997.pdf)>, last accessed 30 November 2010.

<sup>2</sup> Id at 137-138, citing the “most quoted definition” of civil marriage from Lord Penzance in *Hyde v Hyde & Another* (1866) LR 1 P & D 130 at 133, echoed in *Ebrahim v Essop* 1905 TS 59 at 61.

<sup>3</sup> South African examples are given in TW Bennett, *Application of Customary Law in Southern Africa*, Cape Town: Juta, 1985 at 173, note 256 and in South African Law Commission (SALC), *Project 90: The Harmonisation of the Common Law and the Indigenous Law, Discussion Paper 74: Customary Marriages*, Pretoria: SALC, 1997 at 43,

are made applicable to “*marriages by customary law*”.<sup>4</sup> The Children’s Status Act 6 of 2006 defines “*marriage*” very broadly to include “*a marriage in terms of any law of Namibia and includes a marriage recognised as such in terms of any tradition, custom or religion of Namibia and any marriage in terms of the law of any country, other than Namibia, which marriage is recognised as a marriage by the laws of Namibia*”.<sup>5</sup>

In South Africa, the Recognition of Customary Marriages Act 120 of 1998 gave full recognition to customary marriages “for all purposes”.<sup>6</sup> In Namibia, the Law Reform and Development Commission has proposed a law which would similarly give customary marriages full legal recognition, but this proposal has not yet moved forward.<sup>7</sup> The proposed bill would include the following provision:

***Recognition of customary law marriages***

2. (1) *A customary law marriage is for all purposes in law regarded as a valid marriage and –*

- (a) *any reference to “marriage” in any law is construed so as to include a customary law marriage unless the customary law nature of the marriage has the effect that the provision concerned is clearly inappropriate for a customary law marriage;*
- (b) *any reference in any agreement (including any insurance policy or the rules of a pension fund) to a marriage is construed to include a reference to a customary law marriage, unless it is clearly demonstrated that the parties intended to exclude a customary law marriage from the agreement in question.*

(2) *The provisions of this section apply to a law or agreement that exists at the time of the commencement of this Act as well as to a law that is made or an agreement that is concluded after the commencement of this Act.*<sup>8</sup>

Namibia lacks jurisprudence on the treatment of customary marriages in areas of law where they are not yet fully recognised as marriages, so it is necessary to look to South African jurisprudence on this point to see if there are any lessons which might be applicable to informal cohabitation.

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note 4, available at <[www.Justice.Gov.Za/Salrc/Dpapers/Dp74\\_Prj90\\_Cstmar\\_1998.Pdf](http://www.Justice.Gov.Za/Salrc/Dpapers/Dp74_Prj90_Cstmar_1998.Pdf)>, last accessed 30 November 2010.

For Namibian examples, see Legal Assistance Centre (LAC), *Proposals for Law Reform on the Recognition of Customary Marriages*, Windhoek: LAC, 1999, at 47-ff.

<sup>4</sup> Married Persons Equality Act 1 of 1996, section 16. For other examples, see Legal Assistance Centre (LAC), *Proposals for Law Reform on the Recognition of Customary Marriages*, Windhoek: LAC, 1999 at 47-ff.

<sup>5</sup> Children’s Status Act 6 of 2006, section 1.

<sup>6</sup> Section 2 of the South African Act reads as follows:

- (1) *A marriage which is a valid marriage at customary law and existing at the commencement this Act is for all purposes recognized as a marriage.*
- (2) *A customary marriage entered into after the commencement of this Act which complies with the requirements of this Act, is for all purposes recognised as a marriage.*
- (3) *If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.*
- (4) *If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.*

<sup>7</sup> Law Reform and Development Commission (LRDC), *Report on Customary Law Marriages* (LRDC 12), Windhoek: LRDC, 2004.

<sup>8</sup> Id, Annexure B at 2.

Generally, the limited recognition of customary marriages in South Africa sometimes led to severe hardship in that children were not regarded as legitimate and that wives of customary marriages were not given the same status as wives from civil marriages in matters of intestate succession and maintenance.<sup>9</sup> Furthermore, historically, the South African courts did not afford legal validity to customary unions in the context of persons attempting to claim damages from third parties who were responsible for the death of their customary law spouses in road traffic accidents.<sup>10</sup> This problem was addressed in South Africa by the Black Laws Amendment Act 76 of 1963, which recognised customary unions for the purposes of claims for “*damages for loss of support from any person who unlawfully causes the death of the other partner*”. Even so, the marriage had to be proved by a certificate issued by a commissioner, a technical requirement that frustrated many otherwise unassailable claims. There appears to have been no similar statutory remedy in Namibia, although the Motor Vehicle Accidents Fund Act 10 of 2007 explicitly makes provision for spouses in customary law unions and the children of such unions.<sup>11</sup>

Many of the distinctions between ‘civil marriage’ and ‘customary union’ not yet rectified by statute would probably be unconstitutional in Namibia today.

However, one area of ongoing concern could still be the status of partners to a customary union which exists simultaneously with a civil marriage. Historically, a civil marriage to one spouse invalidated a pre-existing customary marriage to another spouse and also made a subsequent customary marriage to another spouse invalid.<sup>12</sup> In South Africa, this problem was addressed legislatively in 1988, by an amendment which prevented civil marriages from automatically terminating customary unions.<sup>13</sup> This amendment has since been replaced by the Recognition of Customary Marriages Act which prohibits spouses in a customary marriage from entering a civil marriage with another person<sup>14</sup>, and prohibits spouses in a civil marriage from entering a customary marriage with another person<sup>15</sup> – but without giving priority to one form of marriage over the other on principle. Although we have not located any case law on the position

<sup>9</sup> See, for example, TW Bennett, *Customary Law in South Africa*, Lansdowne: Juta, 2004 at 308, note 109. citing *Mtyelo a/b Sibango v Qotole* 4 NAC 39 (1920), *Ngqovu v Mciza* 4 NAC 42 (1920) and *Ledwaba* 1952 NAC 398 (NE).

<sup>10</sup> See *Seedat’s Executors v The Master (Natal)* 1917 AD 302 which stated that “no country is under an obligation on grounds of international comity to recognize a legal relation which is repugnant to the moral principles of its people. Polygamy vitally affects the nature of the most important relationship into which human beings can enter. It is reprobated by the majority of civilized peoples, on grounds of morality and religion...” (at 307); *Mokwena v Laub* 1943 (2) PH K64 (W), which emphasised the potentially polygamous nature of customary marriage; *Zulu and Another v Minister of Justice and Another* 1956 (2) SA 128 (N); *Santam v Fando* (1960) (2) SA 467 (A).

<sup>11</sup> Motor Vehicle Accidents Fund Act 10 of 2007, section 1.

<sup>12</sup> See TW Bennett, *Application of Customary Law in Southern Africa*, Cape Town: Juta, 1985 at 172-ff. This continued to be the case in South Africa despite the requirement of the original section 22 of the South African Black Administration Act 38 of 1927 that the husband provide a declaration of the property allotted to the customary law wife, and requiring that the civil marriage be out of community of property – mirrored in Namibia by section 17 of the Native Administration Proclamation 15 of 1928. See *Nkambula v Linda* 1951 (1) SA 377 (A), where a civil marriage by a man who was party to a subsisting customary marriage was treated as being equivalent to desertion of the customary law wife, and *Makholiso v Makholiso* 1997 (4) SA 509 (TkSC), which states: “A civil marriage contracted by a partner to an already subsisting customary union had the effect of automatically dissolving that customary union.” (citing *Seymour’s Customary Law in Southern Africa*, 5<sup>th</sup> edition at 181 and 253, and referring to the common law in force prior to the Transkei statute which governed the case at hand). The first customary law wife in such scenarios has been termed the “discarded wife”. See SALRC at paragraph 2.2.27, note 54 and Bennett at 173.

<sup>13</sup> Matrimonial Property Law Amendment Act 3 of 1988, section 1.

<sup>14</sup> Section 3(2).

<sup>15</sup> Section 10(4).

of simultaneous civil and customary marriages in Namibia, it would seem that the common law rule which gives precedence to the civil marriage remains in place – meaning that in such a situation the customary law spouses may be seen as being in a putative marriage or a cohabitation relationship.

## CASE STUDY

Client was married under Herero customary law in 2003. No children were born of the marriage. She found out in the same year that her husband was already married under civil law since the 1980s. He never informed her of his marital status before they got married under customary law. She recently tested HIV positive and her husband no longer wants to be with her as he fears that she might infect him; she claims that she does not know her husband's HIV status and that she has had a sexual relationship with him alone. She was employed before she got married, but after she got married she devoted her time and energy to the management of the couple's household. She doesn't own any property and relies entirely on her husband for maintenance. Since the pre-existing marriage may render the customary marriage invalid, her rights are not clear.

information from client of Legal Assistance Centre, 2006

Another area of ongoing concern would be where parties who intended to enter into a customary marriage cannot claim the full benefits of marriage because of some fault in the customary marriage procedure – such as incomplete payment of *lobola* or some other flaw in the customary rituals<sup>16</sup> – although it is possible that the principles of putative marriage discussed above might apply in such a case.<sup>17</sup>

However, until such time as customary marriages are given full legal recognition, via law reform or constitutional jurisprudence, it is conceivable that the law pertaining to cohabitation could have some applicability to customary marriage in a context where such marriages are not fully recognised.

<sup>16</sup> See, for example, the arguments put forward for the invalidity of a customary marriage in *Mabena v Letsoalo* 1998 (2) SA 1068 (T), where the Court found that the marriage was valid. See also *Road Accident Fund v Mongalonkabinde v Road Accident Fund* 2003 (3) SA 119 (SCA); *Fanti v Boto and Others* 2008 (5) SA 405 (C); and *Ndlovu v Mokoena and Others* (2973/09) [2009] ZAGPPHC 29 (20 April 2009).

<sup>17</sup> See pages 82-86.

# Chapter 9

## COHABITATION AND UNRECOGNISED RELIGIOUS MARRIAGES

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Marriages conducted in terms of religions which allow polygamy may not be recognised as marriages for all legal purposes, meaning that such couples may be treated as cohabiting partners in some contexts.

Historically, some religious marriages – such as Muslim and Hindu marriages – have not been recognised as “marriages” in the eyes of the law because they were potentially polygamous or because they were performed by religious officials who were not registered as marriage officers under the Marriage Act 25 of 1961.

It is possible for persons who solemnise Christian, Jewish, Muslim, Hindu and some other marriages to be registered as marriage officers in terms of the Marriage Act:

*The Minister and any officer in the public service authorized thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.*<sup>1</sup>

However, problems arise where religious marriages are not concluded in terms of the Marriage Act, because the marriage does not satisfy all the criteria for a civil marriage (such as being polygamous) or because the person officiating at the marriage has not been designated as marriage officer.

The position of marriages concluded under religions other than Christianity has already been addressed by statute in some specific contexts. For example, the Pension Funds Act defines “spouse” to include “a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion”.<sup>2</sup> Similarly, the definition of “domestic relationships” in the Combating of Domestic Violence Act includes

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<sup>1</sup> Marriage Act 25 of 1961, section 3(1).

<sup>2</sup> Pension Funds Act 24 of 1956, section 1(b)(ii).



“a marriage according to any law, custom or religion”<sup>3</sup> and the Children’s Status Act defines “marriage” to include “a marriage recognised as such in terms of any tradition, custom or religion of Namibia”.<sup>4</sup>

We have not located any Namibian case law on the recognition of religious marriages, but Muslim and Hindu marriages have been addressed by a number of South African cases.

This is relevant to the topic of cohabitation because, as in the case of customary marriage, parties to an unrecognised religious marriage may find themselves in the same position as unmarried cohabitants for some legal purposes.

## 9.1 Muslim marriages

In South Africa, Muslim marriages are increasingly being recognised as marriages for specific purposes such as the right to spousal maintenance and intestate succession – even where such marriages are polygamous. These cases show how principles of non-discrimination can lead to the acknowledgement of a variety of family relationships for the purpose of protecting vulnerable parties to such relationships.

These cases are also relevant because the fact that monogamous Muslim couples chose not to enter into civil marriage has not been viewed as a bar to extending certain legal protections to them – demonstrating legal reasoning which can similarly be applied to opposite-sex cohabiting couples who have chosen not to marry.

In recent years, the South African courts have recognised the legality of Islamic marriages for several specific purposes such as maintenance and intestate inheritance – even in some instances where the marriages were polygamous.<sup>5</sup>

Before South Africa’s new constitutional order was in place, Islamic marriages were not afforded much recognition by the courts. Legal hardships for Muslim spouses date back to 1913, when the Court held in *Esop v Union Government (Minister of the Interior)*<sup>6</sup> that Muslim marriages performed by imams not registered as marriage officers could not be legally recognised as marriages, because of their polygamous nature and their ease of dissolution.<sup>7</sup>

Cases such as *Izmail v Izmail*<sup>8</sup> continued to assert that marriages conducted under Islamic rites could not enjoy the same status as civil law marriages because Islamic unions were “*potentially polygamous*” (even when the marriage in question was in fact monogamous). Recognising such marriages was therefore considered to be contrary to public policy. The situation prevailing

<sup>3</sup> Combating of Domestic Violence Act 4 of 2003, section 3(1)(a).

<sup>4</sup> Children’s Status Act 6 of 2006, section 1.

<sup>5</sup> See Elsje Bonthuys, “The South African Bill of Rights and the Development of Family Law”, 119 (4) *SALJ* 748 (2002) at 761-763; Christa Rautenbach, “Muslim Marriages in South Africa”, 7 (1) *Griffin’s View* (2006), available at <[www.rechten.vu.nl/en/Images/7-1 - Muslim marriages in South Africa\\_tcm23-46101.pdf](http://www.rechten.vu.nl/en/Images/7-1 - Muslim marriages in South Africa_tcm23-46101.pdf)>, last accessed 30 November 2010.

<sup>6</sup> 1913 CPD 133.

<sup>7</sup> Id at 135. See Lawrence Schäfer, “Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships”, 123(4) *SALJ* 626 at 637.

<sup>8</sup> 1983 (1) SA 1006 (A).

until recently was summed up in the 1997 case of *Fraser v The Children's Court, Pretoria North*<sup>9</sup> where it was noted (in dicta) that Islamic marriages would not be recognised for the purposes of legislation on adoption which required the consent of married but not unmarried fathers:

*Unions which have been solemnised in terms of the tenets of the Islamic faith for example are not recognised in our law because such a system permits polygamy in marriage. It matters not that the actual union is in fact monogamous. As long as the religion permits polygamy, the union is "potentially polygamous" and for that reason, said to be against public policy... The child would not have the status of "legitimacy" and the consent of the father to the adoption would therefore not be necessary, notwithstanding the fact that such a union, for example under Islamic law, might have required a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable.*<sup>10</sup>

After South Africa became a constitutional democracy, the tide began to turn with the courts gradually making way for a more equitable approach.

The first case to address a Muslim marriage in light of constitutional principles was *Rylands v Edros*,<sup>11</sup> where a woman who had been married and divorced in terms of Muslim rites sought maintenance on the basis of the contractual agreement which formed the basis of the marriage. Here, the Appellate Division questioned the logic in *Izmail* that recognising an Islamic marriage for the purpose of maintenance would be "*contrary to the accepted customs... which are regarded as morally binding upon all members of our society*"<sup>12</sup> because of the potential polygamy in Islamic marriages. In departing from the decision in *Izmail* the Court stated that "*the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it*"<sup>13</sup> – noting that the "radiating" effect of the new constitutional values had changed public policy in South Africa.<sup>14</sup> However, despite the lofty ideals articulated in the Court's judgement, the *Rylands* decision was still limited in its scope; the Court based its decision on the marriage contract in this particular case and stressed that its ruling need not necessarily be followed in the case of an Islamic marriage which was in fact polygamous (as opposed to being merely *potentially* polygamous).

In *Amod v Multilateral Motor Vehicle Accidents Fund*,<sup>15</sup> the South African courts for the first time took a more generalised approach to Muslim marriage, considering whether the common law should be developed to recognise a general duty of support arising from such marriages for the purposes of supporting a claim for loss of support under the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989. The Supreme Court of Appeal applied a two-pronged test, asking firstly, whether a Muslim marriage created a legal duty of support, and secondly, whether the right to support deserved legal recognition and protection for the purposes

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<sup>9</sup> 1997 (2) SA 261 (CC)

<sup>10</sup> Id at paragraph 21 (*per* Mahomed DP) (footnotes omitted).

<sup>11</sup> 1997 (2) SA 690 (C). The Islamic marriage in question was concluded before the adoption of the interim Constitution, but the Court found that the relevant point was not the time when the marriage contract between the spouses was concluded, but the time when the courts were asked to enforce it. At 709G-H.

<sup>12</sup> 1983 (1) SA 1006 (A) at 1026B (*per* Trengove JA).

<sup>13</sup> 1997 (2) SA 690 (C) at 707G (*per* Farlam J).

<sup>14</sup> Id at 709C.

<sup>15</sup> 1999 (4) SA 1319 (SCA).

of the dependant's action.<sup>16</sup> The Court approached the case by saying that legislation had to be interpreted through the "*prism of the constitution*"<sup>17</sup> without specifically relying on any constitutional provision.<sup>18</sup> As in *Rylands*, the Court's reasoning in *Amod* was that the new post-apartheid dispensation in South Africa had created a new ethos which affected public policy. Notably, it was stated in the *Amod* judgment that:

*The Islamic marriage between the appellant and the deceased was a de facto monogamous marriage; that it was contracted according to the tenets of a major religion; and that it involved a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable. The insistence that the duty of support which such a serious de facto monogamous marriage imposes on the husband is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnized and recognised by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the boni mores of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom....*<sup>19</sup>

However, the Court emphasised the *de facto* monogamous nature of the marriage in the case at hand, and specifically refrained from comment on whether a spouse in a *de facto* polygamous Muslim marriage could make a similar claim for loss of support.<sup>20</sup>

Whereas *Rylands* found a duty of support enforceable between spouses in a *de facto* monogamous Muslim marriage, *Amod* went further by finding a duty of support in such a marriage which could also bind third parties.<sup>21</sup> However, neither case involved any general recognition of Muslim marriages as marriages for all legal purposes.

A series of cases since the *Amod* decision have resulted in judicial recognition of Islamic marriages in a broader range of circumstances, though all of these judgements have confined

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<sup>16</sup> Id at paragraph 19 (*per* Mahomed J).

<sup>17</sup> As described in *Daniels v Campbell & Others* 2004 (5) SA 331 (CC) at 351E (*per* Ngcobo J).

<sup>18</sup> The High Court granted relief to the defendant under the common law, as the cause of action arose before the commencement of the interim Constitution. The plaintiff appealed the original decision to the Constitutional Court in 1998. The Constitutional Court, without considering the facts of the case, decided on technical grounds that the Supreme Court of Appeal was the appropriate court to hear the appeal. The Constitutional Court noted:

*The events in the case spanned three constitutional orders. As indicated above the accident occurred before the interim Constitution was in force. The action was instituted in the High Court during the lifespan of the interim Constitution but was heard and decided after the 1996 Constitution had come into effect.*

[1998] ZACC 11; 1998 (4) SA 753; 1998 (10) BCLR 1207 (27 August 1998) at paragraph 8 (*per* Chaskalson P). The Supreme Court of Appeal noted that it did not rely on any constitutional provision, but on the prevailing ethos which had resulted from the movement towards democracy which had preceded the formal adoption of a new Constitution. See 1999 (4) SA 1319 (SCA) at paragraphs 20 and 30 (*per* Mahomed J).

<sup>19</sup> At paragraph 20 (citations omitted).

<sup>20</sup> Id at paragraph 24: "*I have deliberately emphasised in this judgment the de facto monogamous character of the Muslim marriage between the appellant and the deceased in the present matter. I do not thereby wish to be understood as saying that if the deceased had been party to a plurality of continuing unions, his dependants would necessarily fail in a dependant's action based on any duty which the deceased might have towards such dependants. I prefer to leave that issue entirely open. Arguments arising from the relationship between the values of equality and religious freedom – now articulated in the Constitution but consolidated in the immediate period preceding the interim Constitution – might influence the proper resolution of that issue.*"

<sup>21</sup> See Elsje Bonthuys, "The South African Bill of Rights and the Development of Family Law", 119 (4) *SALJ* 748 (2002) at 762.

their applicability to interpretations of specific legislation rather than providing for a more general recognition of Islamic marriages as valid marriages in South African law.

In *Dawood*,<sup>22</sup> the Constitutional Court applied a provision of the Aliens Control Act 96 of 1991 concerning foreign “spouses” to several couples, including one couple married according to Islamic law. This statute required that applications for immigration permits be made from outside the country, but included an exception to this general rule for spouses of South African citizens; however, the procedure for taking advantage of the exception allowed immigration officials an element of unguided discretion. The Court found that lack of guidelines for applying the exception violated married couples’ Constitutional right to dignity. In discussing the significance of marriage, the Court stated:

*South African families are diverse in character and marriages can be contracted under several different legal regimes including African customary law, Islamic personal law and the civil or common law. However, full legal recognition has historically been afforded only to civil or common law marriages. Even if the legal implications of the marriage differ depending on the legal regime that governs it, the personal significance of the relationship for those entering it and the public character of the institution, remain profound. In addition, many of the core elements of the marriage relationship are common between the different legal regimes.*<sup>23</sup>

After holding that the challenged section of the statute constituted an impermissible interference with the duty to live together which is part of marriage, the Court went on to apply its holding to all of the married couples in the case including the couple married by Muslim rites – thus including a Muslim marriage in the general category of valid marriage for a specific legal purpose.

In *Khan v Khan*<sup>24</sup>, a male appellant claimed that as his marriage was actually (rather than potentially) polygamous, he was not liable during the course of the marriage to provide spousal maintenance since polygamous marriages are not recognised under South African law.<sup>25</sup> In dismissing this claim, the High Court stated that it would 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 and who has the same rights and beliefs as the one in the monogamous marriage, a right to maintenance*”.<sup>26</sup>

Various recent South African cases have also examined the language used in Rule 43 of the Uniform Rules of Court to determine whether Islamic marriages should be recognised for the purposes of that rule. Rule 43 provides for a procedure while a divorce case is pending whereby claimants can seek maintenance, costs towards any legal expenditure incurred in relation to the pending action and interim custody or access to any child of the marriage. It is in these circumstances that the courts have most commonly included Islamic marriages under definitions of “marriage” and “spouse”.

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<sup>22</sup> *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).

<sup>23</sup> At paragraph 32 (*per* O’Regan J).

<sup>24</sup> 2005 (2) SA 272 (F).

<sup>25</sup> He also argued that he had divorced his wife under Islamic law, but the Court did not accept this assertion.

<sup>26</sup> At paragraph 11.11 (*per* Goodey AJ). As in several of the other cases in this line of jurisprudence, the *Khan* case was not directly decided on constitutional grounds; the Court’s main task was interpreting the Maintenance Act to decide whether the appellant was responsible for supporting his wife, but it noted that “[p]ublic policy considerations in interpreting legislation have changed with the advent of the Constitution”. *Ibid*.

For instance, in *H v D*<sup>27</sup> a defendant responded to a claimant's application for maintenance by asserting that Islamic marriages are excluded from Rule 43 because it uses the words "matrimonial action" and "spouse". The High Court disagreed, holding that the term 'spouse' in this context includes a spouse "*to a marriage concluded in accordance with the tenets of Islamic personal law*".<sup>28</sup> The Court's interpretation of Rule 43 also affords a Muslim spouse the right to apply for a maintenance order "*even if the validity or lawfulness of such marriage is placed in dispute*".<sup>29</sup>

In *AM v RM*,<sup>30</sup> an Islamic marriage was recognised to allow a wife to seeking maintenance from her husband where the defendant purported to have ended the marriage by way of *talaq* (the procedure for divorce under Islamic law). The High Court held that where a separate court case to determine the current status of the marriage is pending, the defendant must pay maintenance until such time as the marriage is declared by that Court to have expired. For that purpose, "*it does not matter whether or not the parties were divorced in accordance with Muslim rites or not*".<sup>31</sup> Therefore the wife was allowed to obtain the relief she sought under Rule 43 as a spouse in an Islamic marriage.

In reaching this decision, the Court affirmed an unreported decision in *Cassim v Cassim*<sup>32</sup> in which a defendant married in accordance with Islamic law was held to be under a duty to maintain his spouse by "*providing for her reasonable needs in terms of the Maintenance Act*".<sup>33</sup> The Court also referred to the unreported case of *Jamalodeen v Moola*<sup>34</sup> in which an interim maintenance order in terms of Rule 43 was granted to a claimant who had been married under Islamic law and divorced in accordance with Islamic rites, pending a decision by the trial court as to her entitlement to maintenance.

These cases demonstrate that South African courts increasingly recognise Islamic marriages for the purposes of maintenance.

The first case on Muslim marriage to reach the Constitutional Court was *Daniels v Campbell and Others*,<sup>35</sup> which dealt with the right of a widow from a Muslim marriage to inherit intestate in terms of the Intestate Succession Act 81 of 1987 and to claim maintenance from the deceased's estate under the Maintenance of Surviving Spouses Act 27 of 1990. The widow claimed that the relevant provisions of these laws were unconstitutional because they did not recognise Islamic marriages for the purposes of affording widows of such marriages the rights of "*spouse*" and "*survivor*" under these acts. The Constitutional Court held that those who are party to monogamous Islamic marriages must be included under the definition of "*spouse*" and "*survivor*" in these statutes, in order to make the statutes consistent with the Constitutional principles of non-discrimination on the grounds of religion, gender and marital status. In interpreting the meaning of those definitions the Court asserted that,

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<sup>27</sup> 2010 (4) BCLR 362 (WCC) ; [2010] 2 All SA 55 (WCC).

<sup>28</sup> Id at paragraph 28 (*per* Yekiso J).

<sup>29</sup> Id at paragraph 14.

<sup>30</sup> [2009] ZAECPHC 31 (29 May 2009)

<sup>31</sup> Id at paragraph 10 (*per* Revelas J)

<sup>32</sup> Referenced in *AM v RM*, paragraph 7 of Revelas J's judgement as (*Part A*) (*TPD*) (*Unreported 2006-12-15; Case Number 3954/06*).

<sup>33</sup> Id at paragraph 18.

<sup>34</sup> Id at paragraph 18, referencing case as (*NPD*) (*Unreported in Case Number 1835/06*).

<sup>35</sup> 2004 (5) SA 331 (CC).



*The issue is not whether to impose some degree of strain on the language in order to achieve a constitutionally acceptable result. It is whether to remove the strain imposed by past discriminatory interpretations in favour of its ordinary meaning.*<sup>36</sup>

It should be noted that the holding in the *Daniels* case was limited to Muslim marriages which are *de facto* monogamous.<sup>37</sup>

Polygamous Muslim marriages were addressed by the Constitutional Court in *Hassam v Jacobs*,<sup>38</sup> where it held that the Marriage Act 25 of 1961 and the Intestate Succession Act 81 of 1987 violate the Constitutional prohibitions on discrimination by providing for only one Muslim spouse to be an heir to the estate of a deceased husband. The Court found that the distinction between Muslim widows in monogamous relationships as compared to those in polygamous relationships who fall outside the scope of the Marriage Act “works to the detriment of Muslim women and not Muslim men.”<sup>39</sup> The Court similarly considered the failure of the Intestate Succession Act to afford benefits to widows of polygamous Muslim marriages to be unconstitutional, concluding that:

*By discriminating against women in polygamous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection...by so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights.*<sup>40</sup>

This line of cases shows that South African courts have largely been sympathetic to claims that laws which fail to protect Muslim spouses violate the Constitutional protections against discrimination on the basis of religion, gender or marital status. Increasingly, the courts have chosen to interpret various apartheid-era statutes purposively by according Islamic marriages a status equivalent to civil marriages for various purposes.

Whilst Muslim marriages are increasingly being recognised for specific purposes, there has not as yet been any general legal recognition of such marriages, nor any legislative solution as in the case of same-sex life partnerships (as discussed above).<sup>41</sup> In 2003 the South African Law Reform Commission published a report on *Islamic Marriages and Related Matters*<sup>42</sup> which recommends statutory recognition of Islamic marriages. But, at the time of writing, these proposals remain under consideration.<sup>43</sup>

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<sup>36</sup> Id at paragraph 21 (*per Sachs J*).

<sup>37</sup> “[T]he effect of the declaration sought was to cover the situation of the applicant who was a party to a Muslim marriage that was monogamous. This Court is not called upon to deal with the complex range of questions concerning polygamous Muslim marriages”. Id at paragraph 376 (*per Sachs J*).

<sup>38</sup> 2009 (11) BCLR 1148 (CC).

<sup>39</sup> At paragraph 10 (*per Nkabinde J*).

<sup>40</sup> Id at paragraph 37.

<sup>41</sup> See pages 42-43.

<sup>42</sup> South African Law Commission (SALC), *Project 59: Islamic Marriages and Related Matters*, Pretoria: SALC, 2003, available at <[www.justice.gov.za/salrc/reports/r\\_prj59\\_2003jul.pdf](http://www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf)>, last accessed 6 September 2010.

<sup>43</sup> In 2009, the Women’s Legal Centre brought an application in the Constitutional Court seeking an order declaring that the President and Parliament have failed to fulfil their constitutional obligations by failing enact legislation providing for the general recognition of all Muslim marriages. However, the Court declined to consider the substance of the application on the grounds that the applicants had not established a case for

The cases on recognition of Muslim marriage are not directly relevant to cohabitation. The South African courts have tended towards interpreting statutes, or reading words into them to include Muslim marriages within the category of “spouse” and “marriage”. If, on the other hand, the courts did not recognise Muslim marriages for the purposes in question, then the partners would be cohabitants in the eyes of the law and the treatment afforded them would have a strong bearing on the issue of cohabitation. The cases recognising Muslim marriages are nevertheless pertinent in that they show how respect for the constitutional value of non-discrimination leads to the acknowledgement of a wide variety of family relationships for the purpose of protecting vulnerable parties to such relationships.

Moreover, these cases are also potentially relevant to the issue of cohabitation in that Muslim couples, like opposite-sex cohabiting couples, have the choice to enter into a civil marriage – at least in the case of monogamous Muslim marriages.<sup>44</sup> Yet this fact has not prevented the courts from extending some of the same protections to them as are afforded to civil marriages. For example, in *Daniels*, the Constitutional Court said:

*The central question is not whether the applicant was lawfully married to the deceased, but whether the protection which the Acts intended widows to enjoy should be withheld from relationships such as hers. 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.*<sup>45</sup>

Similar reasoning could apply to justify the extension of certain right to cohabitants in long-term relationships which involve factual dependency.

## 9.2 Hindu marriages

In South Africa, Hindu marriages have been given legal recognition for the purposes of maintenance and intestate inheritance, even where a couple could have registered their marriage as a civil marriage but chose not to do so. Similar reasoning could apply to extend analogous right to cohabiting couples who have chosen not to enter into a marriage.

Judicial consideration of Hindu marriages in South Africa has followed a similar line to that of Muslim marriage, with a sea-change from their previous treatment being marked by the 2009 case of *Govender v Ragavayah NO and Others*.<sup>46</sup>

In *S v Vengetsamy*,<sup>47</sup> a murder case, the admissibility of the testimony of the accused’s wife was challenged. Counsel for the defendant argued that the wife’s evidence should not be heard because, although her Hindu marriage to the defendant was not registered under the

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exclusive jurisdiction or direct access and so should commence the application in the lower courts. *Women’s Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC).

<sup>44</sup> See *Daniels v Campbell and Others* 2004 (5) SA 331 (CC) at paragraph 18.

<sup>45</sup> Id at paragraph 25.

<sup>46</sup> 2009 (3) SA 178 (D).

<sup>47</sup> 1972 (4) SA 351 (DCLD).

Marriage Act or any other enactment that is concerned with registering religious marriages, it resembled a Christian marriage and should therefore invoke the common law rule that the spouse of the accused is not a competent witness. The Court agreed, reasoning that the Hindu marriage in question was “*a voluntary union of two persons for life, a union of one man and one woman to the exclusion of all others, while it lasts*”.<sup>48</sup>

However, a subsequent claim for a broader recognition of Hindu marriages failed. In the 2007 case of *Singh v Ramparsad*,<sup>49</sup> the plaintiff was married under Hindu tradition, which does not make any provision for divorce. Consequently, when the marriage broke down, the wife sought an order recognising the marriage under the Marriage Act 25 of 1961 and the Divorce Act No. 70 of 1979. The High Court noted that the couple had the option to register their marriage under the South African Marriage Act, either after the celebration of the Hindu rites and rituals or by having a civil marriage performed by a marriage officer in tandem with the Hindu rites. (Registration as a marriage officer is open to members of all religious faiths.)<sup>50</sup> One of the arguments advanced by the plaintiff as to why her unregistered marriage should be recognised was that legislation on customary marriages gives legal recognition to unregistered customary marriages.<sup>51</sup> The Court held that the different treatment of Hindu and customary marriages did not constitute discrimination, noting (amongst other things) (a) that the legislation on customary marriages concerns potentially polygamous marriages which do not fall within the ambit of the Marriage Act, (b) that this legislation was designed to give recognition to marriages which are a lived reality for a large group of South Africans and (c) that the legislation, despite affording validity to unregistered customary marriages, also places a duty on the parties to register such marriages.<sup>52</sup> Furthermore, the Court was not prepared to become involved in religious matters by pronouncing a divorce from a marriage where the parties took religious vows which did not countenance divorce. Because the Marriage Act “*provides a compromise which permits parties to marry according to the tenets of their religion and obtain secular recognition through the process of registration*”<sup>53</sup>, the Court found that there was no violation of the plaintiff’s dignity or equality rights.

However, despite this refusal to give general recognition to an unregistered Hindu marriage, in *Govender v Ragavayah NO and Others*,<sup>54</sup> the same High Court ruled that an unregistered Hindu marriage falls within the meaning of “*spouse*” in the Intestate Succession Act 81 of 1987. The plaintiff contended that the provisions of the Act were discriminatory in denying her a

<sup>48</sup> Id at 353A-B. The subsequent case of *S v Johardien* 1990 1 SA 1026 (C) had addressed the same question regarding testimony in a criminal case by a spouse in a Muslim marriage, and come to a different conclusion on the basis that Muslim marriages (unlike Hindu marriages) are potentially polygamous. This decision would probably not stand now in light of the intervening Constitutional Court precedent

<sup>49</sup> 2007 (3) SA 445 (D).

<sup>50</sup> Interestingly, this argument has not been canvassed in the cases involving Muslim marriages – not even *de facto* monogamous ones – although it is possible for Imams to be registered as marriage officers in terms of South African law. (See *Women’s Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) at paragraph 9.)

In fact, in the *Daniels* case, the argument seemed to work the other way around: “*Acceptance of the fact that the word “spouse” covers people married by Muslim rites makes it unnecessary to deal with the submission advanced by the executors that the law did not discriminate against the applicant because in terms of the Marriage Act she could have solemnised her marriage before an Imam recognised as a marriage officer.*” *Daniels v Campbell and Others* 2004 (5) SA 331 (CC) at paragraph 35.

<sup>51</sup> One of the reasons cited by the plaintiff for the failure to register the marriage after the fact was abuse by her husband, but not much turned on this point as the Court found the plaintiff to be a generally unsatisfactory witness.

<sup>52</sup> The legislation referred to is the Recognition of Customary Marriages Act 120 of 1998.

<sup>53</sup> 2007 (3) SA 445 (D) at paragraph 52.

<sup>54</sup> 2009 (3) SA 178 (D).

right of inheritance because spouses in Hindu marriages were not recognised by the Act. Acting as *amicus curiae*, the Women's Legal Centre argued that failure to recognise the marriage violated the plaintiff's Constitutional rights to freedom of religion, belief and opinion, as well as the rights pertaining to cultural, religious and linguistic communities.<sup>55</sup> The High Court ruled that the definition of "*spouse*" in the statute should be extended to apply to monogamous Hindu marriages, even though such marriages were not generally valid in law, finding that "*there is judicial support for the proposition that a spouse of a 'marriage' by Hindu rites may well have the religious 'marriage contract' given some recognition by South African law for certain purposes*".<sup>56</sup>

Thus, even where spouses married by religious tradition have chosen not to register their marriages as civil marriage, South African courts have been willing to extend certain specific legal protections to them – without necessarily recognising the marriages in general terms. Similar reasoning could arguably be applied to cohabitants.

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<sup>55</sup> The argument cited Articles 15(1), 30 and 31 of the South African Constitution.

<sup>56</sup> At paragraph 42 (*per* Moosa AJ).

# Chapter 10

## FIELD RESEARCH ON COHABITATION IN NAMIBIA

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*This chapter highlights the insights and concerns identified by participants in a Legal Assistance Centre (LAC) study carried out in nine regions of Namibia regarding the rights of people in cohabitation relationships. (The ethnic background of the interviewees and focus group participants is mentioned only where this may be relevant to understanding their views, such as in connection with discussions about customary norms.)*

### Key Findings of Field Research

The duration of cohabitation relationships reported during the field research varied widely, from 7 months to 35 years.

Most cohabiting couples live in a household with extended family members as well as the children they have together.

Financial considerations are often a catalyst for cohabitation. Many couples live together informally because they cannot afford the expenses associated with marriage, or because one partner (usually the man) is unwilling to marry, or is already married to someone else. Some remain unmarried because of family disapproval, or because of the woman's desire to maintain her financial or emotional independence or to distance herself from extended family involvement.

Many of the respondents indicated that there is a power imbalance in the cohabiting relationships with the male partner having greater control over assets. Many cohabiting couples live in the home of another family member, or in rented accommodation. However, where one of them owns the shared home, it is usually the man. About half of the cohabiting partners interviewed reported that they share household expenses with the other partner; in the other relationships it was most commonly the man who paid household expenses. Women are often left vulnerable because durable assets are placed in the man's name even though they may have contributed to their cost, or because they make non-monetary contributions such as child care. Many cohabiting partners also help to support persons outside the shared household, which can complicate efforts to allocate resources fairly.



Persons who were cohabiting cited various advantages and disadvantages to cohabitation. Advantages included the sharing of expenses, the flexibility of the relationship and greater independence from extended family members. However, some viewed these same factors as disadvantages, feeling that there is insufficient family respect for their relationships or feeling disadvantaged by the insecurity of the arrangement. Some women felt that there is insufficient financial support from their male partners. Although cohabiting relationships are often long-term relationships in Namibia, many respondents reported that a lack of trust in the relationship can lead to instability, tensions and abuse.

Many cohabiting partners have not discussed what would happen if their relationship ends in separation or death – although some said that this was unnecessary because the couple have no assets. Women were perceived as being particularly vulnerable if the relationship ends. Some felt that a resort to customary norms might protect vulnerable partners in this situation, but many others thought that women who survived their male partners would be likely to suffer from ‘property-grabbing’ by his family.

Fewer problems were cited regarding children of cohabitation relationships, although there was a wide range of perceptions of the position of children born to such relationships under customary law. Some felt that children born outside marriage continue to experience disadvantages because of their ‘illegitimacy’ (even though the Children’s Status Act has removed discrimination against children born outside marriage in the law – including both the civil and customary law on inheritance).

The division of resources amongst multiple women in informal polygamous relationships can be particularly problematic, although in some instances this is dealt with in a manner analogous to the allocation of property to different ‘houses’ in formal polygamy. Several persons interviewed acknowledged that there is likely to be conflict between the spouse and the cohabiting partner when the male partner dies. Many thought that the cohabiting partner would be the one who would be disadvantaged in this situation, and there were divergent opinions on what *should* happen in such cases.

Most of the people interviewed felt that people in their families or community disapproved of cohabitation, with many citing Christian morality as the basis for such disapproval, although some found that their situation was accepted. Negative community attitudes were particularly pronounced in the case of same-sex cohabiting couples.

## 10.1 Methodology

The research consists of a small-scale qualitative study with data collection in the form of 61 individual interviews with cohabitants and key informers and 10 focus group discussions.<sup>1</sup> The data was collected by the Legal Assistance Centre in two periods of field research – one in 2002 and one in 2009. It is supplemented by a few questions about cohabitation included at

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<sup>1</sup> As a point of comparison, recent qualitative research on cohabitation in South Africa was based on 68 individual and group interviews in eight sites across four provinces. Beth Goldblatt, “Regulating domestic partnerships – a necessary step in the development of South African family law”, 120 *SALJ* 610 (2003) at 612.

the Legal Assistance Centre's recommendation in a larger study of property and inheritance rights conducted by the University of Namibia in 2002.<sup>2</sup>

| DATA SOURCE  | FOCUS GROUP DISCUSSIONS |           |                           | KEY INFORMANT INTERVIEWS |           |           | INTERVIEWS WITH COHABITING INDIVIDUALS |           |           | REGIONS   |
|--------------|-------------------------|-----------|---------------------------|--------------------------|-----------|-----------|--|-----------|-----------|---|
|              | Men                     | Women     | Total                     | Men                      | Women     | Total     | Men                                    | Women     | Total     |   |
| LAC 2002     | 0                       | 0         | 0                         | 6                        | 5         | 11        | 9                                      | 13        | 22        | 8<br>(Caprivi, Kavango, Omusati, Oshana, Kunene, Erongo, Khomas, Karas) |
| LAC 2009     | 18                      | 80        | 10<br>(98 people)         | 2                        | 6         | 8         | 9                                      | 21        | 30        | 6<br>(Khomas, Karas, Hardap, Oshana, Omusati, Erongo)                   |
| <b>Total</b> | <b>18</b>               | <b>80</b> | <b>10<br/>(98 people)</b> | <b>8</b>                 | <b>11</b> | <b>19</b> | <b>18</b>                              | <b>34</b> | <b>52</b> | <b>9<br/>different regions</b>  |

### 10.1.1 2002 field research

In 2002, the LAC conducted semi-structured qualitative interviews on the subject of cohabitation in 8 regions (Caprivi, Kavango, Omusati, Oshana, Kunene, Erongo, Khomas and Karas). Our desire to investigate the topic was sparked by the fact that a number of clients approached us with problems arising from cohabitation relationships which left women in particular extremely vulnerable.<sup>3</sup>

Interviewees were selected to fit particular criteria, including men and women married in civil and customary marriage, people in cohabitation relationships, and couples under different property regimes.

The questionnaires used for these interviews were developed by the Legal Assistance Centre and were specifically designed to obtain information for the purposes of this report. The interviews were administered by an LAC staff lawyer assisted by University of Namibia law students. Interviews were conducted in the language preferred by the interviewee, and the interviewers were responsible for transcribing their notes and recordings into English where necessary.

In total, 33 individuals were interviewed: 11 'key informants' (6 men and 5 women), and 22 people who were currently in cohabitation relationships (9 men and 13 women).

<sup>2</sup> Debie Lebeau, Eunice Ipinge and Michael Conteh, *Women's Property and Inheritance Rights in Namibia*, Windhoek: Multi-Disciplinary Research and Consultancy Centre, Gender Research and Training Programme and Department of Sociology, University of Namibia, 2004 (hereinafter "UNAM study").

<sup>3</sup> The research about cohabitation was conducted simultaneously with a separate study of community knowledge and preferences on marital property regimes, as a way of trying to make the most of a small research budget. The results of the marital property study are contained in Legal Assistance Centre (LAC), *Marital Property in Civil and Customary Marriages: Proposals for Law Reform*, Windhoek: LAC, 2005.

“Key informants” are individuals selected based on their knowledge of the communities under consideration. They included community, church and business leaders, traditional leaders, school leaders, elderly people with traditional knowledge and youth leaders.

The cohabiting men and women were interviewed individually or in couples. Three of these relationships involved a woman cohabiting with a man who had a wife or other girlfriends in what could be termed an ‘informal polygamous relationship’. Four interviews were conducted with persons in same-sex cohabitation relationships.

The 2002 field research conducted by the Legal Assistance Centre was supplemented by responses to a few questions about cohabitation in individual interviews and focus group discussions which were part of more general survey on property and inheritance rights conducted by the University of Namibia (UNAM).<sup>4</sup> The purpose of the more general study was to investigate women’s property and inheritance rights in various communities in Namibia. The Legal Assistance Centre, as a member of the Steering Group for the UNAM study, arranged to add some questions to the study focussing on traditional norms regarding cohabitation relationships. The overarching study was published in 2004 as Debie Lebeau, Eunice Ipinge and Michael Conteh, *Women’s Property and Inheritance Rights in Namibia*.<sup>5</sup> The material on cohabitation from this study comes partly from the raw data, supplied to the Legal Assistance Centre for this purpose by UNAM.

Interviewers for the UNAM field research were selected and supervised by UNAM, and research teams consisted of two persons for each region – a senior researcher functioning as supervisor and an interviewer who spoke the primary language of the people living in the region. The field research component of this research involved a total of 44 focus group discussions and 55 key informant interviews conducted during 2002 and divided evenly amongst six different regions – Caprivi, Karas, Kavango, Khomas, Omaheke and Omusati. In each region, the research was conducted in one urban and one rural location. Key informants, selected based on their knowledge of the communities under consideration, included community, church or business leaders, traditional leaders, regional councillors, school principal and teachers, church leaders and elderly people with traditional knowledge. Separate focus groups were held for men and women and divided into two age groups (25-40 years of age, and over 40 years old), with each focus group consisting of four to six people. Because of the length of the questionnaire, each focus group was asked to answer only about half of the questions – meaning that not all of the groups considered all of the same questions about cohabitation.

After the initial field data was collected, the study was temporarily shelved because of lack of funding for the research and competing priorities.

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<sup>4</sup> The groups represented on the Steering Committee were the Gender Training and Research Programme of the Multi-Disciplinary Research and Consultancy Centre at the University of Namibia, the Legal Assistance Centre, the Department of Sociology at the University of Namibia, Urban Trust Namibia, Namibia Development Trust, the Multimedia Campaign on Violence Against Women and Children, the Law Reform and Development Commission, the Ministry of Women Affairs and Child Welfare and the United States Agency for International Development (US-AID). Several of these groups were involved because they were recipients of grants from US-AID for projects involving women’s property and inheritance rights

<sup>5</sup> See note 2 in this chapter for the full citation.

### **10.1.2 2009 field research**

The LAC continued its research in 2009, holding 10 focus group discussions and conducting semi-structured interviews with 30 individuals (9 men and 21 women) in cohabitation relationships,<sup>6</sup> including three women involved in informal polygamous relationships as well as 8 key informants (2 men and 6 women). This field research took place in six regions (Khomas, Karas, Hardap, Oshana, Omusati and Erongo).

This field research was carried out by law student interns working under the supervision of the Legal Assistance Centre, with the assistance of a researcher from the Law Reform and Development Commission. Interviews and focus group discussions were conducted in the language preferred by interviewees and participants, subject to the availability of a suitable translator. The interviews and discussions were transcribed in English by the researchers.

#### **Focus group discussions**

Focus group discussions were used to survey community perspectives and to ‘take the pulse’ of various communities with respect to cohabitation. Participants were assembled with the assistance of local churches, NGOs, radio stations and community leaders. In each location, researchers contacted several local NGOs, asking their members to alert community members to the forthcoming focus group discussions. The NGOs were informed of the group’s targeted composition: men and women currently or previously in a cohabitation relationship, or those who have close personal ties to persons in a cohabitation relationship. The majority of participants were women, principally because NGOs that serve women were most concerned about gaining legal protection for cohabitants.

Focus groups were held in seven different locations (Katutura, Keetmanshoop, Khomasdal, Ongewediva, Outapi, Rehoboth and Swakopmund) in six regions (Khomas, Karas, Hardap, Oshana, Omusati and Erongo).

The general structure of the focus group sessions was consistent from region to region. However, this structure was flexible enough to allow participants to direct the conversation towards topics not raised by the facilitators. One to two female moderators directed each discussion. Throughout the study, a total of three female researchers were involved in leading the focus group discussions, taking turns to act as facilitators. To ensure consistency, all three researchers were present at all of the focus groups discussions.

Each focus group contained between 5 and 15 informants of various ages, including some mixed-sex groups and some female-only groups. The gender composition of the groups was not prescribed but was rather a result of the availability and interest of participants from the various communities. Focus group discussions lasted between two to four hours. Facilitators encouraged participants to explore a topic until no more comments could be made. Participants were encouraged to base their responses to their knowledge of specific cases or prevalent attitudes within their communities. Accordingly, some topics which aroused little interest in certain regions were the subject of extended discussions in others.

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<sup>6</sup> It transpired during the course of the interview that one of the interviewees was not personally in a cohabitation relationship, but was interested to discuss law reform options. Another answered the questions with respect to her parents’ cohabitation relationship.

For example, the loss of prestige and status associated with a failed cohabitation relationship was a key topic in Rehoboth. There participants explained to researchers that no girl wanted to leave her partner's "*house, car and money*" to go live at her parents house "*with eleven people*". One male participant explained that women cared about the "*four C's*": car, cash, cell phone and computer, saying that if woman had that she would stay. Many women agreed with his assessment. In contrast, participants in Outapi focussed on the problem of property-grabbing. Participants explained that the deceased's family often blames the female for the death of her male partner, saying she killed him "*by cheating and giving him the HIV*" or "*by witchcraft*"; these accusations are used by the male partner's family to justify taking the couple's shared property, while giving nothing to the surviving female cohabitant.

Researchers subdivided the focus group discussions into four sections: (1) list creation (2) role play (3) story completion and (4) suggestions.

**List creation:** Researchers asked participants to make a list of five good things and five bad things about cohabitation. Researchers then asked participants to share their lists with the group while one facilitator wrote the list on a flipchart. This generally encouraged the entire group to speak while also helping facilitators to identify the topics of most interest in each community before any prompting occurred. Researchers noticed that in the initial focus groups, participants failed to distinguish cohabitation from marriage in their list creation. Therefore, researchers modified their approach in later discussions; after the participants had shared their initial lists, the researchers asked them to identify how cohabitation was different from marriage and to add those good or bad differences to the list.

**Role play:** Facilitators divided the groups into sub-groups and asked each sub-group to present a role play on two different scenarios: (1) how does a cohabitation relationship begin in your community? and (2) how does a cohabitation relationship end in your community? Each group was asked to design a scenario showing the key players, influences and motivations in each situation. The role plays were consistently the portion of the focus group exercise in which participants became most active and expressive, and a wealth of information was gathered through this technique. Translators assisted the facilitators with the verbal communication between the players as necessary. Violence was expressed in almost all of the role plays, especially in the scenario involving the end of a relationship. This scenario also often prompted physical struggles over property, along with much yelling.

**Story completion:** For the story completion section of the focus group, the facilitators presented several brief stories and then asked the group what would happen to each of the participants in the story. The moderators tried not to prompt the participants for answers but simply let them respond freely, asking questions to elicit further responses only when the group response seemed insufficiently clear. In most cases the groups were very vocal and in all cases there seemed to be a strong focus on the need to ensure that the children connected with cohabitation relationships would be adequately cared for. Many people did not know that the law on maintenance provides that mothers *and* fathers have a duty to maintain their children regardless of the relationship status of their parents. Frequently, participants sidelined discussions with personal questions along these lines, seeking information on how to get help if they were personally in the types of situations being discussed in the group. At this point it was possible to identify people for personal interviews which could take place at a later stage.



## Stories for story completion exercise

- 1) **John and Mary are not married. They live together in John's house. While John works nearby, Mary does the housework and takes care of John's child from a previous relationship with Rachel. One day John breaks up with Mary and tells her she has to leave the house.**

### Questions to discuss

- What will probably happen to Mary? What should happen to Mary?
- What will probably happen to Rachel? What should happen to Rachel?
- Will John support Mary for a time after they break up? Should he?
- What will John's family think that Mary should get?
- What will Mary's family think about the situation?
- What will people in the community think about John and Mary's breakup?
- Who will get the property in the household? Who will get the house?
- Who will get the land?
- Does it matter how long John and Mary have been together?
- If a registration system had been available, would John and Mary have registered their relationship? (Explain that the law could make cohabiting couples register their relationships in order to get legal protection).

- 2) **Patrick is married to Paulina who lives in the house he owns in a rural area. Patrick lives with his girlfriend, Linda, when his is working in Windhoek. Patrick and Linda have a child together named Norman. Patrick dies in an accident.**

### Questions to discuss

- What will probably happen to Paulina, Linda, and Norman?
- If Patrick does not have a will, who will get his property and land? Who should get the property and land?
- Should Linda have a right to any portion of his benefits (pension, insurance or social security)?
- What did Patrick want Paulina, Linda, and Norman to get? Should this matter?
- What does Paulina think that Linda and Norman should get (if she knows about them)?
- Should Linda be able to claim any compensation from for the loss of Patrick's financial support? (Note that Paulina already has a right to do this.)
- Who will care for Norman?
- What does Patrick's family think that Paulina, Linda, and Norman should get?
- What does Linda's family think that Linda, Paulina, and Norman's family should get?
- What will people in the community think about Paulina, Linda, and Norman?
- Does it matter how long Patrick and Paulina have been married, or how long Patrick and Linda have been together? What if Patrick and Linda have only been living together for 1 month, but had been having an affair for a year before that? What if Linda does not know about Paulina?
- Does it matter how much time Patrick spends in Paulina's house compared to how much time he spends in Linda's house?

**Second list creation and suggestions:** The focus group discussions ended with participants having an opportunity to revise their initial lists and to offer suggestions on what they want and need out of law reform on cohabitation.

## **Individual interviews**

Following each focus group, participants were invited to participate in individual interviews if they had a specific story to share or an additional contribution that they would like to see included in the study. Generally at least one-third of the group members wanted to participate in an individual interview, and sometimes a majority of a group was eager to take part in interviews. At this point researchers screened potential interviewees for actual knowledge of cohabitation relationships.

The individual interviews were semi-structured in form, and took place in private settings. These interviews gave women and men the opportunity to share their own experiences with cohabitation, and provided insights into how the impact of cohabitation relationships is different for women and men.

In addition to participants who also took part in focus group discussions, other interview subjects were selected randomly or upon the recommendation of a previous interviewee. Researchers solicited individual interviews with women more frequently than with men, because more women tended to be available during the day and willing to participate in the discussions. Because there is a great deal of research activity in Namibia, many participants seemed familiar with the personal interview and focus group discussion format.

Individuals were interviewed separately in 2009, with no interviewees giving information jointly as a couple. This was not by design, but because both partners in the couples in question were not available when the interviews were being conducted. One interview involved a man in a same-sex relationship. No interviews were conducted with females in a same-sex relationship.

## **Key informant interviews**

To gain a better perspective on cohabitation in each study location, the Legal Assistance Centre also conducted a small number of key informant interviews. These interviews were conducted in every location where a focus group was held, to give more insight into the particular characteristics of cohabitation in that area. Key informants included social workers, religious leaders, staff from NGOs and prominent members of the community. Key informants were able to contextualise the particular problems mentioned by participants in the group discussions.

### **10.1.3 Other sources of information**

This report has also drawn on information provided to the Legal Assistance Centre by clients, without revealing any information which could compromise client confidentiality.

Case studies drawn from oral interviews and client statements have been edited slightly for length and clarity, and any information which might point to the identity of the person in question has been removed.

## 10.2 Perceptions of prevalence of cohabitation

In the 2002 field research, a strong majority of key informants reported that cohabitation was common in their community, with one woman stating that it is “*so common almost no one thinks about it*”. One respondent from the Karas Region suggested that there are more people “*staying together*” than those who are married, and one respondent in the Kavango Region said he thinks about 50 percent of couples cohabit, especially in their younger years.

A Damara woman stated: “*Yes it is common, it is a black cultural thing. Even though it is a sin, people cohabit anyway.*” One Subiya male similarly felt that even though cohabitation is common, it is not condoned.

Where the answers given differed from this trend, there is reason to believe that cohabitation may be more unusual in some communities or regions; for example, two key informants living in the Caprivi Region (one Subiya female and one Mafwe male) stated that cohabitation is “*not allowed*” there and is therefore uncommon.<sup>7</sup>

In the one interview conducted with a Muslim key informant, it was noted that cohabitation is prohibited among the Islamic population.<sup>8</sup>

The 2009 field research reconfirmed cohabitation’s prevalence, as every participant in the focus group discussions, without exception, knew someone who was or had been in a cohabitation relationship. Therefore the data suggests that there have been no notable changes over time in the prevalence of cohabiting relationships over the past eight years.

## 10.3 Characteristics of cohabitation relationships

### Relationship duration

The duration of the relationships reported by cohabiting respondents during the field research varied from 7 months to 35 years. The Legal Assistance Centre has also been approached by clients with cohabitation relationships lasting for long periods – 11 years, 17 years, 28 years and 30 years. There is no evidence to suggest that marriage occurs after a certain time-period – although many couples were cohabiting whilst saving up money for a wedding. There is also no indication that cohabitation relationships commonly end after any particular amount of time. Whilst for many people the relationship continues until one of the partners dies, a minority of people stated that a lack of approval from the community, including not having parents’ blessings, could cause some people not to fight to maintain their relationships.<sup>9</sup>

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<sup>7</sup> This perception accords with the most recent census data, which shows the Caprivi Region as having the lowest percentage of cohabitation of all Namibian regions. See page 9.

<sup>8</sup> However, since the law does not recognise Muslim marriages as being valid marriages for all purposes, the law on cohabitation could be relevant to couples who are married by Muslim rites. See pages 146-152.

<sup>9</sup> Research in South Africa suggests that cohabiting relationships are often seen as “easy come easy go”, with neither partner expecting the relationship to be long-term. Beth Goldblatt, “Regulating domestic

## Household composition

A significant majority of cohabitants interviewed have children with their partners, and most live in a household with extended family members as well as the children they have together. Many live with children from their or their partner's previous relationships or marriages, and a significant number reported living as a couple in the household of the parents of one of the partners.

The household composition of cohabitants can be quite large and complicated. For instance, one cohabiting woman in Windhoek provided the following list of people in her household:

*the 4 children we have together, 3 of my partner's children from previous relationships, 2 children of my own from previous relationships, my partner's brother, my partner's sister's child, a grandchild of mine from one of my children from a previous relationship.*

A cohabiting man said that his mother and five of his siblings share a home with him and his partner. A client of the Legal Assistance Centre described a complex blend of children, as recounted by the lawyer dealing with the case:

*The client was not married to her partner, but lived with him for 11 years. The partner was married twice before, and had one child born from the first marriage and three children born from the second marriage. From the partnership between the client and the partner, one child was born. The client raised the three sons from the partner's second marriage and the children were still living with her when the partner died.<sup>10</sup>*

## Reasons for living together

Respondents offered a range of reasons as to how they had come to live together with their partners, with some of the reasons given suggesting that the move to live together might be taken more casually than a decision to marry. Many women indicated that the decision to live together had been the man's choice. Some were vague, saying that they “*fell in love*” or “*just decided to live together*”.

For some, the move was essentially a financial decision – hoping to save money by sharing living costs or buying a house together. The participants at one of the focus group discussions highlighted the economic and social pressures that may influence the choice to cohabit, explaining that “*you can't stay with your mother forever if you have five kids, you take the best offer you can get and if that is to cohabit then so be it*”.

Some were inspired by employment issues – one interviewee moved in with a partner who moved from South Africa to Namibia for work reasons, and one couple moved in together when they were both transferred by their employers to the same town. Migrancy for employment purposes is also a factor, with some men having a wife in a rural area and a cohabitant in the urban location where they work.

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partnerships – a necessary step in the development of South African family law”, 120 *SALJ* 610 (2003) at 613. A similar finding was not evident in any of the data collected or reviewed for this study.

<sup>10</sup> Information from client who contacted the Legal Assistance Centre in 2008.

***Married men from up North who have a wife come here to Windhoek for work and live with someone in Katutura and people don't even worry about it at all. His cohabitant is like his wife down here.***

community activist interviewed in Windhoek, 2009

In several cases, the catalyst was the woman becoming pregnant. Participants in the focus group discussions indicated that some cohabitating relationships may arise when a learner becomes pregnant and drops out of school, noting that a lack of education may then make it difficult for the young mother to become independent at a later date if the relationship does not work out.<sup>11</sup>

In some cases, cohabitation was described as a survival option which has little to do with emotion. For example, one focus group participant said, that poverty was a catalyst: *“if she needs to eat she cohabits without reflecting on the future”*. Another said, *“People are forced by circumstances. An HIV positive woman’s family will mistreat her and so if someone else wants her and will treat her any better, she will go.”*

In many cases, cohabitation relationships were something of a fall-back option, resulting from the couple’s inability to marry for some reason (often the expenses associated with marriage), or reluctance on the part of one partner to marry (usually the man). This is discussed in more detail in the following section.

## **Reasons for not marrying**

When cohabitants were asked why they had not married, the most frequent response given was financial constraints; cultural expectations and the formalities expected for a wedding make it unaffordable for many couples to wed. One of the 2009 interviewees explained that although he and his partner had wanted to get married, they separated before they could save enough money for a big wedding. Participants in one of the focus groups also explained that in the *“old days”*, the community would contribute to the wedding, but now the couple has to pay for the wedding although the community still expects a big party. One man from a small village near Outapi described his frustration; *“It is too expensive to get married. In our culture before you can get married you need to pay lobola to the woman’s family, usually in the form of cattle. I want to marry my partner, but first I need to get together the lobola and the money to pay for a wedding”*. A key informant from Swakopmund described his efforts to encourage less expensive weddings: *“As a priest, I try to give people the understanding that a wedding is about love and not about the party. We are trying to change the culture and have weddings on Thursdays here to encourage people to be modest.”*

***Culturally you need at least two cows to marry. My boyfriend is working and we buy things for the house, but we cannot afford the cows.***

woman interviewed in Swakopmund, 2009

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<sup>11</sup> The problem of pregnant learners dropping out of school was theoretically addressed in 2009 by Cabinet approval of a new Policy for the Prevention and Management of Learner Pregnancy prepared by Ministry of Education. However as of December 2010, this new policy had not been adequately popularised or implemented.



The second most-cited response when respondents were asked why they were not married was that they are still planning on marrying. Again, some cited financial constraints, indicating that they would marry when they could afford the wedding. Many informants in focus group discussions suggested that a period of cohabitation was a good way to determine whether or not a relationship should progress to marriage.

***I would love to be married. But there are cultural requirements for marrying. My partner wants the lengthy marriage process as opposed to a small wedding. It is very expensive. I would have to pay for my closest relative to come, the uncle I grew up with, and all the accommodation and then all the food etc for the party. It's too much.***

man interviewed in Walvis Bay, 2009

The next biggest category of reasons marriage had not occurred was the reluctance or unavailability of the male partner. Participants from one of the Keetmanshoop focus groups explained that men will say “*you are not my wife*” to get out of responsibilities, but at the same time will tell the partner that she has to do what he wishes. The participants in the same focus group, when discussing a case study, said that the man would not want to marry the woman if she was unemployed because he would be stuck supporting her and the child they have together. A high number of respondents admitted that they could not marry because the male partner was already married to someone else or had other girlfriends. Some women accepted their situation as informal polygamy. Several women claimed to be waiting on the male partner’s divorce to come through. Many female respondents said that they had received promises of marriage, but the man repeatedly postponed the wedding or later refused to marry altogether. Some women expressed a desire to be married but said that the man had not asked and they did not want to force the issue. Focus group participants in Rehoboth said: “*There is no future for you – you may still be hoping he will marry you but there is no security.*” A statement by a woman from a village near Outapi is typical: “*he is the one who decides*”. This is consistent with the strong tradition in many Namibian cultures that it must be the man who proposes marriage, never the woman.<sup>12</sup>

***Men always lie that they will marry you so you are always living in that hope.***

woman interviewed in Swakopmund, 2009

Another frequently-cited reason for not marrying was family or community disapproval of the other partner or the relationship. For example, a woman from Rehoboth said that “*people don’t want Northerners and Southerners to marry – they would not approve*”, and that before she could marry her partner, “*he needs to convince people in the North*” to allow the marriage.

A small number of women reported that they prefer cohabitation as a way to retain financial and personal independence. For example, one woman from Windhoek said, “*I am in this type of relationship by choice. I feel I can control my finances better this way. My reasons are personal not cultural. I am earning the most money.*” Another woman from Windhoek had a similar

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<sup>12</sup> The Legal Assistance Centre has encountered this view in community workshops in many regions.

perspective, explaining that the reason she was not married was because her partner was not working and she felt that both partners should contribute financially to the relationship. However, this attitude appears to be the exception rather than the rule, with the trend of the data pointing towards male dominance over the status of the relationship. There may also be a negative financial aspect to the greater independence some associated with cohabitation, as the participants in one focus group suggested that cohabiting partners might prefer to give resources to their biological family rather than to help their partners start up a business, or finance other needs.

A desire to remain financially and socially independent from the extended family was also mentioned as a reason why some chose cohabitation over marriage. The participants from one focus group discussion explained that some people cohabit rather than marry to reduce expectations from the in-laws that they can ask for money. Participants in a different focus group also discussed the social role of the extended family, explaining that by cohabiting, the couple are limiting the involvement of the extended family in their relationship; *“once you marry, the families have too much control”*. However participants from a third focus group discussion felt that the lack of family involvement could be a problem since extended family members can help to address violent situations:

*Violence is common, especially because there is no procedure when people break up. People get frustrated and there is no support. People keep their distance when you break up because it is your affair. This is different in a marriage.*

Thus opinion was varied in regard to whether cohabitation had positive or negative results regarding the involvement of the extended family.

One interviewee, who had a child with his girlfriend, said that they were living together because they loved each other but were too young to get married (the interviewee was 21 years old). The interviewee in this instance lived with his girlfriend for seven months before the relationship ended. A small number of male respondents also said they did not want to marry because they were *“too old”* or because it was *“not the right time”*. Thus it seems that for some people there may be a social barrier against marrying at an early or late age, but this barrier does not prevent a couple from living together.

Disturbingly, there were also a few women who did not want to marry because of the negative behaviour of their male partners. A woman cohabiting with her ex-husband in Windhoek elaborated on her unusual situation:

*The reason why I do not want to remarry is because my partner has not changed; he is still the same person and the reasons why I divorced him are still the same. He is abusive. From his side, he wants us to remarry but I am still very reluctant, because I am afraid that I will end up in the same situation as I was when we were married and it will be difficult for me to get out of that situation again. Living together is easier and I can walk out when I want to.*

Several women mentioned their partner's alcohol abuse. For instance, a woman cohabiting in the Karas Region cited her partner's alcohol abuse as the bar to marriage: *“The reason why I do not want to marry him yet is because he drinks too much, but if he stops drinking, I will marry him immediately. I do not want to separate from him because he does not beat me nor do I go hungry; that is why I still stay with him.”*

A man from the Kavango Region interviewed in 2002 cited lack of trust as a factor which discourages marriage, indicating that cohabitation is seen by some as involving less commitment than marriage:

*It is common for young people in Rundu to cohabit these days. I think that the factors that contribute to people cohabiting and not marrying is the lack of trust between the partners. Because the partners feel they do not know each other well, they do not marry.*

One of the male participants interviewed in 2009 made a similar comment, saying that because he was not married to his girlfriend there was a lot of jealousy and speculation about his behaviour.

The issue of jealousy was mentioned by a number of interviewees and during the focus group discussions, indicating that couples in cohabitation relationships lack confidence in their partner's fidelity. Participants in one 2009 focus group in Swakopmund said: "You don't trust each other because you are not bound together like in marriage."

A few people did not want to marry formally because of the fact that they had children from previous relationships.

Two people in same-sex relationships cited the fact that there is no legal way for same-sex partners to marry.

Overall, the reasons cited for choosing cohabitation over marriage are consistent with those which emerged in other Namibian studies discussed in Chapter 2.<sup>13</sup>

## Ownership of the joint residence

Many respondents did not own the home where they resided and lived in rented accommodation or on a family property. Where this was not the case, it was usual for the jointly-occupied property to be registered in the man's name alone.<sup>14</sup> This latter finding concurs with the information from the focus groups which suggested that if the relationship ended, the woman would have to leave the house since the property would be in the man's name. Eviction from the home has been one of the common problems cited by female clients approaching the Legal Assistance Centre for assistance related to cohabitation.

## Contributions to the household

Approximately half of the cohabiting respondents in the LAC research said that both the man and the woman contribute to household expenses. Where both partners are not contributing, the research suggests that it is the man who usually pays the household expenses alone – which could be a result of the fact that women in Namibia are more likely to be unemployed than men,<sup>15</sup> or that men are more likely to have access to cash income while women often

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<sup>13</sup> See section 2.3 at pages 17-19.

<sup>14</sup> During the 2009 research, we did encounter one couple in a communal area where the house which was built by the two of them jointly was registered in the woman's name. She said that she still worries about her ability to keep the house if he should die "because already his family complains it is in my name". Another couple was living in a house which the woman appeared to have owned prior to the relationship.

<sup>15</sup> The Namibia Labour Force Survey 2008 found that 51.2% of all working-age Namibians (age 15 and above) were unemployed: 58.4% of women and 43.5% of men. Ministry of Labour and Social Welfare (MLSW),

make contributions to the household in the form of labour such as child-rearing, housework or subsistence agriculture.<sup>16</sup>

A man cohabiting in the Kavango Region elaborated on his financial arrangements, describing a situation which typically makes cohabiting women vulnerable because their contributions tend to go on consumables while the male partners are more likely to own durable assets like houses and cars:

*We are both employed but I own the car and house. At the end of the month we draw up a list of our expenses and we both contribute to it. We both have a say in the running of the household. We both decide on money issues, irrespective of whose account the money comes from.*

Thus, in this example, even though the man described mutual financial contributions and an admirable level of joint decision-making, his partner is likely to be left vulnerable when the relationship ends through separation or death.

In one of the focus group discussions, whilst discussing whether the male partner has a responsibility to provide maintenance for the female partner after the relationship ends, the participants used the words “*wasted her time*” to describe the women’s work in raising the child. The use of the word “wasted” in this context is very strong and indicates that the participants view childcare and housekeeping as a valued contribution to a relationship even though in reality this contribution is often not recognised by the male partner.

One key informant similarly made reference to the important non-financial contributions made by women partners: “*She deserves something for unrecognised energy. He got to where he is in life because of what she gave him. I really feel that this is what kills the women when they break up – the energy lost.*”

*I cohabited for a while and I came out fine. I moved into the guy’s house and I knew the rules. Every time he would say “I want to buy something for the house,” I would ask if he had budgeted for it and we would go shopping together. He would “forget” his chequebook and ask me to pay. I would lie and say I didn’t have mine either. I saved my money because I was working. At the end of the relationship, he took everything but he had bought everything!*

woman interviewed in Windhoek, 2009

*I lived with him for 9 years and he didn’t want me to buy anything to put in his house. He always said, just pay the electricity, food, water bills etc. Then when the relationship broke down I wasn’t allowed to take anything with me. We got two kids together, but he married someone else in the end.*

female participant in focus group discussion in Swakopmund, 2009

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Namibian Labour Force Survey 2008, Windhoek: MLSW, 2010 at 65. See also Jo-Maré Duddy, “Half of all Namibians unemployed”, *The Namibian*, 4 February 2010.

<sup>16</sup> The 2001 Census found that 7 out of 10 homemakers are women. Central Statistics Bureau, *2001 Population and Housing Census*, Windhoek: National Planning Commission, 2003 at paragraph 6.9.

Approximately 16-25% of women between the age of 15 and 49 cited agriculture as their occupation in 2006-07. Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek: MoHSS, August 2008 at table 3.6.1. In most cases, this probably refers to subsistence farming.

## Financial support for people outside of the cohabitation household

A strong majority of cohabitants reported that they or their partner provide financial support to people outside the household, with slightly more men than women (though in many cases both partners) providing this support. The most common recipients cited were the parents of one or both partners or children from a previous relationship (usually the man's since the woman's children often live in the cohabitants' household). It was also commonly reported that a partner will support his or her sister, and that men often support a wife and the extended family of the wife.

A Damara man cohabiting in the Kunene Region explained how tradition may dictate the need for some of this financial support: *"Initially I helped my partner's maternal and paternal family. This is like a tradition, if you want approval of your partner's family. And my partner takes care of my maternal and paternal family, which is an honourable thing. We do it, like I said, almost like a tradition."*

This high degree of support for various family members outside the household indicates the potential complexities of trying to allocate assets amassed by the cohabiting couple fairly.

### CASE STUDY

My partner and I have been in a relationship since 2003 and living together since 2007. We have two children together, aged 4 and 5 years old, who live with them. My mother, my two brothers and my three sisters live with us as well.

We are living together because it is too expensive to get married. In our culture before you can get married, you need to pay lobola to the woman's family, usually in the form of cattle. I want to marry my partner, but I first need to get together the lobola and the money to pay for a wedding.

I am employed by the government. I buy the food. My partner is unemployed and contributes to the household by buying school uniforms for all the children in the family (two boys and two girls). My partner also contributes to the household by cultivating the mahangu fields.

I am supporting my two grandmothers. My partner helps her relatives and my relatives by pounding mahangu, if she is called to do so.

The house we live in belongs to my grandfather's second wife. If our relationship broke up, there would be nothing to divide, only the bed and the blankets. Maybe my grandmother will give my partner some of the mahangu. But I don't foresee that we will break up. If we did, I would remain in the house and my partner would go back to her family. She knows that she must go back to her family. I told her when we were quarrelling.

We have not made a will. We have not discussed who will take the property or the house when one of us dies, because there is no property and we do not own a house. If we separate, I will draw up a will but I will not discuss it with my partner. If I die now, my kids will get my bed and blankets.

We experience some problems because of being unmarried. My grandmother wants me to get married because she does not want us to live in sin and go to hell. Some people want me to leave my partner because I am educated and she is not. But she is hardworking and I worry about what will happen to my kids when we separate.

At the beginning, people in our community did not like us living together. But we have been living together now for about three years and they have become used to it. The community did not approve of our relationship because it is against Christian values.

man interviewed in a village near Outapi, 2009



## During the relationship

Interviewees disagreed as to whether there were particular problems for couples in cohabitation relationships compared to married relationships. While the cohabitation relationship is taking place, some people felt that the couple, and particularly the woman, gets no respect. One woman felt there was “*no love*” in a cohabitation relationship.

A few women complained about the lack of financial support from their male partners. One woman who was cohabiting with a married man in the Ohangwena Region said:

*Our relationship is disturbing and brings unhappiness to me and my children. He does not bring anything home; he even failed to pay his own accounts and I am now the one responsible for everything. I can say our life is in a very big mess.*

A woman in a cohabitation relationship in the Erongo Region emphasised the insecurity of the arrangement:

*Yes, we fight a lot, and it makes me very insecure, because I would not know what to do if he were to tell me that I should leave his house; worst of all I would not know what to tell my family.*

Similarly, another woman reported that her partner threatened her during their frequent fights that she would walk away with “*nothing*”.

Several people cited noted problems with the male partner’s relatives. A Herero woman in Erongo Region said: “*I have problems with my partner’s family meddling in our relationship. His children from the wife are also problematic, I think it is because when they visit their mother they are told things by her.*” A female traditional councillor in the Kunene Region said:

*Within the cohabitating relationship women are treated like guinea pigs. The man’s family decides whether the man should marry the women or they simply disapprove of the women. But because the couple loves each other, they just cohabitate.*

## If the relationship ends

Many cohabiting partners had not discussed what would happen if their relationship ended in separation or death, but some had talked about this or even made wills. One woman in Windhoek, who was clearly well-informed and assertive (and involved in a women’s empowerment group), said that she and her partner has discussed this “*extensively*”. Several cohabiting partners said that such a discussion was irrelevant since the couple had virtually no assets of value; this was often the case where the couple were living in the home of another family member without any significant household items of their own. For example, one man in a village in the north who had been living in a relative’s house with his partner for three years said, “*There is nothing to divide, we have only the bed and the blankets*”. One cohabiting woman in Ongwediva reported, unusually, that she and her partner of eight years had put the house into both their names, and agreed that she would retain it if the relationship came to an end. One woman who lived in a house owned by her male partner said that he had already willed the house to her. But many cohabiting partners said that they had simply not discussed what would happen if the relationship ended.

Many persons reported that female cohabiting partners are usually the vulnerable ones if the relationship fails, standing to lose out on a fair share of the accumulated assets or even being left with nothing at all. As a woman from the Khomas Region put it, *“If the relationship breaks up, the woman usually loses out on everything especially when the house that they lived in belonged to the man.”* A woman living in a cohabitation relationship in the Erongo Region described the woman’s situation this way:

*There might not be problems during the relationship, but they certainly experience a lot of problems when the relationship breaks up. It may be that it is easier to leave, because you do not need to go through a divorce, but it also becomes a problem if you depended on the person you have been living with. It leads to exclusion from his/her will, no benefits such as pension, medical aid etc. When the partner dies, one experiences the same problem as when the relationship breaks up.*

However, another female cohabitant in the Erongo Region appeared to accept this situation as long as the children were properly provided for:

*If my partner was to get married to someone else, I would move out. He does not need to support me but he has to care for his children. I don’t want anything from him because it is his money. But I am not prepared to be with him if he is married to another woman. The children should benefit. The unmarried person should only keep his/her property.*

One man suggested that customary norms would guide the division of property upon separation,<sup>17</sup> but it is not clear that this would be sufficient to protect female partners in many communities – who do not receive the same recognition or respect as wives – and where wives are often dependent on property controlled by their husbands.<sup>18</sup>

***Breakups end badly. I know of a couple where the boyfriend burnt down the whole house after they broke up. The girlfriend and her sister’s children were in the house and died. They had had an argument about breaking up earlier.***

priest interviewed in the Erongo Region, 2009

## CASE STUDY

**I had been living together with my partner for 25 years, but we parted ways in 2008. We have 4 children together, now ages 23, 19, 15 and 13.**

**We were living with our children in the same household with other children from our previous relationships and some extended family members.**

**I wanted to get married, but my partner only kept on promising to marry me but it never happened. There were no cultural reasons why we could not get married.**

<sup>17</sup> For example, a Sambwe man living in a cohabitation relationship in the Kavango Region said: *“If we decide to separate, then the extended families may come in and decide on how we should share our assets. I do not think we need to have a law on what happens to the property on separation, because under our tradition there are certain rules.”*

<sup>18</sup> UNAM study at page xi.

When we were in the relationship, I did not work. My partner did not want me to work, I had to stay home and look after the family. My partner was the only one working, and he paid for all the household expenses. I contributed by cooking, cleaning and washing and ironing the clothes.

We had debts, which my partner paid since he was the only one working. At times my partner did not pay the debts, and for the last 3 years of the relationship he also did not bring his salary so we really suffered during that time.

The house was registered in my partner's name. The land we were farming on was communal land.

There was another woman involved, and the relationship became unbearable as my partner would become violent at times. When the relationship ended my partner kept the house and all the furniture. I left the house with nothing. We never discussed how we would divide the property should we part ways, because there were problems in the relationship from the start.

When the relationship ended my partner refused to give me the children, and with the help of the Women & Child Protection Unit I got custody of the children through a court order. The Women & Child Protection Unit also helped me to put in claims for child maintenance against my partner, but when we appeared for maintenance he said he had no problem maintaining his children (there was thus no court order for maintenance payment just a personal arrangement between us for the payment of maintenance). I struggle to get the maintenance payments out of him.

The Women & Child Protection Unit also issued me with a protection order against my partner when the relationship ended, for fear of violence.

When my partner and I started the relationship, we had no livestock. We started farming together. My partner would buy all the livestock because I did not have an income. We had an agreement that every time my partner buys livestock, I would get a share. So say for instance, my partner would buy 20 sheep, I could earmark some of them for myself. If it was 20 I would earmark 5 for myself and leave the remaining 15 for my partner and the children. When the relationship ended my partner refused to give me the livestock that was earmarked for me. I obtained a court order from the Magistrate's to get the livestock from him, but to this day I am still struggling to get my livestock.

We did not make a will. We never discussed who would get the property and land should one of us die since the relationship was problematic from the start.

People were talking about us living together for so long and not getting married. If people would ask my boyfriend this question, he would get into fights with them. The children suffered, they wanted to see us married.

People in the community do not approve of this kind of relationship because of the suffering when the relationships end and because it is against our Christian values.

woman interviewed in Windhoek, 2009

## CASE STUDY

I lived with my partner for 9 years, but we are not together any more. We have two children together. They are still small. No one else lives with us.

I was working at a company making blinds and curtains. He was working at sea. When he was not around, I bought food and things for the kids. I was supporting my mother and my younger brother who was in school. With his money, he was mostly drinking. He had three other kids in Katima Mulilo and he was supporting them with money from time to time

He paid rent and bought food sometimes, or he might give me N\$500 for toiletries. Then he would drink and want the money back. He'd take it back and be gone for two days.

That man was drinking, sleeping around, beating me in front of the children, and not letting me buy anything for myself. He said he wanted me to leave with nothing. When I left his room, I took my clothes and the kids' clothes. He has not seen the kids since. They want their fathers' love but he does not give them any love.

We were mostly fighting all the time over money and everything. He would always say I'd walk away with nothing. Neighbours would come to stop the fight.

My mother kept pushing us for marriage. People in the community disapproved of the relationship because of the fighting that always happened at night. In the morning I was so shy and disappointed in myself. People would look at us when we went to the shops. In the morning he'd ask to be forgiven and try to be a good boyfriend and ask me to go to the shops with him. I could feel all of the people talking behind my back. There is a strong link to alcohol abuse in these relationships. He'd force sex on me and if I refused we were in his room and where could I go in the middle of the night? This was when he came home drunk.

I walked away with nothing.

woman interviewed in Swakopmund, 2009

## When one partner dies

As discussed above, an unmarried partner has no legal claim to any of the property of the deceased partner in the absence of a will.<sup>19</sup> Furthermore, the Communal Land Reform Act 5 of 2002 makes provision for surviving *spouses* to remain on communal land which had been allocated to the deceased, but is silent on cohabiting partners.

Some people felt that cohabiting partners might be able to resort to customary norms, with the help of extended families or traditional authorities, to secure some portion of the couple's assets. For example, a Mafwe key informant residing in the Kavango Region said, "*In the case where one of the cohabiting partners dies, what happens is that the traditional authorities will write a letter that says that partner of the deceased should inherit the assets*". But others disagreed. For example, a Ruwangali man from the Kavango Region said, "*On the death of one of the partners then the family of the deceased comes and gets the property of their child. The surviving partner usually loses the property.*" Similar scenarios were described by many of those interviewed.

Given that wives in many Namibian communities lose assets to 'property-grabbing' upon the death of their husbands,<sup>20</sup> cohabiting partners are likely to be even more vulnerable. Many

<sup>19</sup> Any minor children born to the deceased could apply for maintenance from the estate, but the partner has no legal claim to maintenance or assets from the estate.

<sup>20</sup> Many Namibian studies have shown that one of the most serious issues pertaining to women is the problem of property-grabbing. For example, a study conducted by the Food and Agricultural Organisation (FAO) in 2003 on the impact of HIV/AIDS in northern Namibia found that in Ohangwena Region, 52% of households in which the husband or father had died had lost cattle, 31% had lost small stock and 38% had lost other farm assets. The study reported that "*In some cases households lost all of their productive assets in this way.*" Food and Agricultural Organisation & Africa Institutional Management Services, *The impact of HIV/AIDS on the agricultural sector and rural livelihoods in northern Namibia*, Rome: Food and Agriculture Organization of the United Nations (FAO), 2003 at 10. An LAC study published in 2008 reported:

*...the grabbing of property by relatives of a deceased husband is considered by the perpetrators to be legitimate in terms of customary law, in so far as this law is claimed to follow matrilineal inheritance rules. However, statutory law regards such an act as theft and thus a criminal offence. When cases of property grabbing were brought before the Traditional Authority of Ondonga, for example, the Authority attempted to negotiate acceptable solutions but did not fine the perpetrators because their actions were not regarded as criminal offences – unlike stock theft. Instead, the Traditional Authority views property grabbing as falling within a matrilineal system of inheritance, whereby the family of a deceased husband claims his property and assets...*

persons interviewed spoke about this concern. A woman interviewed in the Khomas Region related a personal account of such a situation: *“I know of a friend of mine who lived together with a man without being married for almost six years and the man died in a car accident. She did not get anything. She lost everything they bought together. The boyfriend’s mother moved into the house and she was chased out of the house, and the mother inherited all the property.”* A woman who was cohabiting reported similar fears on this score, saying, *“I might experience problems if he dies, because I will be forced out of the house”*. A key informant in the Khomas Region expressed the same concern in the UNAM study, saying *“If you are not married, they [the husband’s extended family members] will not take you seriously. They will take everything.”*<sup>21</sup>

***If the man dies discrimination comes in...  
She has to pack her suitcase and leave.***

woman interviewed in 2002

***I know of a woman who bought a washing machine and a bed together with her boyfriend and then he died. She got nothing.***

focus group participant in Keetmanshoop, 2009

As discussed in the section below on informal polygamous relationships, the issue of dividing assets upon the death of one partner seems to get more complicated when the deceased had both an unmarried partner and a married partner.

## CASE STUDY

**I know of a case here where a man was divorced and lived with a girlfriend. He died leaving two cars and a nice house. There were children with the ex-wife and the girlfriend. The wife and the children from his marriage came to take the house and the two cars. Now the girlfriend has had to go to her family in the location with her children. They say the girlfriend never liked them anyway. The girlfriend wasn’t working so she won’t get anything. She has sewed and cooked but nothing is hers.**

social worker interviewed in Swakopmund, 2009

One small advantage for some women in cohabitation relationships is that they may have more freedom under customary law to control and bequeath their own property than married women would.<sup>22</sup> For example, in the UNAM study, a Khomas community leader said:

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Wolfgang Werner, *Protection for Women in Namibia’s Communal Land Reform Act: Is It Working?*, Windhoek, Legal Assistance Centre, 2008 at 14. See also *Millennium Challenge Account Namibia Compact: Volume 3: Thematic Analysis Report – Livestock*, Windhoek: Millennium Challenge Corporation, 2008 at 19.

<sup>21</sup> UNAM study, unpublished records of the key informant interviews.

<sup>22</sup> The UNAM study asked whether there were any differences in a woman’s ability to give property away by written or oral will if she is single, married or cohabiting; Question 102 of the key informant interview guide and the “Focus Group B” discussion guide asked the following question in the section on inheritance, coming after questions on a woman’s general right to bequeath property in an oral or written will:

102 *Is there a difference in whether or not a woman can give away property if she is married, not married but living with someone, or has never been married?*

UNAM study, Appendix 1, at 69 and 80.



*If a woman is married for example in community of property, of course she doesn't have all the freedom to divide property in case of her death. And the one who is never married, she has all the freedom to do whatever she likes with her property, which belongs to her. And if she is staying with a man, it is almost like she is not married – so she also has that whole freedom.*<sup>23</sup>

Participants in the Khomas Region also recommended that an unmarried woman who cohabits should spell out in a written will that she is not married and that her boyfriend and his family have no right to her property, to forestall them from trying to claim it.<sup>24</sup>

A few people in various regions thought that a cohabiting woman would have difficulty bequeathing her property under customary law because she would not be respected by her partner's family. For example, it was said in the Kavango Region that a cohabiting woman would have less ability to bequeath property than a married woman *"because the woman who is married is given much better respect than someone who is not married"*.<sup>25</sup> Still another point of view was expressed in the Omusati Region, where a key informant implied that an unmarried woman's freedom to control her property independently was a kind of trade-off for the lack of respect which would be shown to her: *"There is a difference because people who are married they became one person, but unmarried women, they are not respected but they can give away their property because they are not married."*<sup>26</sup>

In the Omusati Region, persons participating in the UNAM study disagreed on whether a cohabiting woman would be viewed more like a single woman or a married woman in terms of her ability to decide what would happen to her property upon her death.<sup>27</sup> For instance, one focus group reported that *"women who are living with someone and women who are married, are in reality, not allowed to give away [bequeath] property. Instead, this should be left for their extended family and their partner's family."* while another group said that *"sometimes the married woman doesn't give away [bequeath] the property and the living together woman gives more property away."* Several people mentioned that the cohabiting woman's ability to control what would happen to her property after her death would depend on the attitude of the extended families involved.<sup>28</sup>

A few people said that any woman, married or unmarried and cohabiting or not, has the same right to bequeath any property that she owns by will.<sup>29</sup> This is certainly true in terms of civil law.<sup>30</sup> The differences discussed would seem to arise primarily in respect of oral wills or other aspects of customary law, where a cohabiting woman's position is, at best, somewhat uncertain.

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<sup>23</sup> Unpublished records of the key informant interviews.

<sup>24</sup> UNAM study, Appendix 5 at 189.

<sup>25</sup> Unpublished records of the focus group discussions.

<sup>26</sup> Unpublished records of the key informant interviews.

<sup>27</sup> UNAM study, Appendix 6 at 215.

<sup>28</sup> Unpublished records of the focus group discussions and key informant interviews.

<sup>29</sup> UNAM study, Appendices 2-7, supplemented by the unpublished records of the focus group discussions and key informant interviews.

<sup>30</sup> See Wills Act 7 of 1953.

## 10.4 Children of cohabiting parents

Interviewees gave very mixed responses when asked whether children experienced problems as a result of their parents' cohabitation relationship, with approximately equal numbers suggesting that there were difficulties as those stating that they had experienced none.

### CONTRASTING CASE STUDIES

Naomi lived with her boyfriend Filemon in an informal settlement near Katutura. They had a child who was still a minor. When Filemon died, his brothers and sister chased Naomi and the child out of their shack. Filemon had taken out a number of insurance policies naming the child as the beneficiary. Filemon's brother tried to claim the proceeds of one policy, but was stopped from doing so by the insurance company. The brothers are now threatening Naomi to try and get her to sign the claim form so that they can get the payout. The Legal Assistance Centre is attempting to assist Naomi to safeguard the assets of her and Filemon's child.

as related by "Naomi" to the Legal Assistance Centre, 2010

Gladys was living with her boyfriend Petrus in an informal settlement, where they were part of a community savings scheme. They had one child together named Ruben. When Ruben was age six, Petrus died. In the agreement with the savings scheme, Petrus had named the child Ruben as the person who should stand in his shoes if he died. In the agreement, Petrus had also named his 16-year-old sister, who was living with him and Gladys, to act as Ruben's caretaker. However, after Petrus died, his sister reportedly kicked both Gladys and Ruben out of the house. The committee that runs the savings scheme and the extended family stepped in to the case to try and resolve matters. It was agreed that Gladys and Ruben and Petrus' sister will all live in the house together, and they have agreed to stop quarrelling. An extended family member who lives nearby will monitor the situation. All have confirmed that the house is intended for the benefit of Ruben, and that they will do their best to support his interests.

account based on Legal Assistance Centre discussions with various persons involved, 2010

Of those who believed that such children experience problems, a common theme was the 'legitimacy' of the child. Surnames were sometimes contentious, with parents arguing over whose surname the child should have; some fathers apparently did not want the 'illegitimate' child to have their surnames, and sometimes the woman's family would not approve of the child having his father's surname after the relationship ends.<sup>31</sup> Problems were also reported in registering the birth of the child, where the father does not want to recognise the child as his. Later down the line, the father may refuse to pay school fees for the 'illegitimate' child because he is saving to pay for his legitimate children.<sup>32</sup> There were also suggestions that 'illegitimate' children may not inherit from their fathers if there is no will.<sup>33</sup> An issue that

<sup>31</sup> According to the Births, Marriages and Deaths Registration Act 81 of 1963 if the parents are not married, the father's details may be included on the birth certificate only if both parents agree. However, it is possible to change the child's surname later at no cost if the child is registered in the mother's name and the couple subsequently agree to have the child take the father's surname after the father has acknowledged paternity. See sections 8A and 10.

<sup>32</sup> The mother could however apply for a maintenance order. Both parents were responsible to maintain their children, whether born inside or outside marriage, under the Maintenance Act 23 of 1963. The Maintenance Act 9 of 2003 has emphasised and clarified parents' duty to treat all children equally.

<sup>33</sup> As noted above, the law on this rule changed in 2008, between the two rounds of research. See pages 137-138.

was brought up repeatedly was the difficulty of getting a child baptised when his parents are unmarried.

Some thought that children of cohabitation relationships experience discrimination because of their ‘illegitimate’ status. Examples of such perceived or real discrimination were:

- Illegitimate children are neglected.
- If the children come from different fathers, the cohabiting male partner will care only for his own biological children.
- The children “*feel bad*” if their parents are not married.
- If cohabiting parents split up, the children are left with nothing.
- Children are left with nothing from an unmarried father if there is no will. (Note that the law on this point changed in 2008.<sup>34</sup>)

Other reported difficulties included that children of a female partner from a previous relationship may be subjected to sexual abuse by the cohabiting male partner, that parents who want to put money aside for the children will be asked for a marriage certificate, and that fighting frequently occurs in front of the children as cohabiting parents vie for control of them. Furthermore there were suggestions in one focus group that some men move from woman to woman looking for childcare and that the children involved are consequently unhappy and confused. One key informant stated that “*children have a problem growing up because there is peer pressure and they feel ashamed of their parents’ choices because children will tease them.*”

As explained in detail in Chapter 7, there is little remaining distinction under general law between children born inside and outside marriage. The Maintenance Act 9 of 2003 provides that all parents are responsible for the maintenance of their children in proportion to their financial resources, with no distinction made between children born inside marriage and children born outside marriage for this purpose. Children born outside of marriage were until recently at a legal disadvantage when it comes to inheritance, because under civil law, such children could not inherit from their father or their father’s family unless they are named in a will, even if paternity had been proven or acknowledged. However, as explained in detail in Chapter 7, the law has been changed by the Children’s Status Act 6 of 2006 so that children born inside and outside marriage are now treated exactly the same in respect of inheritance. The new law also gives both parents equal rights to act as the child’s custodian or guardian and gives automatic access to the parent without custody (providing that parenthood is voluntarily acknowledged) – but does not provide for joint custody or equal guardianship for cohabiting parents.<sup>35</sup>

However, there are distinctions between children born inside and outside marriage in terms of customary norms in Namibia, which may not have been replaced in practice by the recent law reforms intended to equalise their position. When it comes to relationships between parents and children, some communities view cohabitation relationships as lying somewhere in the middle of the rules which apply to married parents and unmarried parents who are not cohabiting, some equate cohabitants with unmarried parents, and a few view them as equivalent to married parents.

The questionnaire used for key informant interviews and for some of the focus groups in the UNAM study first asked about children’s property rights, contrasting the position of children born inside marriage and children born outside marriage – but without discussing whether the

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<sup>34</sup> See the footnote above.

<sup>35</sup> See page 135.

unmarried parents in the scenario offered were living together or apart.<sup>36</sup> Additional information was solicited by means of stories about different family profiles in some of the focus group discussions, to explore in more detail the impact of different kinds of relationships between parents on the children involved.

About half of the focus groups<sup>37</sup> were invited to consider five different scenarios:

- Thomas and Selma are married both in the church and traditionally. Thomas and Selma live together and have three children together.
- Martha and John are NOT married, but Martha and John are living together and have had two children together.
- Josephine and Charles do NOT live together and are NOT married, but Josephine has two children by Charles who is the father of both these two children.
- Dorothy is NOT married, but has two children who are living with another relative.
- Silvia is not married but has three children who live with her.

Questions about each scenario attempted to explore the rights and responsibilities of the parents and extended family members towards children in the different situations, and what would happen to the children if one or the other parent died.<sup>38</sup>

The Nama focus groups in the **Karas Region** said that personal and financial responsibility for the children of a marriage generally falls upon the parents, with other relatives having a duty to become involved only if both parents die. In contrast, although there was not full agreement amongst the participants, the cohabiting father seemed to be viewed by many as being in a similar position with respect to his children as an unmarried father who lives apart from the mother of the children, with the rights and responsibilities of all unmarried fathers being viewed by many as weaker than those of married fathers. For example, some people said that if the mother in a cohabitation relationship died, the children would go to the mother's parents (or other older extended family members) rather than becoming the responsibility of the father as they would if the mother had been married to the father. (If the father dies, the mother is expected to care for the children in all situations.) Some expressed the view that extended family members would be unwilling to become involved in assisting a child of cohabiting parents because cohabitation cannot be equated with marriage: *"Actually those two people were just living together so in our culture if there is such a situation then children must always live with their parents mostly"*.<sup>39</sup>

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<sup>36</sup> In the key informant interview guide and the "Focus Group B" discussion guide, question 76 was as follows:

76 *Dorothy and Thomas have children, but they are not married. Thomas is married to Rosilin who he also has children with.*

76.1 *If Thomas dies, do the children Dorothy had by Thomas have a right to any of his property, monies or anything else that Thomas owned?*

76.2 *If Thomas dies, who financially takes care of the children of Dorothy and Thomas?*

76.3 *If Dorothy has property and she dies, does Thomas have a right to any of Dorothy's property?*

UNAM study, Appendix 1 at 67 and 78.

<sup>37</sup> As noted above, the questions were divided between the groups so that no focus group discussion would be too long.

<sup>38</sup> Typical questions about each scenario attempted to explore: Where will the children live? Who is responsible for the daily care of the children (such as preparing food, washing clothes)? Who is supposed to financially support these children (such as buying food, clothes and school fees)? What is the role of extended family members? Where will the children live and who will support them if one partner dies? Researchers were to probe for the differences between the different scenarios. Questions in section 2.2.1-2.2.3 of "Focus Group A" discussion guide, UNAM study, Appendix 1 at 70-71.

<sup>39</sup> UNAM study, Appendix 3 supplemented by the unpublished records of the focus group discussions.

In the **Kavango Region**, the participants were primarily Kwangali and Gciriku, with a few Mbukushu and Shimbyu participants. The men in the focus groups thought that there would be no significant difference in the relationship to children of married versus cohabiting parents, but the women generally felt that men who are cohabiting without being formally married will be less likely to take responsibility for their children than married men. One woman said, *“The man [in the cohabitation relationship] does not take responsibility for his kids. It is only the woman who will take responsibility of those children day and night. In the previous story they were married and they can take responsibilities for their children. John and Martha, they are not married, it is just like they were cheating themselves.”* Women also thought that if the mother dies, a cohabiting father is more likely than a married father to take the property and abandon the children. Both men and women thought that the father’s degree of responsibility would be even weaker if the unmarried couple were living apart.<sup>40</sup>

In the **Omaheke Region**, all of the Herero community members who took part in the discussions felt that a cohabiting mother had more rights of control over her children than a married mother because the children’s father has not paid the mother’s extended family for rights over his children. However, the cohabiting father can give one or two cows to the mother’s natal family to demonstrate that the children are his children, thereby increasing his rights over them. He should also ensure that he has a good relationship with the mother’s family in this situation. Younger women, however, emphasised that the cohabiting father should not have equal rights over the children with the mother *“because today’s men tend to go to other women. How will he know about his children whether they are hungry or not? So he has no rights.”*<sup>41</sup> The focus groups viewed the cohabiting couple’s position as being analogous to that of any other unmarried couple, although the father’s lack of rights to the children (when he has not made payment to the mother’s family) was expressed even more strongly in the absence of cohabitation. This general attitude seems to reflect the fact that, although Herero communities follow a double-descent system, the mother’s lineage was viewed by the respondents as being more important to the child.<sup>42</sup>

One male focus group in the Omaheke Region also reported that the status of the parents could affect who would care for the children if the relationship broke down or if one parent died. They said that in the case of a marriage, children might be split up and divided equally amongst the father’s family and the mother’s family. The children of cohabiting parents would be similarly divided on the basis of negotiation between the families. But the children of other unmarried parents would generally stay with the mother or her family, with the father and his family remaining less involved.<sup>43</sup> Older Herero men insisted that children born outside of marriage do not belong to the father, regardless of whether the parents are cohabiting or not.<sup>44</sup>

In the **Omusati Region**, Owambo community members generally expressed the view that married partners and cohabiting partners, and their extended family members, would have the same rights and responsibilities towards their children – influenced perhaps by the fact that Owambo culture is matrilineal. However, some viewed the connection of cohabiting fathers with their children as being stronger than those of other unmarried fathers who live apart from their children.<sup>45</sup>

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<sup>40</sup> UNAM study, Appendix 4.

<sup>41</sup> UNAM study, Appendix 6 at 196.

<sup>42</sup> Id at 195.

<sup>43</sup> Unpublished records of the focus group discussions (Focus Group A, men aged 25+).

<sup>44</sup> Unpublished records of the focus group discussions (Focus Group A, men aged 40+).

<sup>45</sup> UNAM study, Appendix 4 at 222-223.

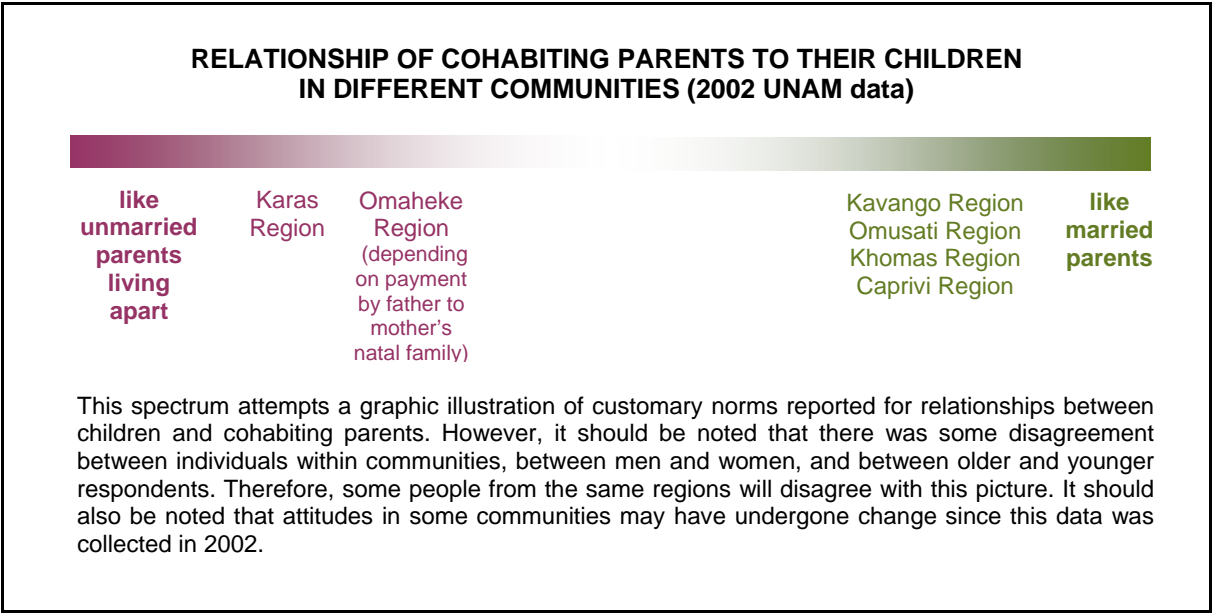


In the **Khomas Region**, the discussions involved people of diverse cultural backgrounds. Here, most people asserted that mothers and fathers have the same rights and responsibilities towards their children regardless of whether they are married, cohabiting, or unmarried and living apart – especially while both parents are still alive. Some women expressed the view that marriage is “*just a piece of paper*” and has no impact on how children are cared for. However, it was also pointed out that if one or both parents die, the attitude of extended family members may be different if the parents were cohabitating and not married.<sup>46</sup> This different point of view may reflect a certain distancing of more urban residents from cultural norms.

The UNAM study did not include discussion of cohabitation in the **Caprivi Region**.<sup>47</sup> However, during the 2002 LAC field research, one Subiya man reported that the rights of children born in cohabitation relationships are “*protected by our customary laws*”. This point was corroborated by a Subiya traditional leader, who said, “*The rights of children are already protected by customary law. Such children are treated as the children born from a valid marriage.*” He maintained that “*there is no discrimination against such children. Both parents take care of them and are responsible for them and if any of the parents die the child will inherit like any other legitimate child.*” However, a Subiya woman added a caveat, saying: “*The children born of a cohabiting relationship can inherit from the biological father. But this will depend on the kindness of the biological father’s spouse. She must decide to give the child something*”.

Although these interviews took place prior to the enactment of the recent laws which have removed discrimination against children born outside marriage, it is unlikely that the recent legal changes have completely altered community perspectives on the impact of the parents’ relationship status on their children.

The range of cultural perceptions about cohabitation and the children of cohabiting parents adds to the challenge of proposing a law reform that will be workable for Namibia as a whole.



<sup>46</sup> UNAM study, Appendix 4 at 168, supplemented by the unpublished records of the focus group discussions.  
<sup>47</sup> The questions on “John and Martha”, the fictional cohabiting couple, are simply marked as “not answered” on the unpublished reports of the Caprivi focus group discussion.

The UNAM study also asked some focus groups about the treatment of children in the position of ‘step-children’ (children born from a previous relationship of a partner who is currently in a relationship with someone else), asking if the position of such children would be different if the current relationship was cohabitation or a marriage.<sup>48</sup> The treatment of such children was cited by some as a problematic area, but no issues were linked specifically to cohabitation as opposed to marriage.<sup>49</sup>

Looking more specifically at the question of inheritance, the UNAM study concluded generally that opinion was significantly divided as to whether a child born to any unmarried parents would inherit from his father under customary law when the father dies:

*In the Khomas Region people say that it is [the mother’s] responsibility to find out if her children inherit any of [the man’s] property, while other people disagree as to whether or not the children have a right to any property. In general, Kavango and Nama people say that children born out of wedlock have a right to inherit from their father’s estate; in Owambo and Herero people say that children born out of wedlock do not have a right to their father’s estate – although in Herero the father’s family could ‘purchase’ the right for [the mother’s] children to become heirs by paying her extended family a cow; and in Lozi these children can inherit from their father if the children were already recognised as [the father’s].<sup>50</sup>*

Again, the fact of cohabitation was not cited as being a relevant factor in this regard.

In the 2002 LAC field research, the position of children born in cohabitation relationships in respect of inheritance was cited as a concern. A Damara woman in the Kunene Region said, “The man’s family mostly only cares for the children born in marriage. Children, born from cohabitation relationships, are neglected. They don’t share in the property or livestock of their father.” An Owambo woman in the Erongo Region who was cohabiting with a married man had similar worries: “Imagine, I am 6 months pregnant and I know that unless he specifically cares and provides for inheritance for my unborn child, my child may not inherit. My children should be accorded the same status as those from his marriage.”

The UNAM study asked some focus groups about the treatment of orphans of married and unmarried parents, probing to see if there were any differences in who took family property and responsibility for the children of unmarried parents living together as opposed to living apart.<sup>51</sup> No distinctions on this basis were cited.<sup>52</sup>

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<sup>48</sup> The focus group discussion guidelines stated:

*This next set of questions is about a man and a woman who are either living together or are married and there are children living in the household who are from a previous relationship.*

*118 If children are born from a previous relationship and then the man and woman get together:*

*118.1 Is there any difference in who is responsible for the children (such as the daily care and financial support) if the children are the woman’s from a previous relationship or if the children are the man’s from a previous relationship?*

*118.2 Does it make any difference in these responsibilities if the current relationship is a marriage, or if the man and woman are living together without being married?*

Section 2.2.4 of “Focus Group A” discussion guide, UNAM study, Appendix 1 at 71-72.

<sup>49</sup> UNAM study, Appendices 2-7.

<sup>50</sup> UNAM study at xii.

<sup>51</sup> After asking about the position of orphans of married parents, a series of questions probed for the treatment of orphans of cohabiting unmarried parents versus other unmarried parents.

*120 If the parents are NOT married but live together and both parents pass away:*

## 10.5 Informal polygamous relationships

One important point raised by many individuals in both stages of the LAC research is that often people do not know that their partner is involved in another relationship. As key informants pointed out, married men from rural areas who travel to Windhoek or other urban centres for work often take a partner in their new location, splitting their lives between one woman back home and another one in the city. The research suggests that in such situations, some but not all girlfriends are aware that the man has a wife, and some but not all married women are aware that their husband simultaneously cohabits with another partner.

In the focus group discussions, some of the participants also acknowledged that women in cohabitating relationships often have to deal with the fact that their partners are married to other women. One of the interviewees felt that registration of cohabiting relationships would be good because *“it would help women because when a boyfriend goes to cohabit, he is already in the government computer system and cannot because he will be shown as married. This will keep people from thinking they can do this sort of thing”*. However, another interviewee viewed the issue from the opposite perspective saying that *“protecting cohabitation relationships would harm marriages and would harm married women”*.

*Most of the married migrant labourers cohabitating to another woman in the urban area do not tell this thing to their wives, it remains a secret. But both cohabitating partners know that they are not legally together. They know they are cheating their one in the rural areas.*

female pastor interviewed in the Oshana Region, 2002

The anecdotes given by female partners suggest that they sometimes become aware that the man is married once it is ‘too late’ to leave the relationship. For example, one female cohabitant said, *“I do not share a household with the married woman, but the married wife knows about me...I had to tell her because I fell pregnant. I did not know he was married, I even wanted to abort the baby but he refused. I am not very happy, it upsets me a lot considering the fact that he never told me that he was married, and I am pregnant now.”*

Because many people are not aware that their partner is in another relationship, they do not class themselves as being in an informal polygamous relationship. Even where they are aware of it, social attitudes may prevent them from wanting to admit this fact.

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120.1 *Is there any difference in who takes care of the children if their mother and father are both dead but they were Not married and did NOT live together?*

120.2 *Is there any difference in who is responsible for the daily care of these orphan children depending on the children's age or sex?*

120.3 *In general, who is most likely to take care of orphaned children (such as older women, grandmothers, younger men, or uncles)?*

<sup>52</sup> UNAM study, Appendices 2-7.

When collecting data about informal polygamous relationships, the LAC focussed on information from persons who had been or were at the time of the interview involved in such a relationship. For that reason the sample size was small and generalised trends cannot be drawn from the results, though the data nevertheless provides insights into the way these relationships may function. Additional information comes from focus group participants who spoke about community norms in such situations.

Informal polygamy is but one manifestation of extramarital relationships. Focus group participants in another recent study in eight regions of Namibia spoke generally about how such relationships have changed over time:

*All [focus group discussion] participants indicated that married men having girlfriends was an accepted practice in the recent past. Even when the wives found out about their husbands' affair with other women, they didn't react violently to the situation. Participants continued, saying that in the past girlfriends knew that wives were the first priority, thus they didn't demand much from the husband.*

*The younger female group added that, in the distant past, if it was found out that the man had an affair, it was made public for everyone to know about it. Girlfriends as a result kept things discrete, they 'knew their place' in a three-way relationship, and did not make any demands of their married partners. This meant that there was little conflict around such relationships, but only if things were kept secret. Now, girlfriends were much more demanding, and did not respect their boyfriend's wives, and this resulted in violence.*

Social Impact Assessment Policy Analysis Corporation (SIAPAC),  
Knowledge, Attitudes and Practices Study on Factors that may Perpetuate or Protect Namibians from Violence and  
Discrimination: Caprivi, Erongo, Karas, Kavango, Kunene, Ohangwena, Omaheke and Otjozondjupa Regions,  
Windhoek: Ministry of Gender Equality and Child Welfare (MGECW), 2009 at 57.

## Dividing resources between multiple female partners

The question of how a man with multiple female partners divides his resources between these partners was met with mixed responses from the informants.

One married man cohabiting with another woman said, “*My wife knows I work far from home. She takes care of the land and children in the North. I send her money. She understands, if she feels bad she doesn't tell me. I send money to the North for the wife and children. Most of my money I send to them. But I also help out with paying for the house and all the other things with my lover.*” A key informant – a male traditional leader from the Caprivi region – agreed that this is what should be done when a man has multiple partners, saying that “*the man must take care of both homes separately and what he buys for the one house is for that woman and what he buys for the other is hers.*” This approach seems to draw on the traditions of formal polygamy.

*Since his wife and I know about each other, I would rather get accepted as his second wife, just like the old tradition.*

woman cohabiting with a married man, Erongo Region, 2009

*It is hard work to change a man from a drunk to a diamond. I polished him like a diamond. I made him do the accounting, cleaned his house better than his mother did so that it looks like a hotel. If it was not for me giving him these guidelines, he would not be the man he is today. Now, some other lady gets to benefit from that.*

wife of a man with a girlfriend, Karas Region, 2009

However, a married woman whose husband is cohabiting with someone else told researchers that she and her children see her husband about two days a month, and that “*whenever he is with us, he pays for something. Otherwise he gives us nothing.*” This suggests that not all men share their resources equitably between multiple partners.

## CASE STUDY

My husband and I have been married for 7 years. We were married in church and under customary law. We have four children together. They all live with me. They are 16, 13, 10, and 6 months old. He has been living with his girlfriend for 5 years. They have 2 children, ages 8 and 4. Maybe for two days a month he comes to us and then he is gone. Whenever he is with us, he pays for something. Otherwise he gives us nothing

The other relationship affects our marriage a lot because I have children and he has children in the other relationship too. It takes the father’s love from my children too and affects the whole household. I suffer from loneliness and feel empty. I had chosen someone to be with for life and now he is gone.

But I don’t have a problem at all with her. She came from a village and my husband told her lies. She accepted him. I greet her when I see her and we talk. It is not from her fault – she did not know him and found out he was married later on.

woman interviewed in Keetmanshoop, 2009

## CASE STUDY

My husband and I are married but he is living with another woman in Windhoek. We have been married for 15 years. We have two children together but they are all grown up. He has been living with the other woman for the past year. It has completely ruined my marriage, I have lost my husband. My children are all grown up so I live alone.

He does not spend anytime with me at all, and he does not assist me or our children financially. It hurts me a lot because this women that he is with is a cousin to me, I do not like their relationship.

I don’t know if my husband has a will or not but since we are still married all the belongings should be for me. I don’t think the partner that is not married should get anything. Protecting that kind of relationship would harm society as more women would feel like they can be with married men.

woman interviewed in Keetmanshoop, 2009



## Inheritance issues in informal polygamous relationships

There was insufficient information from interviews with those involved in informal polygamous relationships to draw conclusions about how assets are divided in the event of the death of a man who has both a wife and one or more ‘girlfriends’, although the comments made by various individuals give some indication of general concerns about this issue. The LAC focus group discussions provided useful indicators of what is likely to happen to the wife and partner in this situation, whilst the UNAM study concentrated on what would happen to the children of the cohabiting partners in these circumstances.

Individuals interviewed generally thought that the married partner should or will get the majority of the property, while the cohabiting partner should or will be disadvantaged. For example, one person said:

*Because any property must be shared with the spouse according to the marital property regime they were married under, the cohabiting partner usually loses out.*

Several suggested that the cohabiting woman will only get the children born from the relationship and nothing else. Others worried about the children of the cohabiting partner being left with nothing:

*The children [from the cohabitation relationship] will not benefit from anything – no livestock, no property, no money. This is so unfair to the poor woman who built a union with that man.*

Some placed inheritance in this situation in the context of polygamy under customary law, such as an Oshiwambo man in the Kavango Region:

*If the rural wife is the senior wife and the urban partner, the junior and they got to know each other, the senior wife, usually with more children, gets the larger share of the property. It becomes a problem when the women do not accept each other; they then bewitch each other so that none inherits.*

Several acknowledged that there is likely to be conflict between the spouse and the cohabiting partner – with one positing that there will be fighting particularly if the man left no will, and another suggesting that conflicts are more likely to occur if there is a will.

Similarly, the general consensus amongst all the LAC focus groups conducted in 2009 was that the married partner will usually get the majority of the deceased’s property if there was no will, although some provision may be made for children of the deceased who were born outside marriage.

There were three separate sets of opinion as to what *should* happen when a man in an informal polygamous relationship dies.

Firstly, many participants believed that the wife should get everything. They thought that the wife should receive most of the deceased’s property, may take the house the girlfriend lives in (if it is not registered in the girlfriend’s name) and that the girlfriend should and would get nothing. Participants who supported this view often referred to the fact that the wife had “papers” and therefore a more legitimate claim on the property than the girlfriend. If the girlfriend bore a child for the deceased partner, there was general assent that the child should

get something, though opinion was divided on whether the child would in reality receive anything. If not, one group suggested that the girlfriend would probably take the child and apply for government grants. The group also suggested that the girlfriend would probably be able to move back home to her family.

A second opinion was that the attitudes of the deceased's family could and should be decisive in determining the division of the property. For example, one woman suggested that if the deceased's family likes the girlfriend then they will take care of her and force the wife to share with the child. A man demonstrated the influence of the family when he said *"I know of a guy that was married but separated. He worked here and lived with his girlfriend for four years. He died and the girlfriend did not get anything. Neither did the wife. The family took everything"*. Many people in the UNAM study similarly mentioned family attitudes as being a crucial factor in the fate of the female cohabitant.

The third body of opinion was that the girlfriend 'deserves' to be able to keep her possessions and those she shared with the deceased, and perhaps the property she lived in, if the relationship was enduring. Justifications for this view usually centred on the time and effort the girlfriend put into the relationship, her role making the deceased happy and her financial input into purchases the couple made. One participant at a focus group discussion gave a personal example to explain why she felt it was unfair that the female cohabitant does not benefit – *"my uncle's girlfriend lived with him for 10 years and nobody gave her anything when he died"*.

## CASE STUDY

A 58-year-old elderly woman, Ruth, is on the verge of losing her homestead in the Oshana Region after the death of her husband, Joseph, who passed away in 2006. She was like a wife to him after he separated from his wedded wife, Mary, approximately 35 years ago. Mary relocated back to her village in around 1971. Joseph lived single for many years before he decided to settle down with Ruth. In the meantime Joseph had many children with various women and as the children became more he knew he needed to make a home for them. Although Joseph was working for a mining company at the time he was separated, he needed to make a house in the village where he could retire and live with all his children and produce food.

It was around that time in the late 1980's when he asked Ruth who was working at a local high school to leave her job and go start a home with him at a nearby village. Ruth's mother was not in support of the idea, mainly due to two things: firstly Joseph was once married although separated with his wife, and secondly, Ruth had a permanent job which she could not just leave as she was the breadwinner of her family. With some elders' advice, Ruth's mother asked Joseph to ask permission from the church to take Ruth. In addition, in honour of tradition when a man takes a lady to go make a home with her, called "elugo", a cow was given to Ruth's mother as a token of appreciation for giving her daughter. It was delivered by one of Joseph's brothers.

Ruth and the late Joseph started their new home together to produce food for their children. They had two children. Ruth cleared the land single handed while Joseph was at work. After harvest, Ruth would go to Oranjemund to visit Joseph and the children and to rest after a year of hard work. The food she produced she would continuously send to in Oranjemund, seeing that omahangu was the family's staple food.

When the late Joseph retired in 2000, he moved permanently to his home at the village and continued to live with Ruth up to the time of his death in 2006. Ruth was at Joseph's bedside in hospital when he died. Their children made arrangements and took care of all expenses to bury Joseph.

The day after burial, as per tradition, relatives of the late Joseph turned the house upside down and destroyed a family that was still mourning – regardless of the fact that Joseph had a will which he wrote in 2002 and made it clear to his children that it should be followed through as per his wishes.

A few family members of the late Joseph refused to honour his wishes and went to great lengths to ensure that the will was not followed. The late Joseph's wishes were shattered and his property destroyed. To justify their actions, some relatives accused Joseph's children of actually writing their father's will. Abusive language was thrown towards Ruth as if she had no human rights or any dignity. Some relatives even wanted to physically throw her out. However Ruth, being a strong woman, stood by what she believed existed due to her hard work. Her fruits in the house were visible for all to see. It is due to her hard work that Joseph could proudly say he was a man with a village home that produced food, and had cows and goats like all other men.

The worst was still to come, a month down the line. Ruth had an unexpected visit by a number of her late husband's family members. The visit included Mary, the wedded wife of Joseph who had been separated from him for approximately 35 years. Their mission was to remove Ruth out of her homestead and put Mary in there. They were determined to remove her that day, and some of them wanted to physically fight the old woman, calling her dirty names and stating that she had to go as she was only a slave to the late Joseph and since he was no longer there she had to leave. They took all the field tools and locked them up, ordered her not to work the field as the wedded wife was going to come work the field herself.

The local headman has made his decision that the land would remain in Ruth's name, to live there with all the children, as he had not known any other women to have been living in the house as the late Joseph's wife. He would in addition prefer to honour the will of the deceased as tradition normally does not allow one to go against the deceased's words.

From the children's side, they are totally devastated by the actions of their father's family. They maintain that their father was a good man who loved everyone, loved order and hated friction among those that were close to him...

What good is a piece of marriage certificate that was not honoured in any way while alive but now is the most important document after death? Is Mary now coming to marry her husband in death? In reality this is what the family of the late Joseph is trying to do. If they so loved each other that the two of them should continue honouring their vows, should this not have been done while he was still alive?

Nowhere in the will of the late Joseph did he mention the name of this now seen to be important wedded wife; most of his belongings he had left for the wife he had been with and who looked after him for half of his life, Ruth.

We now ask your good centre to please help Ruth to fight for what we believe is rightfully hers...

from a statement provided to the Legal Assistance Centre  
by two adult children of "Ruth" and "Joseph", 2009  
(names and identifying information changed to protect client confidentiality)

## CASE STUDY

Maria lived with Elton since 1993 as a result of a customary union. Maria was then involved in a car accident and admitted to the hospital's intensive care unit for three months where after the Motor Vehicle Accident Fund paid her a substantial amount in respect of her injuries. She used the money to pay off the house which she inhabited jointly with Elton. She settled all Elton's debts and bought a bakkie which Elton drove. In less than four days almost all of the Motor Vehicle Accident Fund payment had been spent.

In 2004 Elton overturned the bakkie and died on the spot. The vehicle was written off. After the burial, one of the Elton's sons was appointed as executor and at a family meeting it was decided that Maria should retain the house since it was the only asset in the estate, because she had made substantial payments towards the joint assets and because of her injuries in the car accident.

A second woman, Johanna, then appeared and claimed that she was married to Elton in a civil marriage in 1980. Johanna was then appointed as executor. She took legal action seeking to evict Maria from the house, and steps to transfer the house into her own name.

*Johanna will probably argue that the customary marriage between Maria and Elton is invalid because of the pre-existing monogamous civil marriage, which would place Maria in the position of a cohabitant.*

from a statement provided to the Legal Assistance Centre by "Maria", 2009  
(names and details changed to protect client confidentiality)

***The man's family mostly only cares for the children born in marriage. Children, born from cohabitation relationships, are neglected. They don't share in the property or livestock of their father.***

woman interviewed in the Kunene Region, 2009

In the UNAM research, various scenarios were used to provoke discussion amongst focus group participants on maintenance and inheritance issues for extramarital children of informal polygamous relationships:

*Dorothy and Thomas have children, but they are not married. Thomas is married to Rosilin who he also has children with.*

Using this scenario, the focus group participants were asked to discuss three questions:

- 1 *If Thomas dies, do the children Dorothy had by Thomas have a right to any of his property, monies or anything else that Thomas owned?*
- 2 *If Thomas dies, who financially takes care of the children of Dorothy and Thomas?*
- 3 *If Dorothy has property and she dies, does Thomas have a right to any of Dorothy's property?*<sup>53</sup>

There was disagreement between the various communities on these issues:

*There are significantly differing opinions within and between communities as to whether or not Thomas's children born outside of marriage should inherit from him should he die. In the Khomas Region people say that it is Dorothy's responsibility to find out if her children inherit any of Thomas's property, while other people disagree as to whether or not the children have a right to any property. In general, Kavango and Nama people say that children born out of wedlock have a right to inherit from their father's estate; in Owambo and Herero people say that children born out of wedlock do not have a right to their father's estate – although in Herero the father's family*

<sup>53</sup> This is question 76 in the key informant interview guide and the "Focus Group B" discussion guide. UNAM study, Appendix 1 at 67 and 78 (grammar as it appears in original).

could 'purchase' the right for Dorothy's children to become heirs by paying her extended family a cow; and in Lozi these children can inherit from their father if the children were already recognised as Thomas's.

When asked if Thomas dies who financially cares for Dorothy's children, again there is disagreement between the various communities. Most often people feel that Dorothy will have to support the children. People in the Khomas Region say that Dorothy's natal extended family will help her; the Nama say that Dorothy's and Thomas's parents should help support the children; in Owambo and Kavango Dorothy's brother should financially help; in Herero [communities] if Thomas's family has 'purchased' rights over the children they could 'inherit' the children by asking for the children to live with them; and in Lozi [communities] Thomas's extended family should help financially care for the children.

However, when asked if Thomas has a right to any of Dorothy's property if she dies, all people in the various communities agree that Thomas, having not formally married Dorothy, has no right to anything Dorothy owned.<sup>54</sup>

The LAC research confirmed the differences of opinion on the right of children born outside marriage to inherit under customary law, even within the same community. For example, one Subiya woman in the Caprivi Region thought that such a child would be vulnerable to the goodwill of the deceased's spouse, if there was one: *"The children born of a cohabiting relationship can inherit from the biological father. But this will depend on the kindness of the biological father's spouse. She must decide to give the child something."* On the other hand a Subiya traditional leader confirmed that children would have no problem inheriting under Subiya law: *"There is no discrimination against such children. Both parents take care of them and are responsible for them and if any of the parents die the child will inherit like any other legitimate child."*

Given the legal precedent on children born outside of marriage under general law,<sup>55</sup> it is possible that some future constitutional challenge to customary laws which discriminate against children born outside marriage might lead to changes in some of the current rules.

***We used to have issues with children born out of wedlock  
but the law changed and we don't have these any more.***

female social worker, Swakopmund, 2009

## 10.6 Community attitudes towards cohabitation

Most of the people interviewed by LAC felt that people in their families or community disapproved of cohabitation, although some found that their situation was accepted. Christian morality was often cited as the basis for the disapproval of others.<sup>56</sup> The following quotations give some idea of the range of attitudes:

<sup>54</sup> UNAM study at 48-49 (with typographical error corrected).

<sup>55</sup> See pages 137-138.

<sup>56</sup> It is estimated that 90.9% of people in Namibia are either Protestant or Roman Catholic Ministry of Health and Social Services (MoHSS), *Namibia Demographic and Health Survey 2006-07*, Windhoek: MoHSS, August 2008 at table 3.1.



## **Examples of positive attitudes**

*We do not experience any problems because we are not married. We do not have people gossiping about us. The children are not made fun of at school. The other reason that the community does not point a finger is because many people live together although not married.*

Nama woman in a cohabitation relationship, Karas Region, 2002

*I think older people do not approve, but younger people like my friends do not have a problem with us.*

Herero/Owambo woman in a cohabitation relationship, Erongo Region, 2002

*Nowadays people approve more than they used to. Times are changing.*

man interviewed in Windhoek, 2009

## **Examples of neutral attitudes**

*It is not good to encourage it, unless the couple has a vision to marry.*

Damara man in a cohabitation relationship, Kavango Region, 2002

*Cohabitation is not allowed in my tradition. But if the parents are liberal then they may allow their children to live together.*

Mafwe key informant, Kavango Region, 2002

*Some people don't care.*

man, Swakopmund, Erongo Region, 2002

*If the couple has children then the family will tolerate cohabitation.*

Damara man, Kunene Region, 2002

*The nuns at church just said it's better to get married but when we baptised our children they were not looked at as funny; we were not treated any different from a married couple.*

Nama woman in a cohabitation relationship, Karas Region, 2002

*When one partner is already married, Christian values make this a hard subject, but she may be more of a wife than the real wife, since he may not have seen his wife in years.*

focus group participants, Katutura, 2009

*People don't have time to approve or disapprove because everybody is worried about their own household matters.*

woman in a cohabitation relationship, Swakopmund, 2009

## **Examples of negative attitudes**

*In some cases the relatives of the man will accuse the woman of being a witch and would not take her into the family. People in cohabiting relationships do not get respect in the community. They are not considered as people with status.*

Ruwangali man, Kavango Region, 2002

***The church says that children born out of wedlock have to be made holy by being christened. If a couple continues having illegitimate children, then they are given the ultimatum by the church to marry. This results in forced marriage.***

Owambo male youth leader, Kavango Region, 2002

***In our tradition the goodness of a family and respect is looked at by how many children are married in that family. Churches are reluctant to baptise children born outside marriage.***

Damara man in a cohabitation relationship, Kunene Region, 2002

***Cohabitation was never a part of our cultural system. It always creates family conflicts. Culturally, if a girl has been found to be sexually active, she would be advised to undergo traditional marriage. To avoid chaos in the community, people who are not married should be encouraged to do so. A woman will have no dignity in the eyes of the community until she gets someone to marry her.***

Owambo female pastor, Oshana Region, 2002

***My family is not happy that I am living with a married man.***

woman in a cohabitation relationship, Erongo Region, 2002

***No one approves of us living together, people gossip that he is with me because I bewitched him, and he is more with me than his wife.***

woman in a cohabitation relationship, Erongo Region, 2002

***Marriage is in your culture as a Christian. Not only is there outward discrimination, there is also guilt that one feels for oneself.***

focus group participants, Khomasdal, 2009

***It is against the law of the Lord.***

focus group participants, Swakopmund, 2009

***They disapprove of it and mostly because there is a big association with living together and alcohol abuse and people disapprove of all the fighting.***

woman interviewed in Swakopmund, 2009

***The relationship between the man's family and the woman will be bad, as they will not show her respect.***

focus groups participants, Ongwediva, 2009

***There is a lack of respect in these relationships. People are not worried about the laws. Most of the domestic violence is because of financial stress or because there are other partners who find out about each other and this leads to domestic violence. In marriage there is commitment and respect.***

social worker interviewed in Swakopmund, 2009

Negative attitudes were particularly pronounced in the case of same-sex cohabiting couples:

***It is abnormal and not God's wish. Protecting the couple means encouraging same sex relationships.***

female traditional councillor, Kunene Region, 2002

***Well, I understand that same sex marriages are not recognised in Namibia. My partner and I are both from South Africa, and we might get married once we go back. Right now we love Namibia and have a good relationship. People in the community generally do not know that we are a couple. They probably think we are just two women living together (which we are). I do understand, however, that homosexuality is not accepted in Namibia in general, which is a pity because people do know who we are and should thus not judge us. I think it is just a phobia.***

South African woman in a same-sex cohabitation relationship, Erongo Region, 2002

***Many community members disapproved. Some neighbours got to know us as people, and we had no problems with them. The larger community was not supportive. My family eventually accepted it, but his [family] had a hard time believing this he was in this type of relationship.***

man in a same-sex cohabitation relationship, Keetmanshoop, 2009

A few respondents made suggestions on how cohabitation should be discouraged, for example:

***Churches should start to find a way working hand-in-hand with the State to marry these cohabitating partners. Cohabitation is like a beginning of a relationship, but people should not be encouraged to do so. People should be advised in schools to marry rather than cohabit; advising them on the consequences of such a relationship.***

Damara man, Kunene Region, 2002

***The main thing in our society is that because of the education system, if you fail grade 10, you go to an institute. This causes anxiety in young people who think that if they fail, then they have to stay home and not work. So women look for men with cars to support them, which is very dangerous because men are married and using women. They then abandon the women, leaving them with children and no support. Free education to grade 12 would be a blessing. It would reduce the children left on the streets, alcohol abuse, the drug rate, and dropouts.***

priest, Erongo Region, 2009

Despite the prevalence of cohabitation, the examples cited indicate that Namibian communities have mixed opinions about the practice with the main objections being violation of religious tenets or customary norms.

## 10.7 Advantages and disadvantages of cohabitation

### ***Advantages***

When asked about the main advantages of cohabitation, the most frequent answers from focus group participants related to the financial incentives of living with a partner. The possibility of greater financial stability achieved through the pooling of resources seemed to be the overriding tone of the responses, but within the broader category of ‘financial incentives’ a range of justifications were offered. Answers varied from suggestions that sharing the financial burden of living could enable one partner to get an education whilst the other worked, to one female respondent who said that a strong incentive to cohabit is poverty, arguing that if a woman needs to eat she will cohabit without reflecting on the future implications of her decision. Many people in the focus groups also felt that poverty was a factor influencing cohabitation.

The second most commonly-reported advantage of cohabitation is that it is easier and ‘better’ for parents to raise children together. Respondents noted the benefits of a child knowing both parents, as well as the lessened burden of childcare when the responsibility for raising a child is shared.

Love and emotional support were the third most often-cited benefits of cohabitation, with one participant suggesting that *“it is the best life and both of you think it will last forever”*. There was much support for the sentiment expressed succinctly by one participant that *“cohabitation is a precursor to getting married – it gets rid of illusions you might have and you can figure out your differences together”*. Indeed the idea that marriage would follow from a period of cohabitation was the next most-mentioned ‘advantage’ of cohabitation. However many interviewees also noted that although marriage might be the intention, it did not always materialise.

Other advantages of cohabitation identified by multiple focus group participants were that it is easier to leave a cohabitation relationship than a marriage if the relationship fares badly, that household chores may be shared by cohabitants, that cohabiting encourages monogamy (and therefore reduces the spread of HIV), that cohabitation is preferable to an expensive wedding and finally that moving out to cohabit with a partner relieves pressure on an over-crowded family household.

### ***Disadvantages***

The 2002 field research found that there was disagreement as to whether there were particular problems for couples in cohabitation relationships compared to married relationships. Some people felt that the couple, and particularly the woman, gets no respect. Although one Subiya man felt that a cohabiting couple is not regarded in the same way as a married couple, another Subiya man and one Sambwe man disagreed, saying *“we are regarded as married to our girlfriends”*. One woman living in Swakopmund said that her family did not cause problems for her because *“my family knows that we are saving for our wedding”*.

As already mentioned, women in cohabitation relationships cited the lack of financial support from their male partners, the instability of the relationship and problems with the male partner's relatives.

A female traditional councillor in the Kunene Region noted a range of psychological difficulties which could arise from such relationships, for the partners and the children involved:

*During the relationship the man usually impregnates the woman and beats her up. If the relationship breaks up, the man usually does not want the woman to have another man but he takes on another woman. Suicide among these types of couples occurs more often. The men are selfish. If people cohabited for a long time, it becomes difficult for children to adapt to a new environment. The children are also often disadvantaged in terms of education. In the community children can suffer from a certain complex and become street kids.*

Others felt that there was no real difference between the problems found in cohabitation relationships and those found in a marriage. One woman living in Windhoek said that “yes, there can be problems, but married couples often have the same types of problems”. A female pastor in the Oshana Region agreed, saying “there is no life without problems in a relationship”.

A woman in a cohabitation relationship in the Erongo Region felt that:

*There might not be problems during the relationship, but they certainly experience a lot of problems when the relationship breaks up. It may be that it is easier to leave, because you do not need to go through a divorce, but it also becomes a problem if you depended on the person you have been living with. It leads to exclusion from his/her will, no benefits such as pension, medical aid etc. When the partner dies, one experiences the same problem as when the relationship breaks up.*

Several persons interviewed noted that the woman usually loses any access to the property accumulated during the relationship when a cohabitation relationship breaks up. One woman thought that there is often destruction of property after a break-up and that the children may be left without anything. A woman from Windhoek said: “If the relationship breaks up, the woman usually loses out on everything especially when the house that they lived in belonged to the man.”

Informants also mentioned problems for cohabiting couples when one partner dies, citing fears that the extended family of the deceased will come and take the deceased's property including property that the surviving partner had helped to accumulate.

A female pastor in the Oshana Region emphasised discrimination against women when it comes to property issues:

*If one partner dies, the surviving one is not regarded by the community as a widow or widower, no matter how old they are, or how long they stayed together. However, it is much better from the side of a man if his partner dies, because most of the time men are not discriminated against in this regard, unless he has been a problem and the household was headed by the woman. But if the man dies discrimination comes in. She will be regarded as a visitor, and automatically her time for “visiting” will be up. She has to pack her suitcase and leave.*



## Problems with cohabitation (2002 research)

### Problems during relationship

- Lack of respect from others, especially for the woman
- Lack of financial support from male partner
- Families of the couple do not approve
- Woman feels insecure because of the instability of the relationship
- Man often has other partners and children
- Violence within relationship
- No protection from the police if victim of domestic violence
- Lots of fights
- “No love” in a cohabitation relationship
- The man does not take care of the children
- Unmarried father has fewer rights over the children<sup>57</sup>
- Man spends most of his money on his other girlfriends
- Cohabitation is considered to be a sin
- Cannot receive any medical aid or pension benefits from partner if not married
- Psychological problems for partners and children

### Problems when relationship ends

- Financial disadvantages because of lack of procedure for property division
- Discrimination against women in respect of property, especially when male partner dies
- Remaining partner may struggle to raise children alone

## CASE STUDY

**I lived with my partner for 5 years, but now it's over.**

**We were going to get to know each other and then get married. Then I found out he was cheating and that was the end of the relationship. In the beginning we were both thinking of marriage.**

**We have one child who still lives with me.**

**When we were living together, he paid the rent and I did electricity. We both did the food. When we bought big things we both contributed. I was also supporting my older daughter and my mother.**

**The house was in his name. When we broke up, he took everything and stayed in the house. I took only my clothes. We never had a chance to talk about what would happen if the relationship ended. It came up all of a sudden because I found out he was cheating and we split up.**

**We experienced problems because according to our religion and tradition we cannot be recognised. Our families did not support us. It wasn't pleasant. My mother was always talking to me and so was the church. I was ashamed.**

**My daughter today has problems because she has her father's surname. People are asking her to change it and she doesn't know the whole story.**

**We were not welcome in some places. People gossip. It's against our religion and our tradition. The elders say that this is not a nice thing.**

woman interviewed in Swakopmund, 2009

<sup>57</sup> This was true at the time of the interview, but has been ameliorated since then by the Children's Status Act 6 of 2006.

In the 2009 research, a significant majority of the interviewees and all of the key informants felt that cohabiting couples experience difficulties because of their relationship. When asked what the biggest problems associated with cohabitation are, a large number of focus group informants and interviewees cited problems associated with cheating and a lack of trust.<sup>58</sup> A number of respondents concurred that partners often do not trust each other because they are not bound together as in marriage and that fights occur when one partner is jealous. The participants in one of the focus group discussions stated that the lack of commitment in the relationship can mean that the male partners are very possessive – *“The boyfriend always thinks you are looking for a new boyfriend. With husbands, you go out together and they do not have to be possessive”*. Interestingly, participants in another focus group discussion said that there is no protection against domestic violence in cohabiting relationships because if the couple are not married and the woman complains, the police will tell her that she can leave the relationship.<sup>59</sup>

A related issue frequently raised was the transmission of HIV because of unfaithfulness, and also because of the lack of stability in the relationship, or the lack of a sense of responsibility for the other partner. For example, one woman in a focus group in Ongwediva claimed, *“Men are HIV positive and give it to their girlfriends but don’t tell the woman because they are not their wives and there is no commitment. When the girl finds out she is HIV positive as well, the man feels no loyalty to her and throws her out and accuses her of giving it to him”*. Another then suggested, *“Her partner won’t listen to the doctor’s orders and use a condom with her because he doesn’t respect her like a wife and so she gets the disease and spreads it around”*.

***Within these types of relationships, “extra” relationships happen more than in marriage and there is nothing you can do about it.***

community activist interviewed in Windhoek, 2009

A second very common response when asked about the difficulties concerning cohabitation was that women’s rights over land and possessions are not respected when the relationship ends while both partners are still living. Most focus group participants agreed that if the house is not registered in a woman’s name, she would typically leave the relationship taking nothing but her clothes – regardless of her financial input during the relationship. One group of respondents said that the man may threaten to kill the woman unless she gives back everything that he gave her. In these instances, researchers were told, the police will not step in to help the women leave safely with her belongings. One focus group participant told researchers that she and her boyfriend had been in a relationship for 25 years and had managed cattle together. When the couple separated, the boyfriend only wanted to give her 2 cows. The woman went to the magistrate and obtained a court order saying the man had to give her more cattle but the police did not obey the court order because they wanted to help the boyfriend. Even in less extreme cases where one partner does not take all, there are considerable difficulties. One respondent pointed out, *“there are no laws as to who gets what possessions and money. It is hard to figure out since, unlike in divorce, you don’t each have lawyers”*.

<sup>58</sup> This concurs with a 1994 study which found lack of financial support, jealousy, constant arguments, secrecy, guilt and shame to be the most common problems in cohabitation relationships. See Namibia Development Trust (NDT), Social Impact Assessment and Policy Analysis Corporation-Namibia (SIAPAC-Namibia), Friedrich Ebert Stiftung (FES) and Centre for Applied Social Studies (CASS), *Improving the Legal and Socio-economic Situation of Women in Namibia. Uukwambi, Ombalantu and Uukwanyama Integrated Report*, Windhoek: NDT, 1994 at 3-4 (second part of the report).

<sup>59</sup> In fact the Combating of Domestic Violence Act 4 of 2003 does recognise cohabiting relationships. Therefore this response maybe inaccurate hearsay, or it may reflect ineffective service provision from some police in Namibia. Finding an appropriate balance between providing protection to women in abusive relationships and reminding women that they do not have to stay in violent relationships (even if they are married) can be difficult.

Related to the above problem is the issue of the emotional and financial control that may be exerted by one partner over the other, trapping the latter in the relationship. A number of respondents said that where there has been no marriage, women are often in a vulnerable position and are therefore forced to comply with the wishes of the male partner or be thrown out, taking nothing with them. A key informant from Katutura stressed the weak position women find themselves in: *“These relationships close things off for women and make them more dependant. Often these men ask women to quit work and the women lose some bonds with their own family as they follow these men... Then the family cuts them off and they can’t return to them.”* One male focus group participant said he was aware of the subservient position his partner found herself in: *“If I’m the breadwinner, she is dependent on me. I’ll force her to do things she doesn’t want to do. I may make her have sex with me. Maybe I will emotionally abuse her if she is hanging out with a friend I don’t like”*.

If the male partner dies during the relationship, many female respondents claimed that the man’s extended family will often engage in property grabbing and the surviving partner may be *“chased out”* with her children, without a means of support. In addition, a number of respondents discussed other difficulties in the event of death of the male partner, such as the deceased’s family refusing to provide the female partner with the death certificate which in turn prevents her from claiming certain benefits. One informant also remarked, *“If he dies, no one takes it seriously as losing a partner. The woman might not be allowed to attend her dead partner’s funeral”*. One reason frequently offered by the participants as to why long-term cohabitation partnerships are not taken seriously is the lack of “papers” which seems to be perceived as synonymous with a lack of legitimacy.<sup>60</sup>

Another problem frequently cited by informants in focus groups was family and community interference in the relationships of cohabiting partners. A woman from the Erongo Region provided a typical example of this when she said, *“No one approves of us living together, people gossip that he is with me because I bewitched him, and he is more with me than his wife.”* Some respondents said the man’s family will have a bad relationship with the woman as they will not respect her. Others said community censure is strong. One respondent said that *“breaking up is hard, just like it is in marriage – there is no community support in these relationships though. Since people were not invested in your relationship when it functioned, they are not there to support you when it breaks down. People would tell me I was living in sin about once per month.”* However, it is important to note that the data collected on this issue varied significantly since only about half of the cohabitants interviewed said their communities disapproved of the cohabitation relationship. There were some suggestions by participants that disapproval may be more common in villages than urban areas.

Religious, especially Christian, views on cohabitation were frequently cited as being sources of negative attitudes towards cohabitation relationships. One young woman commented that *“marriage is in your culture as a Christian. Not only is there outward discrimination, there is also guilt that one feels for oneself”*. Many respondents reported that it is difficult or impossible to get a child born outside of marriage baptised, and others said that the unborn child of a cohabiting couple will be cursed.

A further problem that many respondents said often featured in cohabitation relationships is a lack of respect for the female partner and a high level of control exerted by men over their

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<sup>60</sup> Several participants suggested that an “estranged wife” who presented herself after the death of the deceased may receive all of the deceased’s property because she has “papers”, even if she had not played an active role in the deceased’s life for many years and despite any financial contribution that may have been made by the cohabiting partner.

partners, especially after pressuring the partner not to work. The high incidence of threats and domestic violence that informants said occurs in these relationships may play a part in the level of control and power men have over their female counterparts. Alcohol and drug abuse was said to contribute towards many, though not all, instances of domestic violence.

A Namibian study of domestic violence published in 2003 found that women who were cohabiting with partners were more likely than married women to suffer domestic violence. This study also found that abused women in cohabitation relationships were reluctant to seek help from church leaders because of the fear of being reprimanded to “go and sin no more”.<sup>61</sup>

A later study conducted to assess factors and traditional practices related to gender-based violence showed that married women were significantly more likely than single women to have been exposed to physical violence. No differences between married women and cohabiting women, or between cohabiting women and other single women, were noted, which may indicate that there were no significant differences between these situations – or it may be that the researchers did not consider comparisons between these categories.<sup>62</sup> This study also found that extended family involvement in marriages which once helped prevent violence has weakened in some regions,<sup>63</sup> meaning that some of the distinguishing features between marriage and cohabitation in this regard may be collapsing.

The final disadvantage of cohabitation relationships frequently offered by focus group participants is that women end up ‘wasting time’ with someone who will not marry them, reflecting a cynicism towards the idea that cohabitation could be a valuable precursor to a marriage between the partners.

Noteworthy, though less commonly cited, reasons why respondents said cohabitation is problematic included difficulty convincing men to pay for their children’s school fees since the men were saving to pay for their ‘legitimate’ children, problems with getting cohabiting partners or children of such relationships on employee or other benefit schemes and the sexual abuse of children by male cohabitants living in a household with their partner’s children from a previous relationship.

The chart below lists the responses from 2009 focus group discussions where participants were asked to list the “bad things” about cohabiting, with the most frequently-cited problems listed at

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<sup>61</sup> Ministry of Health and Social Services (MoHSS), *An Assessment of the Nature and Consequences of Intimate Male-Partner Violence in Windhoek, Namibia: A sub-study of the WHO multi-Country Study on Women’s Health and Domestic Violence*, Windhoek: MoHSS, 2003 at 24 and 48. This study surveyed 1500 women between the ages of 15 and 49 in Windhoek during 2001, including women from every major ethnic group.

<sup>62</sup> Social Impact Assessment Policy Analysis Corporation (SIAPAC), *Knowledge, Attitudes and Practices Study on Factors and Traditional Practices that may Perpetuate or Protect Namibians from Gender Based Violence and Discrimination: Caprivi, Erongo, Karas, Kavango, Kunene, Ohangwena, Omaheke, and Otjozondjupa Regions (Final Report)*, Windhoek: Ministry of Gender Equality and Child Welfare, 2009 at page 61. It is possible that the position of cohabiting couples was not analysed, since that was not a focus of the study.

<sup>63</sup> Id at 32: “One social norm that was felt to be weakening in northern Namibia (Ohangwena, Caprivi, Kavango and Kunene regions) that was felt to have historically protected women from violence by their husbands related to how marriage was perceived. Historically, arranged marriages were felt to protect wives because the marriage was an agreement between entire families, rather than just the two persons getting married. If problems emerged in the marriage, for example physical violence against the wife by the husband that bruised her or broke bones, this was to be reported by the wife through her parents to the parents of the husband, who were to take it up with the husband. As arranged marriages were no longer common, this perceived protective mechanism was no longer in place.”

the top of each category. Many of the same problems can manifest in any relationship, including a marriage, but most participants thought that some of these problems are more difficult in the cohabitation context – especially those problems arising when the relationship ends.

## **Problems with cohabitation (2009 research)**

### **Problems during relationship**

- Cheating and jealousy
- Not same sense of commitment / life planning as marriage
- Domestic violence
- Men demand that women take care of them like a wife would
- Hard to figure out how to divide finances and chores
- Dependency: Man will force you to stop working and will control you
- Partners mistreat each other's property or sell it without permission
- More HIV transmission because of lack of commitment to each other
- Alcohol and drug abuse
- Threats and blackmail
- Don't have own space or independence
- No family planning
- Feel guilty because of not having money to marry girlfriend
- Problems with supporting her family as well as his
- No work benefits
- Family interference with or disapproval of relationship
- Against Christian values
- Community disapproval
- No community support when relationship breaks up or one person dies
- Children suffer during relationship
- Children suffer if relationship breaks up
- Man will not pay school fees
- Sexual abuse of children by non-biological family members
- Children will be cursed by God

### **Problems when relationship ends**

- You wasted your time when he ends up marrying someone else
- "Left with nothing" when you break up
- Property-grabbing by man's family
- Easy to get kicked out of house or must obey to avoid being kicked out
- Hard to figure out who gets what since no laws cover this
- Woman's parents may not support her if her boyfriend kicks her out
- If man dies, his family will not give the woman his death certificate
- Hard to get out of relationship
- Cohabitants are promiscuous after they break up
- If you do get married, the relationship will be cursed
- If man dies of HIV, family will blame girlfriend for witchcraft

*The field research also gave individuals and focus groups an opportunity to offer opinions on various law reform options which could be implemented to address some of the problems associated with cohabitation. Responses on this are discussed in the next chapter.*



# Chapter 11

## OPTIONS AND RECOMMENDATIONS FOR LAW REFORM

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*This chapter will not attempt to provide a comprehensive survey of international approaches to cohabitation; a great deal of information on comparative law is available elsewhere, such as in the extensive report of the South African Law Reform Commission on domestic partnerships.<sup>1</sup> The focus of this chapter will be to draw on models from other jurisdictions to present options for law reform which could be considered for Namibia.*

*This chapter also records the opinions of the cohabitants and key informants interviewed by the Legal Assistance Centre, as well as feedback on possible law reforms from the focus group discussions. However, it should be kept in mind that this qualitative research involved only a small sample and cannot be taken as representing Namibian opinion.*

### 11.1 Should the law intervene?

***This new cohabitation law needs to be done very quickly. We women are suffering.***

focus group participant in Keetmanshoop, 2009

A strong majority of the persons consulted by the Legal Assistance Centre in both 2002 and 2009 were in favour of some sort of legal protection for cohabitating partners. Participants felt particularly strongly that there should be some mechanism for fair distribution of property division, with more mixed opinions on maintenance. One woman summed up the key argument for protection in a 2009 focus group discussion, saying “*I know of a couple together more than 10 years. They have five children. The man does not want to marry the woman. She is not working. The government should protect people like this.*” Another woman in a separate focus group discussion succinctly said, “*If you change the law there will be more good things and less bad things.*” A man interviewed in Keetmanshoop noted the need to protect women in particular in his support for law reform, saying: “*Currently, women have rights, but it is difficult for them to exercise them. This is especially true with respect of inheritance and property grabbing.*”

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<sup>1</sup> South African Law Reform Commission (SALRC), *Project 118: Report on Domestic Partnerships*, Pretoria: SALRC, March 2006 (hereinafter “SALRC”).

Some who did not think any law reform on protection would be necessary felt that it would be adequate for couples to “*follow their own traditional customs*”. One Sambwe man living in a cohabitation relationship in the Kavango Region concurred and elaborated on his own relationship:

*If we decide to separate, then the extended families may come in and decide on how we should share our assets. I do not think we need to have a law on what happens to the property on separation, because under our tradition there are certain rules.*

A few people opposed legal protection because cohabitation is “*against God’s law*”, and a few were concerned that a law protecting cohabitation would allow same-sex couples to marry. Others said that “*the couple should be able to make their own agreement about property etc.*” and “*make their own choice as to whether the other partner should benefit through inheritance, pension etc. or not.*”

Some legal protection for cohabitation appears to be a Constitutional imperative – to protect equality, dignity and diverse forms of “family”. Some form of protection also appears to be mandated by Namibia’s international commitments, particularly under the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination Against Women.

One counterargument is that some people choose cohabitation precisely to avoid legal responsibilities, but this point is weak in the context of a society where gender equality means that men and women generally approach cohabitation from unequal social positions with unequal levels of bargaining power; “*gender inequality and patriarchy result in women lacking the choice freely and equally to set the terms of their relationships*”.<sup>2</sup> Furthermore, the law should protect weak and vulnerable members of society from unfair exploitation by others. Even as Namibian society gradually becomes more equal in terms of gender, some individuals (male or female) will still lack equal bargaining power and therefore be vulnerable to unfair treatment in the context of cohabitation.

Will legal protection for cohabitation undermine marriage? We think not. The rate of marriage in Namibia is already low because of economic considerations. Providing some legal protection to cohabitation is essentially responding to a situation which already exists. Legal protection for cohabitants need not make the results of cohabitation equivalent to marriage, so it is entirely possible to protect cohabitants while ensuring that marriage will continue to have a special status in society. As one respondent in our field research put it: “*The law must not legalise cohabitation, but the effect of it.*” Furthermore, marriage has not been undermined by legal reforms which protect children born outside marriage. We submit that marriage should not be the sole criteria for protecting vulnerable parties in relationships which involve the intermingling of finances.

Will legal protection for cohabitation be contrary to tradition or religion? A member of a Subiya traditional authority felt that legal protection should not be given as this only condones and encourages these types of relationships:

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<sup>2</sup> See Beth Goldblatt, “Regulating domestic partnerships – a necessary step in the development of South African family law”, 120 *SALJ* 610 (2003) at 616. See also Pierre de Vos, “Same-sex Sexual Desire and the Re-Imagining of the South African Family”, 20 (2) *SAJHR* 179 (2004) at 203.

*Our traditions do not condone such relationships, we only tolerate it because it is happening, but we do not really want it legalised because “mapoto” is a sign of disrespect to one’s parents and elders. The family does not know of the relationship and it is not regarded as proper.*

The disapproval of cohabitation on religious grounds has already been noted and discussed.<sup>3</sup>

The counterargument is that, despite differing cultural attitudes and religious disapproval, cohabitation is present in all regions of Namibia. Even if there is cultural or religious disapproval of the practice, this does not justify denying recognition and protection to the significant numbers of people who live in this type of family arrangement. The recognition of cohabiting relationships will in no way affect the choice couples can make to marry according to their religious beliefs; therefore the two options are in effect mutually exclusive. If religious leaders are concerned that the number of people marrying may be reduced, the logical recommendation would be for churches to strengthen their teachings about the importance of marriage to their congregations rather than blocking alternatives.

When asked whether protecting cohabitation relationships would harm or improve the position of women in society, most respondents in the study said that it would improve women’s position. One woman said legal protection would be good because *“the courts would treat women more fairly by recognising our position. Also, other family members would treat women with more respect. It would enhance our position in the community within our culture”*. The concerns put forward by the few dissenters focused on religious objections, the spread of HIV if relationships outside of marriage were condoned, and the situation of married women who may be disadvantaged if married men are allowed to register extramarital partnerships.

**RECOMMENDATION:**

**On balance, policy considerations point to the need to provide some legal protection for cohabitation to protect economically vulnerable parties from unfair exploitation.**

## **11.2 What types of relationships warrant legal protection?**

Part of what is challenging about crafting a new law on cohabitation is deciding what relationships warrant legal protection. There are several questions which need to be answered at the outset.

### **11.2.1 *Intimate relationships versus other types of relationships***

A distinction can be drawn between persons who live together in an intimate relationship which resembles marriage in at least some respects and persons who share a household and

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<sup>3</sup> See pages 56-58 (Cohabitation and religion) and pages 190-193 (Community attitudes).

undertake certain responsibilities to each other without being in an intimate relationship.<sup>4</sup> The second category could include, for example, parents living with their adult children, a group of siblings, a family unit which includes children from various relationships, various extended family members or even completely unrelated housemates.

Some countries give various forms of legal protection to a range of domestic relationships. For example, the law in **New South Wales, Australia** gives protection to cohabitation of couples in marriage-like relationships (known as “*de facto relationships*”) and also to any “*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*”.<sup>5</sup>

Another example is **Hawaii**’s “*reciprocal beneficiary*” legislation, which provides protection to persons living together in an array of relationships, including siblings and some parent-child relationships.<sup>6</sup>

In **South Africa**, the South African Law Reform Commission initially recommended that a basic level of protection be afforded to couples in intimate partnerships and to persons in “*care partnerships*”, which it defined as “*a close personal relationship, other than a marriage or a registered partnership or an intimate partnership, between two adult persons, irrespective of whether or not such persons are living together or related by family, in circumstances where either of them provides the other with domestic support and personal care*”.<sup>7</sup> Public opinion in South Africa was split on the idea of including such relationships in the legal scheme; some said that this was a good idea because caretaking can interfere with earning power, whilst others said that this was a “*family duty*” or “*an act of love*” which should not be based on the hope of financial reward.<sup>8</sup> Some worried that legal coverage of care relationships might lead to exploitation or abuse of persons in need of care, and some asserted that “*the needs of non-conjugal partners are different to those of conjugal partners and would not be properly covered by domestic partnership legislation*”.<sup>9</sup> After considering this input, the Commission withdrew its recommendation on this point, saying that this kind of relationship should not be included within the scope of the proposed law until after proper study to ascertain the specific needs of carers.<sup>10</sup>

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<sup>4</sup> One South African court construed the phrase “*living together as man and wife*” to mean that the parties share a dwelling, maintain a joint household, and have an “*intimate relationship*”. *Drummond v Drummond* 1979 (1) SA 161 (A) at 167A-C (on the phrase as used in a divorce agreement as the point at which spousal maintenance would cease). The Court posited that “*sexual intercourse, in the case of parties of moderate age, would usually, but not necessarily always, be an essential concomitant*”. At 167A-D.

<sup>5</sup> Property (Relationships) Act 1984, section 5(1)(b). This category excludes relationships where one person 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”. Section 5(2).

<sup>6</sup> Hawaii Reciprocal Beneficiaries Act (Act 383, Session Laws of Hawaii 1997).

<sup>7</sup> SALRC at paragraphs 7.3.18-7.3.20. The proposed definition had exclusions similar to those in New South Wales: “*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 organization, including a government or government agency, a body corporate or a charitable or benevolent organisation*”. Id at 7.3.20.

<sup>8</sup> Id at 7.3.21-7.3.22.

<sup>9</sup> Id at 7.3.22-7.3.23.

<sup>10</sup> Id at 7.3.24.

The Domestic Partnership Bill 2008 ultimately put forward in South Africa (although still under discussion) leaves the door open to both intimate and non-intimate relationships, by defining domestic partnerships as “*a registered domestic partnership or unregistered domestic partnership between two persons who are both 18 years of age or older*”, without limiting the relationship to intimate or marriage-like relationships.<sup>11</sup> However, the Alliance for the Legal Recognition of Domestic Partnerships has suggested that registered domestic partnerships should be available only for “*a permanent, intimate relationship between two adults of same or opposite sex*”,<sup>12</sup> and that protection should be afforded to unregistered domestic partnerships only where there is a “*commitment that two adults have made to one another to live together in a permanent, intimate partnership with concomitant legitimate expectations concerning their property and assets and involving relations of dependency between the partners, for as long as it lasts*”.<sup>13</sup>

One argument in favour of giving protection exclusively to marriage-like relationships is that these are particularly likely to be influenced by prevailing gender stereotypes which can unfairly disadvantage women. In such relationships, women are likely to perform roles such as child-rearing, housework and other unpaid labour, whilst men are more likely to make contributions to the household in the form of cash and therefore more likely to have nominal ownership of key assets. On the other hand, other family-like relationships may also be influenced by gender stereotypes – such as households where grandmothers look after large numbers of grandchildren, or where they share their pensions with other members of the household and may be more vulnerable to exploitation on this basis than male pensioners.

Another concern is the legitimate or reasonable expectations of the parties.<sup>14</sup> Particularly when it comes to automatic legal protections, the law should be connected to the reasonable expectations of the persons involved in such relationships. To give an extreme example, persons who rent rooms in their houses to strangers as a source of income would have no reason to expect that this might produce a cohabitation relationship with legal consequences which go beyond those of landlord and tenant – whilst, at the other end of the spectrum, persons who live in a manner resembling marriage and make contributions to a shared household would probably be less surprised to find that the law requires that the assets of that joint household must be equitably shared on the basis of the parties’ respective contributions.

<sup>11</sup> South African Domestic Partnerships Bill 2008, Government Notice 36 of 2008, Government Gazette 30663, 14 January 2008 at section 1 (hereinafter “**Domestic Partnerships Bill 2008**”).

<sup>12</sup> Alliance for the Legal Recognition of Domestic Partnerships, “Submission to the Department of Home Affairs on the Draft Domestic Partnerships Bill”, 15 February 2008 (hereinafter “**Alliance Submission**”).

<sup>13</sup> Id at 6.

<sup>14</sup> See *Marvin v Marvin* 557 P 2d 106 (Cal 1976). “*Legitimate expectation*” is a doctrine of administrative law relating to procedural fairness which originated in England and has been adopted in Namibia and South Africa. *Transvaal v Traub* 1989 (4) SA 731 (A). It refers to the situation where a person who has no legal right to some benefit or privilege nevertheless has a legitimate expectation of receiving the benefit or privilege; if this is the case, then the law requires procedural fairness before that legitimate expectation is disappointed.

The concept has also been applied in South African labour law, where the rules regarding unfair dismissal apply to a person employed on a fixed term contract who has a “*legitimate expectation*” that a contract will be renewed. See *Du Toit v The Office of the Prime Minister* 1996 NR 52 (LC), which discusses the South African law and holds at 63J that “*the concept of ‘legitimate expectation’ does not necessarily apply in Namibia*”.

In Namibian family law, a similar concept of “*reasonable expectation*” has been incorporated into the Combating of Domestic Violence Act 4 of 2003, in that deprivation of economic resources to which the complainant had a “*reasonable expectation of use*” may establish economic abuse (section 2(1)(c)) and in the Maintenance Act 9 of 2003, in that a maintenance order must take into account “*the manner in which the beneficiary is being, and in which his or her parents reasonably expect him or her to be, educated or trained*” (section 16(3)(c)).



On the question of applying increased legal protections to situations where the parties who share a household are related by blood (such as siblings, grandparents and grandchildren, or parents with children from several different relationships), one issue of concern is how far the law needs to intervene in normal family relationships of dependency and reciprocity. Family relationships such as these, which may involve multiple persons in complex ways, did not form part of the current research,<sup>15</sup> and the specific vulnerabilities in other relationships which might warrant legal intervention would need identification and study before appropriate recommendations could be made. It would be necessary, in particular, to consider whether customary law already provides adequate and accessible remedies for persons in family situations other than marriage-like cohabitation. Therefore, we are not prepared to make recommendations on legal protection for such family relationships at this stage.<sup>16</sup>

We would assert that it is not correct to use marriage as the standard for all relationships which warrant legal protection, as opposed to engaging in a more thorough transformation of the legal framework governing families. Indeed, the Maintenance Act already takes a broad approach to family dependency which is not premised upon marriage. There are many living arrangements which do not conform to the idea of marriage or the ‘nuclear family’, but are deserving of respect as valid family structures – including cohabiting partnerships as well as more diverse family groupings, such as single-parent families and households which incorporate children of various relationships and extended family members.<sup>17</sup> Furthermore the nuclear family model is a Western vision of family relationships and not necessarily suited for the African context – and even in western countries the nuclear model is changing and a number of other family relationships are increasingly recognised;<sup>18</sup> as one family theorist has stated, “*it is essential to think of families, not ‘the family’*”.<sup>19</sup>

But it would probably be unnecessarily complex and cumbersome to try to protect all forms of family under a single law. If there are forms of family groupings other than cohabitation

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<sup>15</sup> Brother-sister households or other family units were not discussed in the research for this report, as the participants interviewed and the participants of the focus group discussions preferred to focus only on intimate cohabiting relationships.

The Legal Assistance Centre is currently conducting a qualitative study on the position of step-children which will be published in 2011.

<sup>16</sup> The Centre for Applied Legal Studies took a similar view in its 2001 research report:

*We are aware of the possibility that non-intimate partners might need to be protected but have not covered such families in our [proposed] definition. This is a difficult issue. It seems important to obtain research on the prevalence of such family forms, and the way they operate in our society. Comparative research and literature from other countries would also be useful. It seems that there is some precedent in our law for legal protection of dependent family members who are not intimate partners. The common law duty of support and intestate succession laws recognise some of these relationships of dependency. In addition, customary law recognises the need to support parents, dependent nieces and nephews, etc. The diversity of such family forms and the different arrangements and expectation that operate within them might make it difficult to regulate. However, a broad test that looks at the particular family involved and how it functions may be able to be used to provide equitable family law coverage. We do not have a clear position on this issue, but have raised some of the factors that need to be considered by law reformed in addressing this difficult issue.*

Beth Goldblatt, *Cohabitation and Gender in the South African Context – Implications for Law Reform*, Johannesburg: Centre for Applied Legal Studies, University of the Witwatersrand, 2001 at 56.

<sup>17</sup> See Pierre de Vos, “Same-sex Sexual Desire and the Re-Imagining of the South African Family”, 20 (2) *SAJHR* 179 (2004) at 199.

<sup>18</sup> See D Chambers, *Representing the Family*, London: Sage Publications, 2001, for a discussion of family theory and a critical review of the nuclear family and its relationship to the functionalist theory of families.

<sup>19</sup> D Gittens, *The family in question: Changing households and familiar ideologies*. Hampshire: The MacMillan Press Ltd, 1993, at 2.

which need legal protection, it might well be best to deal with them in separate laws which address specific needs and vulnerabilities – along the lines of the proposed provisions on child-headed households and kinship care in the draft Child Care and Protection Bill.<sup>20</sup>

Providing new legal protections to cohabiting partners could be a first step towards providing legal protection to vulnerable persons in a wider range of family groupings.<sup>21</sup> It might make sense to eventually extend the remedies for cohabitation to persons in family groupings other than marriage-like relationships, or it may be that other legal remedies would be more appropriate.

In the meantime, we suggest that the trend of defining “dependants” broadly and factually for specific purposes, especially for social safety nets such as social security, medical aid and pensions, should be continued as this will help protect people in non-traditional family forms.<sup>22</sup>

#### **RECOMMENDATION:**

**Limit legal protection for the current law reform on cohabitation to persons living in intimate relationships. If other family forms need legal protections, address them in separate laws aimed at their particular needs after specific study of the problems which need to be addressed. In particular, continue the trend towards broad, fact-based definitions of “dependants” in appropriate statutes, as this will assist families which do not fit traditional profiles.**

### **11.2.2 Opposite-sex versus same-sex relationships**

Cohabitation in the sense of an intimate relationship can take place between two persons of the same sex or two persons of the opposite sex. These situations are often treated differently in the eyes of the law, as (under most legal regimes) same-sex partners do not have the choice of entering into marriage.<sup>23</sup> In contrast, a couple made up of a man and a woman generally do have the option of marriage – if one of them is not already a partner in a civil marriage to someone else or suffering from some other bar to marriage, such as a prohibitively close blood relation or a lack of parental consent (for minors wishing to marry).

The Legal Assistance Centre would recommend extending the same protection to all couples, regardless of sexual orientation. This is an evolving issue worldwide, including in Africa where South Africa recently became the first country in Africa to provide for same-sex marriage even though some other African countries condemn homosexuality.<sup>24</sup>

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<sup>20</sup> See page 1 above.

<sup>21</sup> The Legal Assistance Centre is currently in the process of conducting qualitative research on “step-parents” and “step-children” with a view to assessing the need for law reform in this area.

<sup>22</sup> See section 6.2 beginning on page 99.

<sup>23</sup> June D Sinclair assisted by Jacqueline Heaton, *The Law of Marriage, Volume 1*, Kenwyn: Juta & Co, Ltd, 1996 (hereinafter “**Sinclair**”) at 268. Sinclair quotes Hahlo, who states that cohabitation “connotes the relationship of a man and a woman who live together ostensibly as man and wife, without having gone through a legal ceremony of marriage”. HR Hahlo, *The South African Law of Husband and Wife*, 5<sup>th</sup> edition, Cape Town: Juta, 1985 at 36.

<sup>24</sup> See SALRC at paragraph 4.7.20. In South Africa, the Civil Union Act 17 of 2006 gives same-sex couples the option of concluding a marriage or a civil partnership. See generally Human Rights Watch/International Gay and Lesbian Human Rights Commission, *More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, New York: Human Rights Watch, 2003.

Public opinion in Namibia is, predictably, split on this issue. For example, one woman interviewed felt strongly that no legal protection should be given to same-sex couples on the grounds that this would encourage such behaviour. In contrast, one woman living in a same-sex relationship spoke out strongly in favour of equal protection for same-sex couples:

*Our relationship should be afforded the same legal protection as a heterosexual relationship in all respects. Discrimination, whether based on sexual orientation or marital status is still wrong.*

We would assert, with respect, that the *Frank* case was incorrect in its statement that the equality clause in the Namibian Constitution does not encompass discrimination on the basis of sexual orientation,<sup>25</sup> and that equal protection of opposite-sex and same-sex relationships is a Constitutional imperative.

However, given the political unlikelihood that a proposed law on cohabitation which covers same-sex couples would be enacted, it should be noted that the general proposals on law reform in this study would not be affected by the inclusion or exclusion of same-sex couples. The position of same-sex couples in Namibia is perhaps more likely to be addressed through future litigation than legislative enactment.<sup>26</sup>

#### **RECOMMENDATION:**

**Give legal protection to cohabiting couples regardless of sexual orientation, to fulfil Namibia's constitutional and international obligations against discrimination. (However, should this not be politically possible at this stage, the recommendations proposed could in theory be applied only to opposite-sex partnerships.)**

### **11.2.3 Monogamous versus polygamous relationships**

Some countries give protection to cohabitation only in situations where neither partner is already married. This is often the case where cohabitation of certain duration, or the registration of a cohabitation relationship, produces all the effects of a marriage.

<sup>25</sup> *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC). The Court stated: "Whereas the word 'sex' can be defined as 'being male or female', or 'males or females as a group', 'sexual orientation' could encompass in theory 'any sexual attraction of anyone towards anyone or anything'. The prohibition against discrimination on the grounds of sexual orientation is so wide, that a case may even be made out for decriminalizing the crime of bestiality, particularly, when done in private". Id at 149G-H (citation omitted). We submit that this reasoning is flawed, as protecting homosexual couples against discrimination would not lead to equal treatment for all forms of sexual behaviour as shown by the experience of many other jurisdictions.

The Court also noted "*in passing*" that the International Covenant on Civil and Political Rights specifies "sex" as one of the grounds on which discrimination is prohibited but not "*sexual orientation*". Id at 145E-F. In fact, in March 1994 (*before* Namibia's ratification of the Covenant), the Human Rights Committee charged with monitoring the Covenant stated that the references to "sex" in the provisions on discrimination are "*to be taken as including sexual orientation*". *Toonen v Australia* Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

See generally Edwin Cameron, "Constitutional protection of sexual orientation and African conceptions of humanity", 118(4) *SALJ* 642 (2002).

<sup>26</sup> It may be that an attempt to establish constitutional protection for gay and lesbian relationships will have more likelihood of success in a context which does not involve a discretionary decision such as permanent residence, which was at issue in the *Frank* case.

However, in Namibia, historical and economic factors (such as pre- and post-independence labour migration), combined with customary acceptance of polygamy in many Namibian communities, mean that there are in practice many concurrent relationships. Failure to give any protection to such relationships would simply leave the vulnerable women and children in such arrangements more vulnerable. As will be seen below, we do not recommend that cohabitation be fully equated with marriage – which means that affording some basic legal protection to cohabitation relationships regardless of whether one or both partners is also married to another does not imply endorsement of polygamy. As noted above, it is possible that informal cohabitation is already replacing polygamy.<sup>27</sup> Furthermore, it may become particularly important to give basic legal protection to such forms of cohabitation since the Law Reform and Development Commission has proposed outlawing polygamy in customary marriage.<sup>28</sup>

In South Africa, the Women’s Legal Centre has noted that “*due to our history and migrancy, many men who come to work in urban areas get involved in domestic relationships, whilst having wives in the rural areas. Failure to acknowledge this reality and give protection to people in both these relationships will cause hardship for many women.*”<sup>29</sup> The Alliance for the Legal Recognition of Domestic Partnerships similarly gave a strong motivation for giving protection to concurrent relationships:

*Do we leave the woman who is in a domestic partnership penniless, without any rights or recourse, despite the fact that her partner created relations of dependency between them simply because he had married someone else and in many cases did not tell her about this? Why should the co-existence of a marriage be sufficient to prevent any forms of protection to those in domestic partnerships? The protection of domestic partnerships where multiple relationships exist flows from the rationale for protecting domestic partnerships in the first place ie: that vulnerable partners are being discarded unfairly and without legal protection at the end of the partnership.*<sup>30</sup>

<sup>27</sup> See page 16.

<sup>28</sup> Law Reform and Development Commission (LRDC), *Report on Customary Law Marriages* (LRDC 12), Windhoek: LRDC, 2004.

<sup>29</sup> Women’s Legal Centre, “Domestic Partnership: Comments to the South African Law Commission Issue Paper 17”, 2001, as quoted in Canadian HIV/AIDS Legal Network, *Respect, Protect and Fulfil: Legislating for Women’s Rights in the Context of HIV/AIDS, Volume Two: Family and Property Issues*, Toronto: Canadian HIV/AIDS Legal Network, 2009 (hereinafter “**Canadian HIV/AIDS Legal Network**”) at 2-4.

The Bill recommended by the South African Law Commission offer protection for women in informal polygamous relationships only where the man has a customary marriage with another woman and not a civil marriage or a registered domestic partnership with another woman. At paragraphs 7.3.13-7.3.17:

*A court may not make an order under this Chapter [on unregistered domestic partnerships] regarding a relationship of a person who, at the time of that relationship, was also in a civil marriage or registered partnership with a third party.* (paragraph 7.3.17).

Almost identical wording appears in the South Africa’s draft Domestic Partnerships Bill 2008 (section 26(3)), which is still under discussion at the time of writing. An NGO submission on this provision states:

*This appears to constitute unfair discrimination based on race or culture and must be changed to accommodate all forms of intimate union. The reality in our country is that people in all types of unions also sometimes enter into unregistered domestic partnerships. The law needs to reflect this reality so that it can help everyone involved with a fair distribution of property taking into account all rights, needs and interests involved.*

Alliance Submission at 11.

<sup>30</sup> Alliance Submission at 12.

As the South African Law Reform Commission stated, even though public opinion may be opposed to the legal recognition of polygamous relationships, “[d]ual households are a reality that requires recognition and protection”.<sup>31</sup>

However, most participants in the interviews conducted by the LAC in 2009 supported the idea that the wife should receive all the property – but with some of these conceding that the cohabiting partner should be allowed to keep her own property. A woman interviewed in Swakopmund said that the money “*can only go to one partner*”. A similar opinion was expressed by another woman from Swakopmund, who replied when asked if a cohabiting woman receive any property if there is also a wife, “*No just the wife; when you marry, you marry until death.*” Similar thoughts were offered by men interviewed in Rehoboth (“*The married person should get everything.*”), Windhoek and Outapi (“*There should be no division, the wife should get everything in this case.*”).

Some of the interviewees advocated a more equitable division. A man interviewed in Keetmanshoop felt that “*This person [the man who has a wife and cohabits with a girlfriend] has also been part of the woman’s life so it should be equal... divided 50/50.*” A woman from Keetmanshoop whose husband was living with a girlfriend had a similar opinion: “*The things that they have should stay with the cohabiting partners. If my husband broke up with that lady, she should keep the things she has over there.... The wife should keep the wife’s property and any money in the bank.*” Similar comments were put forward by women in Windhoek and Outapi.

A few people took a middle ground. For example, a woman from Rehoboth said that the wife should receive all the property and should decide for herself whether the cohabiting partner should receive anything: “*Benefits should only go to the married person... Hopefully the wife will care about the child and give money to the woman for support.*” A woman from Outapi thought that the property division should focus on the needs of the children: “*The only reason the girlfriend should get something is if there are children involved.*”

It may be argued that giving any protection to informal polygamous relationships will create a conflict of rights between the lawful spouse and the domestic partner. However, it should be possible to protect all the women affected – through the customary law concept of property allocated to each “house”, or in the case of a civil marriage, by allocating to the cohabiting partner only a portion of the man’s independent property or a portion of his half of the joint estate.<sup>32</sup> Thus, protecting the informal partner need not unfairly disadvantage the lawful spouse.

It must be remembered, as some of the case studies presented in Chapter 10 show, that sometimes a partner who is still technically married may have lived separately from his spouse for many years; domestic partners may have had longer relationships and made greater contributions to family property than spouses. Because cohabiting partners will have to meet a certain threshold to qualify for legal protection, the law will exclude casual, short-term relationships with little financial or emotional interdependency.

A question has been raised about fairness to third parties if multiple marriage and cohabitation relationships are recognised. For example, this approach might mean that a third party must

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<sup>31</sup> South African Law Reform Commission (SALRC), *Project 118: Domestic Partnerships, Discussion Paper 104*, Pretoria: SALRC, 2003 (hereinafter “**SALRC Discussion Paper**”, not to be confused with the subsequent report on the same topic which is cited herein simply as “SALRC”) at paragraph 10.3.6.

<sup>32</sup> Making a fair distribution of assets would be most difficult in the case of the accrual system, but it should still be possible even there to make an equitable allocation after a factual enquiry.



provide medical aid benefits to multiple spouses/partners.<sup>33</sup> But this is already the case where customary marriages are polygamous. Furthermore, most benefits which would be affected – such as medical aid, pensions, employees’ compensation or social security – have a built-in cap on total benefits. So the potential recognition of multiple relationships would not generally increase the size of the pie, but would more likely result in smaller pieces of the same pie for each partner – and where there are concurrent relationships, this will probably accord with relative degrees of factual dependency.

#### **RECOMMENDATION:**

**Legal protection for cohabitation should include informal polygamous relationships which meet the threshold requirements for legal protection, whilst also ensuring that lawful spouses are not unfairly disadvantaged in any allocation of assets.**

### **11.2.4 Adults versus minors**

Many laws limit protection for cohabitation to relationships between adults. Refusing to give any protection to such relationships involving minors – in situations which often involve adult men and minor girls – could be detrimental to vulnerable young girls.<sup>34</sup> It was also suggested in South Africa that offering protection against exploitation in such relationships might be a disincentive to adult partners to enter into relationships with teenagers.<sup>35</sup>

On the other hand, it would be problematic for the law to appear to sanction the involvement of children in such relationships, especially where this might be illegal under the Combating of Rape Act 8 of 2000 or the Combating of Immoral Practices Act 21 of 1980.<sup>36</sup> Furthermore, providing legal protection to such relationships might also have the effect of presenting informal cohabitation as a viable option for a child who was too young to conclude a civil or customary marriage. It might also provide a financial incentive to minors to enter “sugar daddy” or “sugar mommy” relationships which are already motivated by the younger partner’s desire to get access to financial resources.

We have not located any useful examples of protection for children in cohabitation relationships in other jurisdictions. Many jurisdictions limit the coverage of laws on cohabitation to persons aged 18 or older. In Namibia, this is already the age at which persons are free to enter civil marriage without state consent,<sup>37</sup> and it is the proposed minimum age for customary marriage as well.<sup>38</sup> Persons under age 21 presently need the consent of their parents to marry since 21 is

<sup>33</sup> SALRC Discussion Paper at paragraph 10.3.8.

<sup>34</sup> This concern was also raised in Beth Goldblatt, “Regulating domestic partnerships – a necessary step in the development of South African family law”, 120 *SALJ* 610 (2003) at 616.

<sup>35</sup> Beth Goldblatt, *Cohabitation and Gender in the South African Context – Implications for Law Reform*, Johannesburg: Centre for Applied Legal Studies (CALS), University of the Witwatersrand, 2001. This report cited concerns about the protection of girls in such relationships, but did not offer a proposal for a mechanism to do this.

<sup>36</sup> The Combating of Rape Act 8 of 2000 (section 2(2)(d)) defines rape as including consensual sexual acts between persons under age 14 and partners who are more than 3 years older, while the Combating of Immoral Practices Act 21 of 1980 similarly criminalises sexual contact between persons under age 16 and partners who are more than 3 years older (section 14).

<sup>37</sup> Marriage Act, section 26.

<sup>38</sup> Recognition of Customary Marriage Bill, section 3(3)(b), in Law Reform and Development Commission (LRDC), *Report on Customary Law Marriages* (LRDC 12), Windhoek: LRDC, 2004.

the age of majority,<sup>39</sup> but the possibility of lowering the age of majority to 18 is under discussion.<sup>40</sup>

**RECOMMENDATION:**

Limit legal recognition and protection to cohabitation relationships involving persons 18 years of age or older, to parallel the age at which persons may marry without state permission.

## 11.3 What legal protection?

Before taking the question of criteria any further, it is necessary to consider what type and degree of legal protection will be offered.

The criteria adopted for legal protection will depend partly on the **degree** of legal protection which is contemplated: giving more elaborate consequences to cohabitation may require a higher threshold for coverage by the statutory scheme.

Different criteria may also apply depending on the **route** to legal protection for cohabitation relationships: a different set of criteria might be appropriate where people are protected only if they register their partnership or make an express contract between themselves (thereby “opting in” to the system), as opposed to a legal scheme where the protection comes into play automatically if certain criteria are recognised.

Looking at the degree of legal protection which could be afforded, the South African Law Reform Commission has described the following spectrum of models for the legal consequences of cohabitation, ranging from one extreme to the other:

- **no consequences** – producing no legal rights and duties, which is essentially the case in Namibia now, with the exception of a few statutes which apply to cohabiting partners or dependants;
- **blank-slate-plus** – where the law applies some specific rights and obligations to cohabitation without attempting to parallel marriage laws, often focusing on matters that are of practical importance to cohabitants;
- **marriage-minus** – where cohabitation has effects which are similar in most respects to marriage, without being completely equivalent to marriage (often applied to same-sex couples in jurisdictions where they are excluded from marriage);
- **like marriage** – treating cohabitation which satisfies prescribed criteria, such as duration or registration, as being equivalent to marriage.<sup>41</sup>

### DEGREES OF LEGAL PROTECTION FOR COHABITATION



no legal protection      blank-slate-plus      marriage minus      = marriage

<sup>39</sup> Age of Majority Act 57 of 1972.

<sup>40</sup> See draft Child Care and Protection Bill, revised final draft, June 2010.

<sup>41</sup> SALRC at paragraphs 6.2.11-6.2.13.

## RECOMMENDATION:

The recommendations in this chapter could best be characterised as “blank-slate-plus”. As discussed in more detail below, we do not propose that informal cohabitation should be equated with marriage.

The degree of protection must be considered in conjunction with the route to qualify for legal protection. There are also essentially two different routes to legal protection, which can be used alone or in combination with each other. The two basic approaches are: (1) some form of automatic protection which applies to couples who fulfil the criteria for “cohabitation” set by law (such as living together for a certain time period); and (2) some form of agreement between the parties, manifested by registration or contract, which has the effect of providing them with certain legal protections.

There are many variations within these two basic approaches. For example, some jurisdictions which provide automatic protections allow couples to “opt out” of them if they wish, whilst other jurisdictions do not. When it comes to agreements, there are varying levels of state intervention. For example, some systems provide registration frameworks which require the couple to go through specified dissolution procedures to end the cohabitation, whilst other registration systems function more simply as proof that the relationship existed as from a particular date. Some jurisdictions provide a fairly fixed set of consequences for registered cohabitation relationships, whilst others provide couples with a framework for making agreements about the consequences of their relationship between themselves. Possible variations will be discussed in more detail below.

These two basic approaches can be used in combination, such as by providing a minimal degree of automatic protection and making a higher level of protection available if the couple make an agreement to this effect.

## ROUTES TO LEGAL PROTECTION FOR COHABITATION

### Automatic

- **automatic protection** for cohabiting couples who satisfy certain criteria
- **automatic protection with opt-out:** automatic protection with a provision allowing couples to opt-out of the legal framework by private agreement

### By agreement

- **opt-in by registration:** protection only for registered partnerships
- **opt-in by contract:** protection only for partners who conclude express contracts, which could be private agreements between the parties or officially registered

### Combinations

- some combination of protections

## RECOMMENDATION:

We suggest a basic level of automatic protection which can be supplemented by agreement between domestic partners if they wish.

### 11.3.1 Automatic protection

#### Equating long-term cohabitation with marriage?

Several African countries have adopted models which transform some instances of cohabitation into marriage, purely on the basis of the parties' conduct.

In **Tanzania**, the Law of Marriage Act 5 of 1971 presumes that a “*de facto*” marriage has taken place if it is proved that a man and woman lived together for two or more years and that they publicly hold “*the reputation of being husband and wife*”.<sup>42</sup> Although some report that this law has given greater legal certainty to customary relationships and helped to mitigate the position of children born to such relationships,<sup>43</sup> a 1994 report of the Law Reform Commission of Tanzania recommended that this law on “*de facto* marriage” should be repealed because it interferes with the sanctity of marriage.<sup>44</sup>

#### **TANZANIA Law of Marriage Act 5 of 1971**

**160.** (1) *Where it is proved that a man and woman have lived together for two years or upwards, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.*

(2) *When a man and a woman have lived together in circumstances which give rise to a presumption provided for in subsection (1) and such presumption is rebutted in any court of competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and the court shall have jurisdiction to make order or orders for maintenance and, upon application made therefore either by the woman or the man, to grant such other reliefs, including custody of children, as it has jurisdiction under this Act to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation, as the court may think fit, and the provisions of this Act which regulate and apply to proceeding for and orders of maintenance and other reliefs shall, in so far as they may be applicable, regulate and apply to proceedings for and orders of maintenance and other reliefs under this section.*

In **Kenya**, the courts have relied on British common law to apply a doctrine of “presumption of marriage” after a reasonable period of cohabitation.<sup>45</sup> This presumption has been used by the courts to extend protections typical of marriage to parties in cohabitation relationships,

<sup>42</sup> Law of Marriage Act 5 of 1971, section 160(1).

<sup>43</sup> M Calaguas, C Drost, and E Fluet, “Legal Pluralism and Women’s Rights: A Study in Postcolonial Tanzania” *Columbia Journal of Gender and Law* Vol. 16(2) (2007) 471.

<sup>44</sup> B Rwezaura, “The Proposed Abolition of De Facto Unions in Tanzania: A Case of Sailing Against the Social Current, 42 (2) *Journal of African Law* 187 (1998) at 187, citing Law Reform Commission of Tanzania, *Report of the Law Reform Commission on Law of Marriage Act* (No. 5, 1971), 1994.

As far as we are aware, to date this proposed repeal has not been put into effect and section 160 remains valid law. See SALRC at paragraphs 4.7.3–4.7.9 for a discussion of this law.

<sup>45</sup> G Gopal and M Salim, *Gender and Law: Eastern Africa Speaks*, Washington DC, USA: World Bank, 1999 at 32. Note that Kenya’s Judicature Act, section 3, provides for the reception of British law into Kenya.

such as by granting an interest in property owned by the other party.<sup>46</sup> A draft Marriage Bill before Parliament in Kenya in 2010 would completely overhaul and update Kenya's laws on marriage, which have not been amended since 1962.<sup>47</sup> Section 7 of the Bill would codify the doctrine of presumption of marriage to a man and woman who have lived together for at least two years "*in such circumstances as to have acquired the reputation of being husband and wife*".<sup>48</sup> The Marriage Bill sets up a system of marriage registration, which specifically includes customary marriage and cohabitation relationships that meet the requirements of section 7. The proposed changes have been met with some criticism, particularly from religious leaders, who argue that Islam and Christianity do not recognise informal relationships of this kind, and that such recognition by the law would undermine traditional marriage.<sup>49</sup> But the International Federation for Human Rights and the Kenyan Human Rights Commission have called upon the Kenyan government to enact this bill along with other draft legislation which focuses on women's rights.<sup>50</sup>

### Kenya Marriage Bill 2007

7. *Where it is proved that a man and woman having capacity to marry have lived together openly for at least two years in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.*

In **Malawi**, the Constitution expressly recognises cohabitation relationships and "*marriages by repute or permanent cohabitation*", and courts have relied upon this constitutional provision to extend the rights and protections associated with marriage to cohabiting couples. However, court decisions applying the constitutional principle have been rather inconsistent,<sup>51</sup> so there

<sup>46</sup> Id at 32. See *Yawe v Public Trustee*, Civil Appeal No. 13, 1976 (marriage presumed in a case where a couple had lived together for seven years and had children together but had skipped certain customary ceremonies required to make their relationship into a formal customary marriage); *Peter Hinga v Mary Wanjiku Hinga* Civil Appeal No. 9, 1977 (customary marriage presumed where couple had been cohabiting for seven years and had many children, but had not completed traditional rites and ceremonies of customary marriage); *Mary Wanjiru Githatu v Esther Wanjiru Kiarie* Civil Appeal No. 20 of 2009 (marriage presumed in a cohabitation relationship of fifteen years producing three children, where the man paid rent and both parties behaved as if they were married)

<sup>47</sup> J Thongori, "New Marriage Act will be good for the family", *The Nation*, 29 March 2009, available at <[www.nation.co.ke/oped/Opinion/-/440808/554266/-/44owxp/-/index.html](http://www.nation.co.ke/oped/Opinion/-/440808/554266/-/44owxp/-/index.html)>, last accessed 5 November 2010.

<sup>48</sup> Kenya Marriage Bill 2007, available at <[www.kenyalaw.org/Downloads/Bills/Unpublished/200703.pdf](http://www.kenyalaw.org/Downloads/Bills/Unpublished/200703.pdf)>, last accessed 8 November 2010.

<sup>49</sup> See for example: Peter Leftie, "Cabinet ponders new laws that seek to radically change marriage", *Daily Nation*, 28 September 2009, available at <[www.nation.co.ke/News/-/1056/664998/-/item/1/-/a0u3t2/-/index.html](http://www.nation.co.ke/News/-/1056/664998/-/item/1/-/a0u3t2/-/index.html)>, last accessed 10 November 2010.

<sup>50</sup> *International Federation for Human Rights*, "Kenya – Launch of African Women's Decade – Concrete steps required to demonstrate government's will to respect women's rights", 11 October 2010, available at <[www.africa4womensrights.org/post/2010/10/11/Kenya-%3A-Concrete-steps-required-to-demonstrate-government-s-will-to-respect-women-s-rights](http://www.africa4womensrights.org/post/2010/10/11/Kenya-%3A-Concrete-steps-required-to-demonstrate-government-s-will-to-respect-women-s-rights)>, last accessed 5 November 2010.

<sup>51</sup> See *Nelson v Magombo* (1964-1966) ALR Mal 134 (finding a marriage where a couple had cohabited for a period of seventeen years); *Doreen Chikayera v Manuel Miteka* Civil Case No. 70 of 2004, M. C. (unreported) (finding a marriage after two years of cohabitation although the cultural requirements for customary marriage had not been met, and awarding child maintenance after the relationship ended); *Mumba v Mumba and Another*, Civil Case No 687 of 2006, [2007] MWHC 52 (1 January 2007) (finding a marriage in a situation where the couple had never formally married but "*were involved in an informal relationship*" and "*had on diverse occasions stayed in the same house*"); in contrast to *Khembo v Khembo* Civil Appeal No. 16 of 1969 (unreported) (where the court refused to recognise the existence of a marriage although the parties had cohabited for nine years and had three children together, but did award maintenance for the children). See Lea Mwambene, "Divorce



is a lack of clarity from the courts as to what period of cohabitation invokes the constitutional protection. As a result, the Malawi Law Commission has recommended that Parliament enact legislation setting out clear guidelines as to the extent of repute and length of cohabitation required to bring a cohabitation relationships within the protection of the Constitution.<sup>52</sup> The protection afforded to cohabiting couples has aroused criticism within Malawi. Religious leaders in particular oppose the law, arguing that it undermines the importance of formal marriage in church as well as traditional customary marriage practices.<sup>53</sup> However, the Malawi Law Commission, which supports the retention of the provision in the Constitution, notes that the courts make use of the constitutional provision as “*a fall back position so that women and children from informal relationships are protected against potential neglect and abuse by, normally, the male party to the relationship*”, and that it provides the courts with a tool to ensure that cohabiting partners and children of the relationship can inherit from a deceased’s estate.<sup>54</sup> The Malawi Law Commission has proposed a Marriage, Divorce and Family Relations Bill to clarify and reform marriage law as it pertains both to married and cohabiting couples.<sup>55</sup>

## Malawi Constitution

### 22. Family and marriage

...

(3) *All men and women have the right to marry and found a family.*

(4) *No person shall be forced to enter into marriage.*

(5) *Sub-sections (3) and (4) shall apply to all marriages at law, custom and **marriages by repute or by permanent cohabitation.***

During the LAC’s field research, respondents were asked whether the law should treat people in cohabiting relationships as if they were married, after they had been living together for a certain length of time in a partnership resembling a marriage. Many respondents initially said that cohabiting couples should be treated as if they are married in these circumstances. However, it is not entirely clear that the analogy between cohabitation and marriage was thoroughly considered by these interviewees, as some who said that cohabitation should be treated equivalent to marriage after a certain time period subsequently gave inconsistent answers to related questions – such as whether cohabiting partners should have a right of intestate inheritance or a duty to maintain each other. Thus, it seems that at least some of those interviewed were not keeping in mind the totality of the consequences of marriage when they answered this initial question.

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in matrilineal Customary Law marriage in Malawi: A comparative analysis with the patrilineal Customary Law marriage in South Africa”, thesis, University of Western Cape: 2005.

<sup>52</sup> Malawi Law Commission, *Report of the Law Commission on the Review of the Laws of Marriage and Divorce*, 2005 at 8, available at <[www.lawcom.mw/index.php/reports/4-reports/60-laws-on-marriage-and-divorce-review-of-june-2006](http://www.lawcom.mw/index.php/reports/4-reports/60-laws-on-marriage-and-divorce-review-of-june-2006)>, last accessed 30 November 2010; S Gloppen and FE Kanyongolo, “Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law”, 5 (2) *International Journal of Constitutional Law* 258 (2007) at 270.

<sup>53</sup> Agness Mizere, “Marriage or cohabitation?”, *The Times*, 11 April 2010, available at <[www.bnltimes.com/index.php?option=com\\_content&task=view&id=2981&Itemid=30](http://www.bnltimes.com/index.php?option=com_content&task=view&id=2981&Itemid=30)>, last accessed 9 November 2010; Malawi Law Commission, “Discussion Paper No. 1: Human Rights under the Constitution of the Republic of Malawi”, 2006 at 9, available at <[www.lawcom.mw/docs/discussion\\_paper1\\_human\\_rights.pdf](http://www.lawcom.mw/docs/discussion_paper1_human_rights.pdf)>, last accessed 9 November 2010.

<sup>54</sup> Malawi Law Commission, “Discussion Paper No. 1: Human Rights under the Constitution of the Republic of Malawi”, 2006 at 8, available at <[www.lawcom.mw/docs/discussion\\_paper1\\_human\\_rights.pdf](http://www.lawcom.mw/docs/discussion_paper1_human_rights.pdf)>, last accessed 9 November 2010.

<sup>55</sup> Id; see also Lea Mwambene, “Reconciling African Customary Law with Women’s Rights in Malawi: the Proposed Marriage, Divorce and Family Relations Bill”, 1 (1) *Malawi Law Journal* 113 (2007).

Some persons agreed with the suggestion of giving cohabiting partners only *some* of the rights that married people benefit from. For example, one cohabiting partner responded to the question of whether cohabiting partners should be treated as if they were married by saying, *“In part. We are not married. For me it is all about the children so they get what they are entitled to from their father. Also there should be no property grabbing.”* A young woman said: *“There is a difference between a girlfriend and a wife. They may act the same, but it is not fair because it is not forever and there is not the same commitment to stay with her.”* A focus group participant said, *“Cohabitation cannot entail the same rights as marriage because then what is the point of marriage?”*

Some respondents thought that cohabitation should be protected *“like a marriage”*, while others felt that *“the law should be different than for marriage because the two are different”*. However, answers to more detailed questions about the consequences of cohabitation indicate that not everyone who was interviewed had contemplated all of the legal consequences of marriage before responding to this question.

There would be potential Constitutional problems with ‘common-law marriage’ where living together for a certain time period (or satisfying other criteria) automatically transforms a relationship into a marriage. Article 14(2) states that *“Marriage shall be entered into only with the free and full consent of the intending spouses”*. It would seem contrary to this notion to allow informal relationships to become marriages without a clear and informed decision on the part of both partners.

Furthermore, law reforms on marital property which are currently under consideration by the Law Reform and Development Commission are moving in the direction of promoting more informed choice by intending couples; the proposals under discussion would remove the notion of a default property regime in favour of requiring couples to choose a property regime and indicate this choice on the marriage certificate, after a standard explanation of the options was provided by the marriage officer.<sup>56</sup> Presuming a marriage between couples who have not made a conscious choice to be married would seem to move in the opposite direction and would raise the question of what property regime should be applied in such a situation.

There is also no need to provide a secular alternative to marriage for those who do not want to involve religion, as it is already possible to conclude a civil marriage before a magistrate without any religious connotations,<sup>57</sup> or to enter into a customary marriage which is also of secular nature.

Furthermore, equating cohabitation with marriage is likely to raise religious objections in Namibia as it has done in other African countries.

There would arguably be no logic in automatically transforming cohabitation relationships into marriages since this would seem to create an unnecessary duplication in the law – as well as introducing a mechanism which approximates a change in the status of individuals without the formalities and safeguards supplied by the law in respect of marriage and divorce.

Additionally, since the law already protects children born outside marriage,<sup>58</sup> it is not necessary to equate cohabitation with marriage for the purpose of protecting children of such relationships.

<sup>56</sup> Law Reform and Development Commission (LRDC), *Report on Marital Property* (LRDC 15), Windhoek: LRDC, 2010.

<sup>57</sup> Marriage Act 25 of 1961, sections 2 and 30.

<sup>58</sup> See Chapter 7.

### RECOMMENDATION:

We do NOT propose that couples who cohabit for a minimum time period should be treated as if they are married. Marriage is a status which should be consciously and knowingly chosen, and there are other mechanisms which can be used to protect cohabiting couples.

## A basic level of automatic protection

Several countries have a basic level of automatic protection which provides minimal equity to cohabiting partners, combined with a supplementary system for registered relationships or the alternative of allowing individual couples to replace the general rules with their own private agreements.

For example, **Sweden** provides minimal automatic protection for all “*cohabitees*” combined with a more elaborate level of protection for registered partnerships. The automatic protection covers people who live together as a couple on a permanent basis and share a joint household, regardless of whether they are of opposite sexes or the same sex – provided that neither are married or in a registered partnership. It applies only to matters concerning the couple’s joint home and joint furniture and other household goods, and does not provide for maintenance or intestate succession. During the cohabitation, the partners own and manage their own property, but neither may sell, mortgage, lease out or give away the joint home or furnishings. If the relationship breaks up, either party can ask a court to divide the joint property; the guiding rule is that joint property is shared equally after allowing for debts, but the court has the power to adjust the basis of the division in appropriate cases. A surviving partner can similarly ask for a division of property if the relationship ends by death – but the heirs of the deceased partner do not have the right to make such a request. A request for division of the joint property must be made within one year of the end of the relationship. To simplify proof, objects acquired before the relationships began are presumed to have been acquired for single use (thus not becoming part of the joint property) and objects acquired after the relationships began are assumed to be for mutual use. If one partner moves into a home which the other partner already owned or leased prior to the relationship, that home is not viewed as a joint home – even if the couples shared debts and other costs pertaining to it – unless the couple register it as a joint home. Couples can opt out of the automatic protections altogether by written agreement.<sup>59</sup>

In **New Zealand**, same-sex or opposite-sex couples in “*de facto relationships*” are automatically subject to the same statute on property division as married couples.<sup>60</sup> This law allocates a couple’s property into two categories: relationship property and separate property. Relationship property includes such things as the joint home, household furniture, the family car, jointly-owned property and most assets acquired by either partner during the course of the relationship.<sup>61</sup> Upon

<sup>59</sup> Swedish Cohabitees Act 2003, as described in *Cohabitees and their joint homes – a brief presentation of the Cohabitees Act*, Stockholm: Ministry of Justice, undated, available at <[www.regeringen.se/content/1/c4/33/39/9aabdf51.pdf](http://www.regeringen.se/content/1/c4/33/39/9aabdf51.pdf)>, last accessed 15 November 2010, and SALRC at paragraphs 4.3.16–4.3.46.

<sup>60</sup> The New Zealand *Property (Relationships) Amendment Act 2001*, which took effect on 1 February 2002, made major changes to the provisions of the *Matrimonial Property Act 1976*, including bringing “*de facto*” couples into the scheme. The amending legislation also changed the name of the *Matrimonial Property Act 1976* to the *Property (Relationships) Act 1976*. Under section 2D(1), the definition of “*de facto partnership*” applies to relationships between “*2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)*”.

<sup>61</sup> *Property (Relationships) Act 1976*, section 2.

termination of the relationship, all relationship property is split in half unless extraordinary circumstances make such a division repugnant to justice.<sup>62</sup> Cohabiting couples who do not wish to be subject to these rules have the option to contract out of it by mutual agreement.<sup>63</sup> The government made the following statement regarding the choice of automatic protection:

*This will mean that vulnerable people who are unaware of their legal situation regarding property in de facto relationships will be covered by the legislation without having to take deliberate steps to contract in. It is also possible that some would not be able to secure the necessary support of their partner to contract into the legislation. This is of particular concern where the relationship is a long one or where there are dependent children.*<sup>64</sup>

The South African Law Reform Commission's discussion paper on domestic partnerships looks to **New South Wales, Australia** as a model of automatic protection.<sup>65</sup> A statute called the Property (Relationships) Act 1984<sup>66</sup> automatically gives cohabiting couples recourse on property division and maintenance in the event that the relationship breaks down. Persons in same-sex or opposite-sex domestic partnerships which meet certain criteria may apply to court for an order adjusting their property interests equitably. The court must take into consideration all property and financial resources in the relationship, regardless of how or when they were obtained and regardless of whose name any property is in.<sup>67</sup> A partner in a relationship which has ended can also make a claim for maintenance where one party is unable to support himself or herself adequately because of assuming the care of a child of the relationship who is under age 12, or because the circumstances of the relationship adversely affected that partner's earning capacity.<sup>68</sup> Furthermore, domestic partners have an automatic right to intestate inheritance<sup>69</sup> and maintenance from the deceased estate.<sup>70</sup> Other statutes were amended to give domestic partners basic rights and duties towards each other,<sup>71</sup> and rights to make certain claims against third parties in respect of the injury or death of a partner.<sup>72</sup> Couples can opt out of the property protections of the law by making a domestic relationship agreement which applies to their relationship, although courts are not bound to follow individual agreements in the case of disputes. Couples do not have the power to opt out of the other automatic legal consequences.<sup>73</sup>

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<sup>62</sup> Id, sections 11, 13.

<sup>63</sup> *Property (Relationships) Act 1976*, section 21. Couples are also permitted to come to agreements that are not in accordance with the rules provided in the Act once they have separated. Id, section 21A.

<sup>64</sup> Justice and Electoral Committee, "Matrimonial Property Amendment Bill and Supplementary Order Paper No. 25 – Government Bill – As reported from the Justice and Electoral Committee – Commentary", at 7, available at <[www.gp.co.nz/wooc/bills/mpa/2000-109-3-comm.html](http://www.gp.co.nz/wooc/bills/mpa/2000-109-3-comm.html)>, last accessed 30 November 2010. This scheme has been supplemented by the Civil Union Act 2004 which provides both same-sex and opposite-sex couples with the possibility of entering into a civil union.

<sup>65</sup> SALRC Discussion Paper at paragraphs 10.2.15-ff.

<sup>66</sup> As amended by the Property (Relationships) Amendment Act 1999.

<sup>67</sup> Property (Relationships) Act 1984, section 20.

<sup>68</sup> Id, section 26-27.

<sup>69</sup> By virtue of amendments made by the Property (Relationships) Amendment Act 1999 to the Wills, Probate and Administration Act 1898.

<sup>70</sup> By virtue of amendments made by the Property (Relationships) Amendment Act 1999 to the Family Provision Act 1982.

<sup>71</sup> For example, several laws pertaining to health issues were amended to give domestic partners rights to make medical decisions for incapacitated partners, be consulted regarding treatments in case of certain mental health issues, etc. See SALRC at paragraphs 4.5.49-ff.

<sup>72</sup> See SALRC at paragraphs 4.5.53.

<sup>73</sup> Property (Relationships) Act 1984, sections 44-49; SALRC at paragraph 4.5.37-4.5.39.

In **Scotland**, the Family Law (Scotland) Act of 2006,<sup>74</sup> applies a number of automatic rules to cohabitation relationships (regardless of whether they are same-sex or opposite-sex).<sup>75</sup> For example, if a couple cannot agree who owns which household goods, the court will assume that they are shared.<sup>76</sup> The same rule applies to money which is part of any allowance made by either cohabitant for their joint household expenses or any property acquired out of such money.<sup>77</sup> If the relationship breaks down, a partner may apply to a court for an appropriate financial settlement. The court can consider making financial provision for a cohabiting partner who was financially disadvantaged during the relationship (for example, by staying at home to care for the children).<sup>78</sup> A cohabiting partner also has the right to apply to the court for an award of money or property from of the estate if the other partner dies without leaving a will.<sup>79</sup> The Act provides a broad definition of cohabitation which can apply to any two people living together as a couple, taking into account the length of time the couple have been living together, the nature of the relationship and the couple's financial arrangements.<sup>80</sup>

**South Africa** has proposed a two-part system which includes some automatic protections. The Alliance for the Legal Recognition of Domestic Partnerships (an NGO grouping) asserted that a law to assist domestic partners must deal with the following basic issues:

- *Maintenance obligations of the partners after the partnership ends whether through death or breakdown of the relationship;*
- *Property sharing on termination of the partnership;*
- *The fact that a domestic partnership may co-exist with another relationship, including civil marriage, customary marriage, a civil union, or another domestic partnership. All parties must be taken account of to ensure and fair and just distribution of property;*
- *The need for the most accessible procedures to enable poor, unrepresented, illiterate or rural parties to access courts to make use of the remedies in the legislation.*<sup>81</sup>

The South African Law Reform Commission took a similar view, suggesting that a court should be able to enforce a limited right to maintenance after separation or death, intestate succession and property division for any cohabiting partners who fall within the prescribed criteria for an unregistered domestic partnership,<sup>82</sup> with additional consequences for registered partnerships. The following commentary gives a concise summary of the two levels of protection offered by South Africa's proposed Domestic Partnerships Bill 2008:

*This Draft Bill provides for two forms of domestic partnership: registered and unregistered. Entering into a registered domestic partnership involves a public commitment in the form of a formal registration process that is undertaken by two persons (irrespective of their gender), neither of whom is married or in a civil union or another registered domestic partnership with an outsider. In consequence of registration, many of the legal consequences that attach to a valid marriage are extended to the partners. For instance,*

<sup>74</sup> Family Law (Scotland) Act 2006, available at <[www.legislation.gov.uk/asp/2006/2/data.pdf](http://www.legislation.gov.uk/asp/2006/2/data.pdf)>, last accessed 11 November 2010.

<sup>75</sup> Id, section 25.

<sup>76</sup> Id, section 26. This excludes money, securities, motor vehicles and pets.

<sup>77</sup> Id, section 27.

<sup>78</sup> Id, section 28.

<sup>79</sup> Id, section 29.

<sup>80</sup> Id, section 25(1)-(2).

<sup>81</sup> Alliance Submission at 4.

<sup>82</sup> SALRC at paragraph 7.5.1. Further details of the specific protections offered automatically will be discussed below at pages 239-240 and 247.



*registered domestic partners will be placed under an ex lege duty to support one another according to their respective means and needs, will be prohibited from disposing of joint property without written consent, and will be entitled to occupy the family home irrespective of which partner owns or rents it. A registered domestic partner will also automatically qualify as a “spouse” for the purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act, and as a “dependant” in terms of the Compensation for Occupational Injuries and Diseases Act. Over and above termination through death, a registered domestic partnership can be terminated by mutual agreement coupled with a de-registration procedure, unless minor children are involved, in which case a court procedure similar to divorce is required.*

*On the other hand, the unregistered domestic partnership envisions a (generally monogamous) relationship that has not been registered under the Draft Bill, and permits either or both partners to approach the High Court at the termination of the relationship for an order relating to property division, maintenance, or intestate succession. In deciding whether to grant the order, the court must have regard to “all the circumstances of the relationship” in addition to any specific requirements prescribed for the nature of the particular claim sought. As such, the unregistered domestic partnership adopts an ex post facto judicial discretion model.<sup>83</sup>*

## Pros and cons of automatic protection

Most of those who took part in the 2002 LAC field research favoured some form of agreement or registration over automatic protection, but many interviewees and focus group discussions in the 2009 LAC field research supported some form of automatic protection.

Many of those interviewed thought that a cohabitation relationship should come within the ambit of legal protection once the relationship has lasted for a minimum amount of time. For example, a social worker at the Ministry of Health in Swakopmund thought that it would be a good idea if “*it was automatic after 5 years if you could prove a relationship...since many men don’t respect women and just want cooking and sex*”.

Some people thought that automatic protection would be important for to persons who would probably be unable to register a cohabitation relationship because their partner was already married to someone else; as one said, you “*cannot make property arrangements with a lover already married to another woman*”.

A priest in Swakopmund explained that automatic protection is a good idea because “*it is like forcing a commitment*” – although he thought that people should be able to opt out of such a system.

Some cited specific legal consequences which they felt should be automatic rather than a matter of choice:

- any cohabitation relationship should be automatically “in community of property”
- a cohabiting partner must get a share of the couple’s assets
- children of cohabiting partners must get a share of the assets
- if one partner dies, the surviving partner and the children must get all the property, even if the extended family disagrees.

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<sup>83</sup> BS Smith & JA Robinson, “An Embarrassment of Riches or a Profusion of Confusion? An Evaluation of the Continued Existence of the *Civil Union Act 17 of 2006* in the Light of Prospective Domestic Partnerships Legislation in South Africa”, 13 (2) *PER / PELJ* 30 (2010) at 31-32 (footnote omitted).

Those who were opposed to automatic protection focussed on freedom of choice; for example, one woman said, “*Any law reform should be pro choice*”. However, one male cohabitant favoured automatic protection despite recognising its interference with freedom of choice, commenting that “*automatic might be good for vulnerable women but it is stripping people of the right to choose. But it is much more good than bad*”.

Some focus group participants worried that people would not respect a law which provided automatic protection. For example, members of an Ongwediva focus group discussion did not think that the man’s family would respect automatic protection and would take the property if the male partner died regardless of such protection. However, as a focus group discussion participant in Mondesa noted, culture is mutable and, “*If the law tells them [the family] to do something, we change the culture to get them to do it*”.

Some worried about how a system of automatic protection would work in practice. Because the accessibility of courts and law is generally problematic in Namibia, some people thought that proving relationships before a magistrate would be a hardship on cohabitants.

A few focus group participants also worried that automatic coverage would discourage marriage, especially if there were no real differences between cohabitation and marriage.

In South Africa, a study of cohabitation argued against requiring any formalities as a pre-requisite to legal protection:

*Such formalities are unrealistic in South Africa where many people are illiterate, have little knowledge of the law and even less 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.*<sup>84</sup>

The same South African study draws analogies between cohabitation and labour law, where the freedom to contract is overridden by a set of legal rules which regulate fairness in the employment context, because employers and employees do not negotiate from positions of equal power.<sup>85</sup>

***Recognition and legal coverage of domestic partnerships should not be dependent on any formalities (such as registration or a written contract of partnership). Such formalities are unrealistic... where many people are illiterate, have little knowledge of the law and even less access to it. There is also the issue of unequal power relationships between men and women, which means that women may not be able to insist on registration... The situation can be likened to that of labour law where the freedom to contract has been curtailed by the imposition of rules that regulate fairness in the employment relationship. This is based on the recognition of an unequal power relationship between employees and employers in most situations.***

Beth Goldblatt, *Cohabitation and Gender in the South African Context – Implications for Law Reform*, Johannesburg: Centre for Applied Legal Studies (CALS), University of the Witwatersrand, 2001 at paragraph 4.1.3 (emphasis and brackets omitted).

<sup>84</sup> Beth Goldblatt, *Cohabitation and Gender in the South African Context – Implications for Law Reform*, Johannesburg: Centre for Applied Legal Studies (CALS), University of the Witwatersrand, 2001 at paragraph 4.1.3.

<sup>85</sup> Ibid.

The South African Law Reform Commission similarly noted the advantages of automatic protection:

*Couples need not be aware of the existence of the relevant legislation for it to apply to them. This makes the unregistered partnership model particularly valuable for vulnerable partners who cannot convince their partner to get married or register the relationship. This 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.*<sup>86</sup>

Some critics dislike the automatic approach to regulating cohabitation relationships, proffering an autonomy-based argument against this type of scheme. The argument proceeds on the assumption that people enter into cohabitation relationships instead of marriages because they wish to avoid the requirements of marriage. So, when governments make cohabitation relationships more similar to marriages, they unfairly reduce people's autonomy and freedom to contract.<sup>87</sup> Others argue against automatic protection on the grounds that the "private sphere" should be protected from government interference,<sup>88</sup> asserting that government should not intervene in cohabitation relationships since they are private.

However, as discussed above,<sup>89</sup> the idea of choice is problematic since both partners may not have the same degree of choice in societies marked by gender inequality. Furthermore, the entire field of family law already infringes upon the "private sphere" in order to protect vulnerable persons against unfairness. Additionally, in a country like Namibia where there is a predominately rural population with a low level of legal literacy, it is unlikely that the public interest will be adequately served by a legal framework which provides protection only to registered cohabitation relationships.

#### **RECOMMENDATION:**

We propose a basic level of automatic protection for cohabiting couples who meet specified criteria. Applying some automatic protection is the best way to protect vulnerable partners who may be in a weak negotiating position, or those who may remain unaware of the need to register such relationships even after a law reform allows for this possibility.

## **Opting out of automatic protection**

Some legal schemes provide automatic protections, but allow couples to make an agreement to "opt out" of this system if they choose.

For example, in **New Zealand**, the Property (Relationships) Act allows couples to contract out of the provisions of the Act concerning property division at any time before, during or after the relationship.<sup>90</sup> Opting out requires each partner to obtain independent legal advice

<sup>86</sup> SALRC at paragraph 7.2.12 (footnote omitted).

<sup>87</sup> See, for example, R Bailey-Harris, "Dividing the Assets on Breakdown of Relationships outside Marriage: Challenges for Reformers" in R Bailey-Harris, ed, *Dividing the Assets on Family Breakdown Family Law*, Bristol: Family Law, 1998 at 83.

<sup>88</sup> See, for example, Sinclair at 293-294.

<sup>89</sup> At pages 52-56.

<sup>90</sup> Property (Relationships) Act 1976, section 21 and 21A.

about the effect of the agreement. The agreement to opt out must be in writing with signatures witnessed by each party's lawyer, and each lawyer must certify that he or she explained the effect and implications of the agreement to that partner before the agreement was signed.<sup>91</sup> (Although opting out is possible, a court is not bound by the agreement between the partners if enforcing it would result in a "serious injustice".<sup>92</sup>)

In contrast, in **South Africa**, it would not be possible under the proposed Domestic Partnerships Bill 2008 for partners to opt out of the automatic consequences of a domestic partnership. However, as the South African Law Reform Commission notes, even though the protections are "*automatic*", making use of them still requires some positive action by at least one partner:

*... in order for one or both partners to enforce their rights, they have to approach the Court for relief.... In practice it means that one or both partners can effectively "opt in" to the already available protection of the Act after the relationship has come to an end.*<sup>93</sup>

The South African Law Reform Commission asserted that the absence of an "opt-out" mechanism is not unfair, since the court in determining that a domestic partnership existed would be examining the circumstances of the cohabitation to see "*whether there are indicators of mutual commitment*", which would include "*consideration of the intentions, whether stated or implied, of the partners*".<sup>94</sup> Furthermore, the requirement that the partner who wishes to make use of the law must approach a court will afford the other partner a chance to argue that there was no intention that the relationship "*be one of interdependency*".<sup>95</sup> The Commission concluded that applying automatic protections at the termination of a relationship would be the best way to protect the vulnerable:

*Vulnerable partners who could not convince their partner to commit to the relationship will be able to find relief from an objective source at the end of the relationship when they are at their most vulnerable. Thus, although one partner cannot bind the other partner unilaterally during the existence of the relationship, he or she can afterwards bring the other to account for his or her conduct.*<sup>96</sup>

An opt-out option cures many of the alleged defects in the informal system by preserving freedom of contract. This type of provision would be especially relevant to parties who are of equal bargaining power and have freely chosen not to marry. However, those who criticise formal systems requiring opt-in registration see similar problems with including an opt-out option in a system of automatic protection, particularly in the more common case where the partners do not enjoy equal bargaining power.

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<sup>91</sup> Ibid. The cost of contracting out of the property division rules of the *Property (Relationships) Amendment Act 2001* was a concern, since the requirement of independent legal advice will mean that legal fees will be incurred. Justice and Electoral Committee, "Matrimonial Property Amendment Bill and Supplementary Order Paper No 25 – Government Bill – As reported from the Justice and Electoral Committee – Commentary" at 15, available at <[www.gp.co.nz/wooc/bills/mpa/2000-109-3-comm.html](http://www.gp.co.nz/wooc/bills/mpa/2000-109-3-comm.html)>, last accessed 30 November 2010. But this may be cheaper than litigation of disputes, which are more likely to occur in the absence of agreements.

<sup>92</sup> Ibid.

<sup>93</sup> SALRC at paragraph 7.2.30.

<sup>94</sup> Id at paragraph 7.2.40.

<sup>95</sup> Id at paragraph 7.2.42.

<sup>96</sup> Id at paragraph 7.2.41.

The persons consulted in the field research were divided on this question,<sup>97</sup> with many persons expressing concerns for vulnerable partners if opting out is allowed. For example, a male participant in a Rehoboth focus group discussion spoke against an opt-out provision, asserting that “*women will lose out because guys will force them to accept opting*”, while one woman said that “*no-one should be able to opt out because the other party will lose out in the process*”. Several people made comments to the effect that “*you shouldn’t be able to escape the law*”. One woman warned that “*it would bring a lot of violence and confusion if people thought they could escape it or get out of it*”.

Speaking in favour of opting out, one man typically stated that “*it is stripping people of the right to choose*” – saying further than cohabiting couples should be able to choose in the same way that married couples can pick their marital property regime. One key informant suggested that sometimes it is a woman’s financial status that would be protected by allowing her to opt out of automatic protection, such as an affluent widow who might otherwise be subject to insincere male attention.

Several people spoke in favour of some sort of qualified opt-out provision. One man felt that opting out might be possible only if a clause remained that ensured that there would be continual maintenance of both partners and the children. A woman in Swakopmund said, “*If boyfriends want to opt out they should have to say why they don’t want to be covered*”. One woman felt that opting-out should be possible only if the alternative agreement would provide better benefits for each partner.<sup>98</sup>

We assert that the automatic protections provided to cohabiting relationships should be at a very rudimentary basic level and so need not be subject to opting out, in the same way that employer and employees cannot make an agreement waiving the basic conditions of employment provided to workers by labour legislation.<sup>99</sup> Furthermore, if both parties are in agreement about the desire to avoid automatic protections, they can both simply ignore the law – with the possible exception of action by heirs after the death of one partner.

#### **RECOMMENDATION:**

**There is no real need to include an opt-out provision for basic automatic protections. After all, if *both* cohabiting partners do not want to take advantage of the legal protections available to them, they can escape coverage merely by declining to take any steps to access such protections.**

<sup>97</sup> More people were in favour of an opt-out option in 2002 while more people interviewed in 2009 preferred a system with no such option.

<sup>98</sup> The Centre for Applied Legal Studies at the University of the Witwatersrand similarly advocated a limited possibility for opting out which did not allow partners to exclude a mutual duty of support: “*While we agree that parties should be able to enter into a contract varying the automatic consequences of this legislation, we suggest that the maintenance provisions be excluded from such variation. Domestic partners should not be able to escape their duties of support towards each other, even by agreement.*” Gender Research Project of the Centre for Applied Legal Studies, University of the Witwatersrand, “Response to the South African Law Reform Commission’s Discussion Paper 104, Project 118, Domestic Partnerships”, 2004 at 4, available at <<http://web.wits.ac.za/NR/rdonlyres/77205BA9-61DE-4227-AEEC-289DDDAD5BDC/0/SALCresponsetodiscussionpaper.pdf>>, last accessed 23 November 2010.

<sup>99</sup> See Labour Act 11 of 2007, section 9.



## 11.3.2 Registration

There are a range of options for registration. For purposes of discussion, we can identify three useful models:

- (1) **Model 1:** registration of a domestic partnership with consequences similar to marriage and a dissolution procedure similar to divorce;
- (2) **Model 2:** registered declaration of a domestic partnership primarily as proof of the relationship, with automatic termination of the relationship when it ceases to exist because of death or abandonment by one or both partners;
- (3) **Model 3:** optional registration of private agreements between partners, with registration designed merely to facilitate enforcement of the agreement.

Many are critical of a formal system requiring registration, on the grounds that such a system would be unlikely to protect those who most need it – usually women, who frequently have unequal bargaining power and reduced freedom of choice in such relationships.<sup>100</sup> Some argue that a formal system requiring registration would simply create an additional, unnecessary layer of family law rules that would be inaccessible to the most vulnerable persons.<sup>101</sup> If a system of formal registration were implemented, perhaps some cohabitants would opt into it – but a cohabitant who can convince her partner to register is a person who already has some degree of power and is therefore less vulnerable than those who would not be aided by such a system. However, a system of formal registration of cohabitation relationships could be a useful supplement to a basic level of automatic protection.

The **Canadian HIV/AIDS Legal Network** offers a possible outline for supplementary registration in its suggested provisions for cohabitation law in Southern Africa. Although it recommends a regime based on automatic protection, it proposes optional registration to provide certainty for couples who wish to take advantage of it:

*While a system of registration could be established which does not preclude the application of domestic partnership law to those who do not register, it is likely that many domestic partners will not contemplate registration because it is a bureaucratic measure they may wish to avoid. Nevertheless, there may be cases where couples do wish to register their domestic partnership during their relationship, especially if this is a straightforward and inexpensive option; and where couples wish to ensure their rights are protected and wish to avoid a subsequent dispute requiring costly and time-consuming court intervention. For this reason, an optional additional provision is provided for the establishment of a system of registration of domestic partnerships.*<sup>102</sup>

**Model 1** is often utilised in practice as an alternative to marriage for same-sex partners. This kind of arrangement is sometimes referred to as a “civil partnership” or “civil union”.

The UK Law Commission provides the following overview of this type of registered partnership:

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<sup>100</sup> See, for example, R Bailey-Harris “Dividing the Assets on Breakdown of Relationships outside Marriage: Challenges for Reformers” in R Bailey-Harris, ed, *Dividing the Assets on Family Breakdown Family Law*, Bristol: Family Law, 1998 at 83.

<sup>101</sup> See Canadian HIV/AIDS Legal Network at 2-15.

<sup>102</sup> Ibid.

*In some jurisdictions, registered partnership offers all, or almost all, of the same rights and responsibilities as marriage. In others, registered partnership offers a distinctive, generally less extensive, package of legal consequences. However, most of these schemes go beyond simply providing registered couples with financial relief in the event of separation or death. They tend to have other implications, for example, elsewhere in family law, and in relation to tax, social security, employment rights and so on, effectively creating a new “status” category throughout the law of potential benefit to both parties.*<sup>103</sup>

For example, in **the Netherlands**, the rights and responsibilities which go with marriage and registered partnerships are virtually identical. Registered partnerships are available to parties who are 18 years of age or older and of the same or opposite sex. The partnership comes into existence as soon as the partners have signed and registered an agreement called an “*akte van registratie van partnerschap*”. The registered partnership can be terminated by death, by mutual agreement of the two parties or by an order of court after a proceeding similar to a divorce proceeding. It is also possible to convert the partnership into a marriage, or to convert a marriage into a registered partnership.<sup>104</sup>

**South Africa** is discussing a bill with a registration scheme that falls somewhere on the spectrum between Models 1 and 2. In terms of the Domestic Partnerships Bill 2008, two adults (of the same or opposite sexes) who are cohabiting or intending to cohabit could register a domestic partnership by signing certain documents in the presence of a government official designated as a “registration officer”. Partners in a registered partnership would have a mutual duty of support and a right to occupy the joint home, regardless of who owns or leases it. Furthermore, each partner would be able to deal in joint property only with the written consent of the other partner. This is a greater level of rights and duties than those which apply automatically. A registered couple would also have the additional option of concluding an agreement between themselves – called a “registered domestic partnership agreement” – which would say how they will deal with their property and other financial resources, including pension schemes and similar benefits. Registered partnerships would be analogous to marriages “out of community of property”; the bill would not allow domestic partnership agreements to establish “in community of property” regimes, but the couple could have some jointly-owned property such as their home and household goods.

<sup>103</sup> [UK] Law Commission, *Consultation Paper No 179: Cohabitation: The Financial Consequences Of Relationship Breakdown*, London: Law Commission, 2006, at paragraph 5.44, available at <[www.lawcom.gov.uk/docs/cp179.pdf](http://www.lawcom.gov.uk/docs/cp179.pdf)>, last accessed 9 November 2010.

<sup>104</sup> Bradley S Smith, “The Development of South African Matrimonial Law With Specific Reference to the Need For and Application Of a Domestic Partnership Rubric”, doctoral thesis, University of the Free State, Bloemfontein, South Africa, 2009 at 758-759; SALRC at 4.1.13-ff. The Dutch Civil Code, Article 80C (as at July 2001) stated:

*The registered partnership ends:*

- *by death;*
- *by disappearance of one partner followed by a new registered partnership or by a marriage of the other partner ...;*
- *with mutual consent by the registrar’s recording ... of a dated declaration, signed by both partners and by one or more advocates or public notaries, stating that, and at what moment, the partners have concluded a contract relating to the termination of the registered partnership [as specified in Article 80d];*
- *by [judicial] dissolution at the request of one partner [as specified in article 80e, which declares applicable the provisions on marital divorce];*
- *by conversion of a registered partnership into a marriage [as specified in article 80g].*

“Text of key articles on Registered Partnership in the Dutch Civil Code”, summary-translation by Kees Waaldijk, Universiteit Leiden, The Netherlands, July 2001, available at <<http://media.leidenuniv.nl/legacy/Translation%20of%20Dutch%20law%20on%20registered%20partnership.pdf>>, last accessed 21 November 2010.

In terms of the proposed South African bill, a registered partnership can be terminated by agreement between the parties, where both of them sign a “termination agreement” in the presence of a registration officer. This agreement can provide for maintenance, the division of any joint property, what will happen to the family home and other financial matters. If there is a dispute on financial issues, they must approach a High Court or a family court. If they had made a registered domestic partnership agreement, the court would have reference to this agreement but would not be bound to apply it if proved to be unfair. Couples with minor children would be *required* to terminate their domestic partnership by means of a court order, so that the court can ensure that the welfare of the children is properly protected. If a registered domestic partnership terminates by death, the surviving partner would qualify for intestate succession and maintenance from the deceased’s estate on the same basis as a spouse.

**Model 2** generally involves a simpler registration process, where registration serves primarily as a declaration that a cohabitation relationship exists. The consequences of this type of registration differ from jurisdiction to jurisdiction; registration of this nature may serve as a trigger for certain rights and obligations, or it may simply provide clear proof for the application of automatic protections. Under this model, termination of the relationship may happen automatically or with (at most) the filing of some sort of notice by one or both parties that the relationship has ended.

For example, in **New South Wales, Australia**, cohabiting couples may make a relationship declaration which can be used to demonstrate the existence of a “*de facto relationship*” within the meaning of the Property (Relationships) Act 1984 and other legislation. A relationship can be registered by any two people (regardless of their sexes) if they are over the age of 18, not related by family and not married or in a relationship as a couple with another person. People who wish to register their relationships must provide proof of their age and identity. The registration becomes effective after a 28-day “cooling-off period” which is designed to ensure that the decision to register is not taken lightly; either partner can withdraw the registration during this period. The registration provides conclusive proof of the existence of the relationship, and eliminates the need to prove any further factual evidence of the existence of the relationship. Unregistered couples are still covered by the relevant legislation, but they would have to first prove that their relationship falls into the protected category of “*de facto relationship*”. The registration is automatically revoked if one of the parties dies or marries. It can also be revoked on application by one or both parties; if only one partner wishes to revoke the registration, that partner must show that notice was given to the other partner (unless this is impossible for some reason). The revocation becomes effective after a 90-day cooling-off period. The registration is void if the agreement of one or both partners was obtained by fraud, duress or other improper means, or if either party was mentally incapable of understanding the nature and effect of the registration.<sup>105</sup> Where a domestic relationship is not registered, one or both partners can still approach a court to show that a “*de facto relationship*” existed.<sup>106</sup>

In both the District of Columbia and Hawaii, USA, the registration and termination processes are simple, but the registration acts as a trigger for certain rights rather than just as proof of the relationship.

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<sup>105</sup> New South Wales Relationships Register Act 2010.

<sup>106</sup> New South Wales Property (Relationships) Act 1984.

In the **District of Columbia, USA**,<sup>107</sup> unmarried adults who share a permanent residence may register as domestic partners, regardless of whether they are same-sex or opposite sex couples. Couples who have registered the partnership receive a certificate to this effect. Dependent children can also be listed. Domestic partner registrations are public records. Termination of a registered domestic partnership can occur automatically upon the death of one partner or when one partner ceases to fulfill one of the requirements for registration – such as by entering into a marriage with someone else, abandoning the relationship or ceasing to occupy a mutual residence. It is also possible for one or both partners to file for termination; if only one partner files for termination, notice of intent to terminate the partnership must be served on the other partner and the termination then becomes final after six months. If one of the partners informs a third person of the existence of a domestic partnership for the purpose of receiving some benefit, then there is a corresponding duty to inform that same third party of the termination of the domestic partnership. Failure to give this notice does not carry a criminal penalty, but can lead to civil liability if the third party sues to recover losses that ensue from the failure to notify.<sup>108</sup> Originally, registration in the District of Columbia made the domestic partner eligible only for limited benefits: government health care insurance coverage if one of the partners was a government employee, mutual visitation rights in hospitals and nursing homes, and the right to make decisions concerning their partner's remains after death. Additional legal consequences were assigned to registered domestic partnerships by subsequent legislation,<sup>109</sup> which provided rights to intestate inheritance, duties of child support, rights to division of property and maintenance upon the termination of the partnership and rights of action against third parties for harm to a partner.<sup>110</sup>

In **Hawaii, USA**, a reciprocal beneficiaries law allows the registration of a relationship between any two unmarried persons who cannot legally marry (such as same-sex couples or persons in non-intimate family relationships such as a widow and her unmarried son). Each party must sign a “*declaration of reciprocal beneficiary relationship*” and affirm that consent has not been obtained by “*force, duress, or fraud*”. A certificate is then issued and the parties become “*entitled to those rights and obligations provided by the law to reciprocal beneficiaries*” – which are contained in a range of other statutes. The relationship is terminated by a signed “*declaration of termination*” filed by either party, which will result in the issue of a “*certificate of termination*”. Marriage by either party automatically terminates the “*reciprocal beneficiary relationship*”.<sup>111</sup> The rights and obligations of reciprocal beneficiaries include, for example, certain property rights, intestate succession and the right to sue third parties for loss of support in the event of the wrongful death of the partner.<sup>112</sup>

**Model 3** involves the optional registration of a private contract between cohabitants. Cohabiting partners are, of course, free to make an express written contract between themselves without registering it. However, registration would give it more weight.

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<sup>107</sup> The District of Columbia is a district additional to the 50 states of the United States and the location of the nation's capital.

<sup>108</sup> Health Care Benefits Expansion Act of 1992, DC Law 9-114, effective 11 June 1992.

<sup>109</sup> Including the Domestic Partnership Equality Amendment Act of 2006, DC Law 16-79, effective 4 April 2006.

<sup>110</sup> District of Columbia Department of Health, Vital Records Division, “Domestic Partnership: Frequently Asked Questions”, available at <[http://dchealth.dc.gov/doh/cwp/view.a.3.q.573324.dohNav\\_GID.1787.dohNav\\_33110|33120|33139|.asp](http://dchealth.dc.gov/doh/cwp/view.a.3.q.573324.dohNav_GID.1787.dohNav_33110|33120|33139|.asp)>, last accessed 19 November 2010.

<sup>111</sup> Hawaii Reciprocal Beneficiaries Act (Act 383, Session Laws of Hawaii 1997).

<sup>112</sup> “Registering as Reciprocal Beneficiaries: Here's how it works, what it means and how to do it!”, *Lambda Legal*, 27 April 2010, available at <[http://data.lambdalegal.org/publications/downloads/fs\\_registering-as-reciprocal-beneficiaries.pdf](http://data.lambdalegal.org/publications/downloads/fs_registering-as-reciprocal-beneficiaries.pdf)>, last accessed 19 November 2010.

The **Canadian HIV/AIDS Legal Network** includes the following discussion of contracts in its suggested provisions for cohabitation law in Southern Africa:

*In jurisdictions without a legal framework governing domestic partnership, rights and responsibilities between domestic partners can be determined by contract. Permitting domestic partnership agreements allows individuals who have the means to do so to determine the financial consequences of their relationship (for example, property ownership and maintenance) and respects their freedom to contract. In addition, where domestic partnerships are regulated, if couples do not wish to be governed by a default property regime, the possibility of concluding a domestic partnership agreement allows them to opt out of the default regime. Concluding a domestic partnership agreement may also encourage couples to consider more carefully the financial implications of their relationship, particularly if their decision is to opt out of the default property regime by contract.*

*As with all contracts, a contract concluded at the outset of a relationship may fail to make provision for changed circumstances, or it may be framed in a way which makes it difficult to adapt it to the changing circumstances of the union, such as the birth of children. Moreover, domestic partners may not bargain on an equal footing, or the terms of an agreement may be concluded as a result of fraud, coercion, undue influence or domestic violence that is in the financial interest of the economically stronger partner (usually the man). Therefore, [the proposed provision on optional registration of contracts] allows a court to vary or set aside any one or more of the provisions of a domestic partnership agreement in cases of serious injustice and where fraud, coercion, undue influence or domestic violence was involved.<sup>113</sup>*

The experience of the United Kingdom is instructive on the question of contracts. In **England and Wales**, there is as yet no legal framework for cohabitation relationships.<sup>114</sup> To fill this gap, non-governmental organisations have implemented other measures to address the challenges that cohabiting couples face. For example, organisations such as *Married or Not* and *Advice Now* provide information about the legal differences between married and unmarried couples and suggest practical solutions for unmarried couples in the absence of legislative provisions.<sup>115</sup> These organisations, and many others, recommend that partners make private agreements between themselves as a form of protection. Such agreements are usually termed “*living together agreements*”. For example, the organisation *Advice Now* provides a pamphlet on their website which contains a simple *proforma* agreement and a guide for working through it. The agreement covers topics such as money and assets brought into the relationship, how expenses and household costs will be shared and the roles and responsibilities of each partner.<sup>116</sup> The pamphlet explains the validity of these agreements:

*The courts will not let you sign away rights that the law gives you but a court will generally follow what you both agreed if:*

- *it still produces a fair result for both of you*
- *you were both honest with each other about your finances at the start.*

<sup>113</sup> Canadian HIV/AIDS Legal Network at 2.12.

<sup>114</sup> [UK] Law Commission, *Consultation Paper No 179, Cohabitation: The financial consequences of a relationship breakdown, A consultation paper*, 2006, available at <[www.lawcom.gov.uk/docs/cp179.pdf](http://www.lawcom.gov.uk/docs/cp179.pdf)>, last accessed 9 November 2010.

<sup>115</sup> See <[www.marriedornot.org.uk/](http://www.marriedornot.org.uk/)> and <[www.advicenow.org.uk/living-together](http://www.advicenow.org.uk/living-together)>, last accessed 9 November 2010.

<sup>116</sup> “Living together agreements”, London, Advice Services Alliance in partnership with One Plus One, 2010, available at ><http://static.advicenow.org.uk/files/livingtogether-agreements-2010-867.pdf>>, last accessed 9 November 2010.



*A court is even more likely to uphold the agreement if both of you also had some legal advice about what you were doing.*<sup>117</sup>

The organisation *Advice Now* has also produced a substantial amount of information on cohabitation including a “*breaking up checklist*” and information about cohabitation and wills, pensions and other benefits.<sup>118</sup> Such materials, adapted for the Namibian context, could be very useful in Namibia to help ensure that people understand their rights in cohabiting relationships and think clearly about their respective financial contributions.

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It may help you to indicate whether you both agree to the rules that are set out here:

- If you owned something before you got together, it belongs to you. YES / NO
- If you bought something with your own money it belongs to you. YES / NO
- If you inherited something, or it was given to you by someone else, it belongs to you. YES / NO
- If one of you buys something and gives it to the other it belongs to the person to whom it is given. YES / NO
- If you buy something out of a joint bank account it belongs to you equally, unless you have agreed to own the account in different shares. If you have, you own the object in those shares. YES / NO
- If you buy something together but each contribute different amounts to the price, you own it in the shares in which you contributed. YES / NO

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## 7. OWNING THE HOME

*[Choose the clause that describes what you want to do and delete the others. It is important that you take legal advice about what you intend to do with the Home. If you make a mistake at this stage it could prove very expensive later on.]*

- We [will] own the Home in our joint names as a joint tenancy. We intend to continue to have equal shares in the Home even if we do not make equal contributions.
- We [will] own the Home in our joint names as a tenancy in common.
  - We [will] own equal shares and we intend to continue to have equal shares in the Home even if we do not make equal contributions OR
  - We [will] own the following shares:  
..... : .....%  
..... : .....%<sup>1</sup>
- ..... owns [will own] the Home in his/her sole name and [the name of the non-owner] ..... understands that s/he will not get any share in the Home or any rights over the property even if s/he makes a contribution to paying for the Home or the household.

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<sup>117</sup> Id.

<sup>118</sup> See *Advice Now* website: <[www.advicenow.org.uk/living-together](http://www.advicenow.org.uk/living-together)>, last accessed 9 November 2010.



**CHILDREN: WHO IS GOING TO TAKE RESPONSIBILITY AND PAY FOR THEM?**

In Jamaica, the Family Property (Rights of Spouses) Act 2003 facilitates private agreements between both married persons and cohabitants about “*the ownership and division of their property (including future property) as they think fit*”. (The term “*spouse*” in the Act includes persons who have cohabited for at least five years.) The law explicitly states that such an agreement between cohabitants will not be considered as being void as against public policy.<sup>119</sup> Couples are free to make any private agreement they wish, but the law suggests that such an agreement may (a) define the share of the property to which each spouse shall be entitled upon separation, dissolution of marriage or termination of cohabitation; and (b) provide for the calculation of such share and the method by which the property will be divided. Each party must obtain independent legal advice before signing the agreement, which must be formally witnessed. However, although a court will have reference to such an agreement in the event of a dispute, it is not obliged to give effect to any such agreement if it would be unjust to do so, considering –

- (a) *the provisions of the agreement;*
- (b) *the time that has elapsed since the agreement was made;*
- (c) *whether, in light of the circumstances existing at the time the agreement was made, the agreement is unfair or unreasonable;*
- (d) *whether any changes in circumstances since the agreement was made whether or not such changes were contemplated by the parties) render the agreement unfair or unreasonable;*
- (e) *any other matter which it considers relevant to any proceedings.*<sup>120</sup>

Even if the cohabitants have made no agreement, they can still approach the court to divide their property appropriately.<sup>121</sup>

<sup>119</sup> This is presumably to ensure that a court does not treat the agreement as providing money or property in exchange for sexual favours.

<sup>120</sup> Family Property (Rights of Spouses) Act 2003, section 10.

<sup>121</sup> *Id.*, sections 11-ff.

Similarly, cohabiting couples in all provinces in **Canada** can enter into a cohabitation agreement to ensure that their relationship is subject to whatever property division scheme they chose upon dissolution of the relationship. For example, they may agree to an equal division similar to that found in matrimonial property legislation, or they may agree that their individual property is to be kept completely separate. In the past, courts would not uphold such contracts, finding that they were contrary to public policy based upon immorality. However, there has been a shift towards judicial acceptance of these agreements during the past 20 years.<sup>122</sup> The various Canadian provinces have also adopted legislation that specifically allows unmarried cohabitants to enter into cohabitation agreements. For example, in Ontario, the Family Law Act states:

*A man and a woman who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including,*

- (a) ownership in or division of property;*
- (b) support obligations;*
- (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and*
- (d) any other matter in the settlement of their affairs.*<sup>123</sup>

Judges can set aside a cohabitation agreement using the tools of regular contract law, for example, if there was coercion or undue influence involved in coming to the agreement. Some legislation specifically provides other grounds for setting aside such an agreement. For example, the Ontario *Family Law Act* allows a court to set aside such an agreement (or a provision of it) if a significant asset, debt or other liability was not disclosed by one person, or if one party did not understand the nature or consequences of the agreement.<sup>124</sup>

Another useful template for optional registration of cohabitation contracts comes from the treatment of parenting plans in **Namibia's draft Child Care and Protection Bill** (see box).

### **Parenting plans in Namibia's draft Child Care and Protection Bill**

Parenting plans are written agreements between co-holders of parental responsibilities and rights, confirmed by two witnesses. They can cover issues such as

- where and with whom the child will live
- maintenance
- contact with various persons
- schooling and religious upbringing
- medical care, medical expenses and medical aid coverage.

They are voluntary agreements which are intended to help prevent disputes, although provision is made for getting help to mediate a plan where there is disagreement.

<sup>122</sup> JD Payne and MA Payne, *Introduction to Canadian Family Law*, Scarborough: Carswell, 1994 at 36.

<sup>123</sup> Ontario Family Law Act, RSO 1990, c F-3, section 53(1).

<sup>124</sup> Id, section 56(4).

Parenting plans can be registered with the clerk of the children's court, which makes them enforceable in court. If a parenting plan is registered, then amendments to the plan or an agreement to terminate it must also be registered.

To provide an even greater degree of security, the parties to the parenting plan can lodge an application to have the plan made into an order of the children's court. If the plan is made into an order of court, then it may be enforced by that court and may be amended or terminated only by court order. A court which is considering an application to enforce, amend or terminate a parenting plan may call for a social worker investigation if necessary, and consider any relevant evidence.<sup>125</sup>

Cohabitation contracts could be similarly structured so that privately-concluded contracts provide an extra degree of security if registered.

## Pros and cons of registration

The concept of registration was very popular among interviewees and in focus group discussions. Perhaps the most common reason that people endorsed registration (as opposed to a more informal system) was because they wanted tangible evidence of the relationship and of the law. Many of the participants spoke of the benefits of having the '*paper*' that registration would entail, suggesting that they perceived registration as lending legitimacy to the relationship. For example, an Owambo woman from a village near Outapi said of marriage, "*...in case of a death problem you have 'papers'*". And, as the Outapi focus group participants explained, not having documents is a huge problem to achieving equity or getting what you need in that community.

Several people suggested that registration would be important for purposes of proof, such as a Damara man living in Kunene Region:

*Registration serves as proof that I was living together with my partner for such and such years and that children were born of this relationship. This is necessary since most men are either already married and do not tell their partners about it or may have several partners. As such, registration will serve as evidence if inheritance or property sharing is an issue.*

Others were in favour of a registration system because it would help those people who wish to marry but cannot because of cultural or financial constraints. For instance, a Herero woman in Swakopmund who was cohabiting with her boyfriend because they could not afford "*the cows*" to marry, wanted the government to create a registration system since "*...it would mean the families could not take the things. My partner and I would both want to register*". A registration system would be most beneficial to cohabitants like these, who both want the law to recognise and to protect their relationship.

Some women supported registration because it could serve as a 'bargaining chip' for women. For example, a young Baster woman living in Rehoboth explained, "*If he would not want to [register], I would know that I should break up with him because he does not care about me. It would be a good stepping stone to marriage. It takes the relationship to the next level.*"

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<sup>125</sup> Draft Child Care and Protection Bill, Revised Final Draft June 2010, sections 120-124.

Some were in favour of registration, but felt that couples should be allowed to register only after meeting certain criteria, such as living together for at least two years and having an indication of serious commitment to each other. One woman elaborated on this idea:

*I think that the cohabiting partners should live together for one year, and then they must register the relationship, otherwise the man should pay lobola. The man should be required to pay more lobola as a penalty.*

The most common arguments in favour of registration were to ensure protection of both partners and their children, or to provide proof that the relationship exists.

When asked *where* they thought couples should register, many interviewees suggested that magistrates' courts would be an appropriate venue. Others suggested churches, police stations, government departments, lawyers, social workers and the Legal Assistance Centre. A number of respondents said that this power should be extended to traditional leaders in rural areas.

Respondents expressed mixed views on whether a cost should be attached to registration. One woman said that a registration system should not cost any money since "...people are poor and unemployed people live together too". Others suggested that charging for the service would be a mistake as many couples do not marry because it is too expensive. On the other hand many participants said that attaching even a small cost would make people take registration more seriously. A key informant from an NGO in Swakopmund argued, "*If it was free it would not be a serious matter and there would be too much coming and going in relationships. It needs to be a bit expensive*". A social worker in Ongwediva similarly thought that a small fee such as N\$100 would "*keep people serious about it so they wouldn't be jumping in and out*". Most of those who thought a cost should be attached recommended sums between N\$100 and N\$500.

However, several interviewees also expressed some reservations about registration. For example, some of the same people who spoke in favour of registration also said that the law should provide protection that no one should be able to avoid. For example, one person said that automatic protection "*seems like a good idea in case one doesn't want to register*". Similarly, a Nama couple in Karas Region felt couples should be *allowed* to register their relationship at relevant institutions (such as the Social Security Commission and the Ministry of Home Affairs) in order to qualify for specific benefits, but felt that it should not be a prerequisite to legal protection. Only a few people clearly favoured registration as the sole basis for legal protection, such as one man who said "*Forget all the automatic stuff. Registration should be the only way*". Most of those who spoke on registration and automatic protection cannot be said to have expressed a clear preference between these two options and often favoured both. It seems that people were most interested in ensuring that there was some legal protection.

A woman in a same-sex cohabitation relationship in Erongo Region felt that registration should be allowed but not required, especially if it included same-sex couples, because of fears of victimisation:

*Couples should not be required to register, but they should be allowed to do so.... Some same-sex couples might be threatened by the publicity involved in registration. They should still be afforded protection without public victimisation.*



Others were concerned that registration would not be possible where one cohabitating partner was already married to someone else, or refused to register.

There is also some doubt as to whether financially stronger partners in cohabitation relationships would be willing to agree to registration. Indeed, most of the cohabiting women interviewed in 2009 indicated that they would register as cohabitants if the law allowed them to do so, but only a small minority of them believed that their partners would definitely want to register. A related concern was expressed by one man who thought that a law allowing registration would be pointless, particularly with young people, who would go out and do what they wanted to do anyway. This indicates that a law which provides protection only upon registration, or only by facilitating private agreements between cohabiting partners, would not be very helpful to the vulnerable partners in unequal relationships. If one partner (often the woman) wants to marry and the other (often male) does not, then the same difference of opinion is likely to prevent registration. In one focus group, many participants favoured registration as a trigger for legal consequences, but then when they thought about the situation where one partner is unwilling to register, they decided that automatic coverage should also be an option.

A Nama woman in Karas Region summed up one key argument against registration, saying *“Cohabiting couples should not be obliged to register their partnerships. If they are, they might as well just get married.”* Similarly, one key informant who was formerly a legal adviser at the Government Institutions Pension Fund said, *“This is so close to a marriage, so why bother? I also worry about fraud and people registering just to get benefits.”* Similarly, a focus group participant said, *“If there were registration, there would be no point to getting married.”*

It should also be noted that some of the respondents’ expectations of the impact of registration were unrealistic. For example, one focus group participant said:

*Men will just say, “You are not my wife and you cannot tell me what to do.” He can then do what he wants and stay out all night. If there were registration, he would treat her differently because he will know there is something there to protect her.*

Another thought that registration would help combat the spread of HIV:

*People would stick more to one partner and there would be less disease like AIDS and the nation would be safer.*

But registration certificates are just as unlikely as marriage certificates to address these concerns.

Another consideration is that registration of cohabitation could be understood as implying a higher degree of acceptance of this type of living arrangement than simply providing some basic legal protection as a means of protecting vulnerable parties from exploitation. As a result, a system of registration might attract more opposition from those who view extramarital relationships as immoral.

Requiring a termination procedure similar to divorce for cohabitation relationships would seem to be particularly problematic. There is already tension in Namibia between the desire to make divorce procedures reasonably accessible, without undermining the seriousness of the commitment to marriage or the protections which are provided to children and vulnerable parties through formal divorce procedures. The existing law on civil divorce has been recognised

as being cumbersome and inaccessible to many, and proposals for simplifying and improving it are already under discussion.<sup>126</sup> On the other hand, the highly informal procedures for becoming divorced under customary law in many communities are also inadequate for protecting women and children – which has led to proposals for incorporating some of the safeguards which apply to civil divorces into customary divorces.<sup>127</sup> Against this complex background, it would be challenging to identify an appropriate procedure for terminating marriage-like cohabitations, if parties were not allowed to make this decision on their own.<sup>128</sup> It would seem to make sense to focus primarily on protecting vulnerable parties by providing legal recourse to parties *who have a dispute* about finances or children when a relationship ends, rather than requiring a dissolution procedure for the termination of *all* cohabitation relationships.

Yet another argument against registration is that setting up a system of cohabitation registration parallel to marriage registration would require a greater degree of administration and expense. In fact, it should be noted that Namibia has no accessible national record of marriage and divorces as yet. The Ministry of Home Affairs and Immigration has a hard-copy record of marriages in Windhoek, but this is organised by date and place of marriage and not by the surnames of the parties, which reduces its practical usefulness. The marriage record also includes an indication of whether there is an ante-nuptial agreement between the parties, but the actual agreement is not placed on file here, but rather with the Deeds Registry.<sup>129</sup> Furthermore, records of divorces are kept at the High Court and are not currently reconciled with the marriage record.<sup>130</sup> The Ministry reports that it hopes to computerise the marriage register in future.<sup>131</sup> Against this background, it would be unrealistic to expect a record of registered cohabitation agreements to be more comprehensive and accessible than the current record of marriages.

## Pros and cons of contracts

One form of registration would be the registration of optional contracts between cohabiting couples.

One drawback to the use of express contracts is that contract law is premised on equal bargaining power and is less well-suited to relationships involving dependency. However, this concern would be offset to some extent by a legal framework which presents the option of voluntary contracts against a background of automatic protection for the most basic issues of fairness.

Many persons interviewed thought that cohabiting couples should be allowed to make their own property arrangements, but this was often suggested as only one of several options for protecting such relationships. The main reason cited for approving of this avenue was that

<sup>126</sup> See Law Reform and Development Commission (LRDC), *Report on Divorce* (LRDC 13), Windhoek: LRDC, 2004.

<sup>127</sup> See Law Reform and Development Commission (LRDC), *Report on Customary Law Marriages* (LRDC 12), Windhoek: LRDC, 2004.

<sup>128</sup> Note that there is a distinction between requiring a court procedure to terminate a cohabitation arrangement and allowing a partner to approach a court to settle disputes about property or maintenance which result from the termination of a cohabitation relationship.

<sup>129</sup> Deeds Registries Act 47 of 1937, sections 86-87.

<sup>130</sup> Although the High Court should notify the Ministry of Home Affairs and Immigration of finalised divorces, this system does not seem to be working effectively in practice.

<sup>131</sup> The information on marriage records comes from a personal interview with a representative of the Ministry of Home Affairs and Immigration, November 2010.

cohabiting couples must have the right to make their own decisions and choose whether they would like their property to be shared or kept separate, in the same way that married couples choose a marital property regime. Some also thought that inheritance between cohabiting partners is best handled by making wills.

One woman said of cohabiting couples, *“If they want legal protection they should simply be able to make a legal contract on how property should be shared”*. Another woman put forward a similar suggestion saying, *“Yes it is a good idea, because it counts when one partner dies or when the relationship breaks up. It is clear what should happen.”*

Most people who did not agree with the use of contracts felt that certain rights must be dictated and not provided merely as an optional choice; as a man interviewed in Rehoboth put it, *“they must be protected by the law”*.

#### **RECOMMENDATION:**

**Supplement automatic protection with a system which allows couples to register the existence of their relationship to facilitate proof if they wish to do so, with registration resulting in the issue of a certificate of registration.**

**Allow couples to register a contract between themselves at the same time (or later) if they wish to do so, and encourage this with a simple template accompanied by accessible educational material on what issues should be considered. This could be accompanied by a popularisation campaign encouraging cohabiting couples to make contracts and wills. But authorise courts to depart from the provisions of such private contracts to take into account changed circumstances or to prevent manifest unfairness.**

**Provide for termination of registered relationships without official intervention upon the death of one partner or when one partner ceases to fulfil one of the requirements for registration – such as by abandoning the relationship or ceasing to occupy a mutual residence.**

**Additionally allow both partners to file for termination to facilitate proof that the partnership has ended. Official termination should be recorded on a certificate of termination.**

**Allow aggrieved partners to approach the courts for appropriate financial redress, regardless of whether the partnership was registered – or if registered, regardless of whether it was officially terminated.**

### **11.3.3 Hybrid systems**

This paper essentially recommends a hybrid system which includes automatic protection along with optional registration and the facilitation of private contracts which can also be registered if the cohabiting couple wishes to do so. This combination attempts to combine a basic level of protection for vulnerable parties with a system which gives cohabiting couples a significant degree of free choice on how to organise their relationships.

Other countries have also adopted similar hybrid systems. For example, the Domestic Partnerships Bill 2008 under discussion in **South Africa** proposes a two-tier system, with one set of rules for registered domestic partnerships and another set of automatic protections for unregistered domestic partnerships.

### **SOUTH AFRICA'S DOMESTIC PARTNERSHIPS BILL 2008**

The South African Domestic Partnerships Bill 2008, which is still in draft form, provides for two forms of domestic partnership: registered and unregistered.

#### **Registered domestic partnerships**

Entering into a registered domestic partnership would involve a public commitment in the form of a formal registration process open to couples (regardless of sex) who are not married or in a registered domestic partnership with anyone else. Certain government officials would be designated as “registration officers”. The partners who are cohabiting (or intending to cohabit) would both declare their willingness to register their domestic partnership by signing the prescribed documents in the presence of the registration officer who would then give them a “registration certificate”.

The consequences of a registered partnership would be:

- registered partners would have a mutual duty of support
- both would have a right to occupy the joint home, regardless of who owns or leases it
- each partner would be able to deal in joint property only with the written consent of the other partner.

A registered couple has the option of concluding an agreement between themselves – called a “registered domestic partnership agreement” – which would say how they will deal with their property and other financial resources, including pension schemes and similar benefits. Registered partnerships would essentially have to be analogous to marriage “out of community of property”. The Bill would not allow domestic partnership agreements to establish “in community of property” regimes, but the couple could have some jointly-owned property such as their home and household goods.

If a couple wish to terminate their relationship, they must both declare their desire to do so by signing a “termination agreement” in the presence of a registration officer. This agreement can provide for maintenance, the division of any joint property, what will happen to the family home and other financial matters. If there is a dispute on financial issues, they must approach a High Court or a family court. If there was a registered domestic partnership agreement in place, the court would have reference to it but would not be bound to apply it if proved to be unfair. Couples with minor children *must* terminate their partnership by means of a court order, so that the court can ensure that the welfare of the children is properly protected.

If the partnership terminates by death, the surviving registered domestic partner would qualify for intestate succession and maintenance from the deceased’s estate on the same basis as a spouse.

## Unregistered domestic partnerships

The draft bill gives protection to unregistered partnerships only after the relationship comes to an end by separation or the death of one partner. If a partner approached the High Court or a family court for assistance, the court would first look to a set of specified criteria (such as duration and degree of financial dependence) to see if the relationship qualifies for protection. If so, the partner who approaches the court could apply for an order for an equitable distribution of the joint or separate property of the partners, for 'spousal' maintenance or for intestate succession.

### RECOMMENDATION:

Adopt a two-step approach: (1) Provide a basic level of automatic protection for cohabiting couples who satisfy certain criteria. (2) Provide for optional registration of the cohabitation relationship which can be accompanied by a cohabitation agreement giving greater detail to the arrangements between the parties if they choose.

## 11.4 Detailed criteria and protections

This paper has recommended a two-step approach: (1) a basic level of automatic protection for cohabiting couples who satisfy certain criteria and (2) optional registration of the relationship which can be accompanied by a cohabitation agreement between the parties if they choose. Within that approach, it is necessary to decide on –

- what criteria should invoke automatic protection;
- what form automatic protection should take;
- the mechanics of optional registration; and
- additional amendments to existing statutes to protect cohabitants.

This section includes recommendations on these points summarised into a rough layperson's draft for ease of consideration.

### 11.4.1 Criteria for automatic protection

In **South Africa**, the proposed Domestic Partnerships Bill would allow courts to recognise unregistered domestic partnerships "*between two persons who are both 18 years of age or older*" after consideration of "*all the circumstances of the relationship*", including:

- (a) the duration and nature of the relationship;*
- (b) the nature and extent of common residence;*
- (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the unregistered domestic partners;*
- (d) the ownership, use and acquisition of property;*
- (e) the degree of mutual commitment to a shared life;*
- (f) the care and support of children of the unregistered domestic partnership;*



- (g) *the performance of household duties;*
- (h) *the reputation and public aspects of the relationship; and*
- (i) *the relationship status of the unregistered domestic partners with third parties.*<sup>132</sup>

The **Canadian HIV/AIDS Legal Network** suggests that the law might require that the domestic partnership have a specific duration before applying legal consequences; however, whether or not a time period is applied, this organisation suggests the following criteria for identifying a domestic partnership:

- (a) *whether the two persons live or lived together;*
- (b) *the degree of emotional interdependence between the parties;*
- (c) *the degree of financial dependence or interdependence, including any arrangements for financial support, between the parties;*
- (d) *whether or not a sexual relationship exists or existed;*
- (e) *the ownership, use and acquisition of their property;*
- (f) *the degree of mutual commitment to a shared life;*
- (g) *the care and support of any children of the current or past relationships;*
- (h) *the performance of household duties;*
- (i) *the public aspects of the relationship; and*
- (j) *the duration of the relationship.*<sup>133</sup>

In **New Zealand**, the following test is applied to identify “*de facto relationships*” which attract automatic protections:

<sup>132</sup> South African Domestic Partnerships Bill 2008, sections 1 and 26(2).

<sup>133</sup> Canadian HIV/AIDS Legal Network at 2-6 to 2-7. This list draws on the New South Wales, Australia, Property Relationships Act of 1984 and the Australian Capital Territory Legislation Act of 2001. Id at 2.7, note 28.

The corresponding New South Wales provision reads as follows:

4 De facto relationships

- (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.*
- (2) *In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:*
  - (a) *the duration of the relationship,*
  - (b) *the nature and extent of common residence,*
  - (c) *whether or not a sexual relationship exists,*
  - (d) *the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,*
  - (e) *the ownership, use and acquisition of property,*
  - (f) *the degree of mutual commitment to a shared life,*
  - (g) *the care and support of children,*
  - (h) *the performance of household duties,*
  - (i) *the reputation and public aspects of the relationship.*
- (3) *No finding in respect of any of the matters mentioned in subsection (2) (a)-(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.*
- (4) *Except as provided by section 6, a reference in this Act to a party to a de facto relationship includes a reference to a person who, whether before or after the commencement of this subsection, was a party to such a relationship.*

Property (Relationships) Act of 1984, section 4.

## Meaning of de facto relationship

- (1) *For the purposes of this Act, a de facto relationship is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman) –*
  - (a) *who are both aged 18 years or older; and*
  - (b) *who live together as a couple; and*
  - (c) *who are not married to, or in a civil union with, one another.*
- (2) *In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:*
  - (a) *the duration of the relationship;*
  - (b) *the nature and extent of common residence;*
  - (c) *whether or not a sexual relationship exists;*
  - (d) *the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;*
  - (e) *the ownership, use, and acquisition of property;*
  - (f) *the degree of mutual commitment to a shared life;*
  - (g) *the care and support of children;*
  - (h) *the performance of household duties;*
  - (i) *the reputation and public aspects of the relationship.*
- (3) *In determining whether 2 persons live together as a couple, –*
  - (a) *no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and*
  - (b) *a Court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the Court in the circumstances of the case.*
- (4) *For the purposes of this Act, a de facto relationship ends if –*
  - (a) *the de facto partners cease to live together as a couple; or*
  - (b) *1 of the de facto partners dies.*<sup>134</sup>

Reviewing the few existing references to cohabitation in Namibian statutes, we find a variety of definitions:

- *a partner living with the public officer on a permanent basis as if they were married or with whom the public officer habitually cohabits (Anti-Corruption Act)*
- *being of different sexes, live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other (Combating of Domestic Violence Act)*
- *living as man and wife (Employees Compensation Act)*
- *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 (Insolvency Act).*<sup>135</sup>

During the field research, people tended to define cohabitation as some variation on “*people who are living together as husband and wife*” or “*a couple staying together*”. An overwhelming majority of participants thought that cohabiting couples should only fall within

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<sup>134</sup> New Zealand Property (Relationships) Act 1976, section 2D.

<sup>135</sup> The import of these various provisions is discussed above in section 6.1 at pages 94-99, with specific references to the relevant sections of the laws.

the ambit of legal protection once their relationship had lasted for a minimum amount of time – with most participants suggesting a threshold of duration between 1 and 5 years.

Opinion was equally divided on whether it was necessary to factor in whether the relationship is continuous and whether the couple reside together all or only part of the time – with several mentioning migrant labour.

A strong majority of respondents believed that the existence of a sexual relationship between the partners should *not* be a relevant consideration in defining cohabitation for legal protection purposes, saying things like “*love is not sex*” or “*How would you check? Bring all your condoms?*”.

The majority of interviewees spoke in favour of the other proposed factors, including

- care and support of any children;
- if the couple have a commitment to a shared life;
- whether the couple own, use or buy property together;
- how the partners financially support one another;
- how the couple divide household duties; and
- the reputation and public aspects of the relationship – whether, for example, people think of them as a ‘couple’.

One focus group participant summed up the idea of using a range of criteria well, saying “*The government should look at how long they have been together and what type of relationship they have, as well as the things they have together.*”

Most of the discussions centred around couples who were living together. However, one focus group raised the issue of couples who are boyfriend/girlfriend, but do not live together, pondering whether or not the law should protect such relationships. The group reported that these relationships were common, saying that often the woman would perform chores such as washing the man’s clothes, but would not sleep at his house each night because she did not want to displease her parents. However, the group felt that couples living apart would be unlikely to share property and so were not sure if these relationships deserved protection.

Although financial dependence and interdependence could occur without cohabitation, sharing a home seems to be a useful dividing line for automatic protection because it is a good indicator of when the intermingling of property and finances are most likely to become complex.

One person consulted thought that government should utilise social workers to investigate where a couple is really living in a marriage-like relationship, but this is probably an unrealistic option given the many other duties of social workers.

After considering the field research and the comparative examples, we suggest using the term “*domestic partnership*” and defining it as “*a permanent, intimate relationship between two adult persons of the same or opposite sex who have shared a common residence for a significant amount of time*”.

Because of the need for the law to give clarity which can minimise the need to resort to courts, we suggest that the automatic protection should apply to intimate relationships between two

persons who are aged 18 or over and who have shared a common residence for at least two years, whether continually or on a habitual basis.

- The qualification on residence is necessary to capture the situation where migrant workers have a wife or partner in one area and another partner in another place.<sup>136</sup>
- The reference to “*intimate*” relationships is intended to capture those relationships between couples which resemble the “*consortium*” of marriage, but it is not intended to necessarily include sexual relations as it seems an invasion of privacy to require a demonstration of this aspect of a relationship. An alternative wording might be living together “*as a couple*” or “*in a relationship in the nature of marriage*”.
- Two years is a suggested duration which could easily be changed, but we would suggest a maximum of three years. A time period of 2-3 years is consistent with legislation on duration in other countries such as Tanzania, Kenya, South Australia, New Zealand and Canada.<sup>137</sup>

We suggest further that it should be possible for a court to find a cohabitation relationship of a shorter duration worthy of protection, after considering the following criteria

- (a) the duration and nature of the relationship;
- (b) the nature and extent of common residence;
- (c) the degree of financial dependence or interdependence between the parties;
- (d) the degree of mutual commitment to a shared life;
- (e) the arrangements for care and support of any children in the household;
- (f) the performance of household duties; and
- (g) the reputation and public aspects of the relationship.

Allowing for this possibility might prevent unfairness where a relationship has ended just short of the minimum duration specified, by coincidence or by design of one of the parties who is seeking to avoid legal obligation.

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<sup>136</sup> One study, in Cote d’Ivoire, discusses a type of relationships known as “*visiting unions*”, where the spouses do not live together: “*In this case a woman forms a union with a man who visits her regularly, and with whom she may have several children.*” See D Meekers, “The process of marriage in African societies: A multiple indicator approach”, 18(1) *Population and Development Review* 61 (1992).

<sup>137</sup> In Tanzania, section 160 of the Law of Marriage Act 5 of 1971 presumes that a “*de facto*” marriage has taken place if it is proved that a man and woman lived together for two or more years and publicly hold the reputation of being husband and wife.

Section 7 of the draft Marriage Bill in Kenya, before Parliament at the time of writing, provides that if a couple “*lived together openly for at least two years in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married*”.

The South Australia Domestic Partners Property Act 1996 does not include a duration requirement under the definition of “*domestic partner relationship*”, but section 9 of the Act imposes a requirement that the partnership have lasted for at least three years or that the domestic partners have a child as a prerequisite to a property adjustment order.

In New Zealand, a *de facto* relationship of less than 3 years’ duration is considered too short to justify property division unless there is a child of the relationship or exceptional circumstances. Property (Relationships) Act 1976, sections 2A and 14A.

In Canada, where family law falls under provincial jurisdiction, the province of British Columbia defines “spouse” in section 1 of the Family Relations Act (RSBC 1996, c 128) to include a person who “*lived with another person in a marriage-like relationship for a period of at least two years*”. Similarly, in the province of Ontario section 29 of the Family Law Act (RSO 1990, c F-3, section 29) which deals with support obligations includes in the definition of spouse “*either of two persons who are not married to each other and have cohabited...continuously for a period of not less than three years*”.

We do not suggest that monogamy be a requirement, since this would not suit the Namibian reality and would exclude women in need of legal protection; as one focus group participant said, *“In Namibia it is acceptable to have one long relationship and lots of others starting and stopping along the way, so the requirement of monogamy should not be applied to the Namibian context”*. Public opinion was generally divided on this issue, with some asserting that monogamy was an important aspect of commitment and others saying things like *“It should not matter”*, *“How would you know?”* or *“It is common to cheat in marriage so it should not matter here”*.

We suggest that the law should be structured to provide a rebuttable presumption that an intimate relationship of the specified duration was a cohabitation relationship, with rebuttal being possible by showing that the relationship did not sufficiently fit the listed criteria.

Finally, we propose that a domestic partnership which has been registered should automatically fall within the automatic protection, regardless of duration and regardless of the applicability of the specified criteria. (Even if a registered partnership has been terminated, its past existence will still be relevant.)

#### **RECOMMENDATION:**

Automatic protections should apply to

- persons who have lived together as a couple for at least 2 years (unless they can show that their relationship should not be treated as a domestic partnership);
- persons who have lived together as a couple for a shorter time period but warrant treatment as a domestic relationship in light of specified criteria; and
- persons who have registered their relationship as a domestic partnership.

### **PART 1 – AUTOMATIC PROTECTION**

#### ***Establishing a domestic partnership***

(1) *The provisions of this Part apply to any persons who are or were in a domestic partnership, provided that their relationship does not constitute incest.*

(2) *For the purposes of this Part, a domestic partnership is an intimate relationship between two persons aged 18 or older of the same or opposite sex, who have shared a common residence for a significant amount of time.*

- (3) *A domestic partnership shall be presumed to exist between two persons who –*
- (a) *are both aged 18 years or older; and*
  - (b) *have an intimate relationship; and*
  - (c) *have shared a common residence for at least two years, whether continually or on an habitual basis,*

*Provided that either partner may rebut this presumption by showing that the relationship should not be considered to be a domestic partnership with reference to the criteria in subsection (4).*



*(4) A court may on application make a declaration that a domestic partnership exists between two persons aged 18 years or older in an intimate relationship who have shared a common residence, whether continually or on an habitual basis, for a period of less than two years, after consideration of the following factors:*

- (a) the duration and nature of the relationship;*
- (b) the nature and extent of common residence;*
- (c) the degree of financial dependence or interdependence between the parties;*
- (d) the degree of mutual commitment to a shared life;*
- (e) the arrangements for care and support of any children in the household;*
- (f) the performance of household duties;*
- (g) the reputation and public aspects of the relationship.*

*Provided that no finding in respect of any of the matters mentioned in this subsection, or in respect of any combination of them, is to be regarded as necessary for the existence of a domestic partnership, and a court determining whether such a partnership exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.*

*(5) Any domestic partnership registered under section x shall automatically be subject to this part.*

## **11.4.2 Contents of automatic protection**

We propose three main forms of automatic protection for consideration:

- a mutual duty of support
- a right to equitable division of property if the relationship ends; and
- where the partnership is terminated by death, a right to be considered for an equitable share of intestate succession, and a right to maintenance from the deceased estate (should the underlying law be changed to allow for spousal maintenance from a deceased estate).

The **Canadian HIV/AIDS Legal Network** on its model law on cohabitation for Southern Africa suggests the following automatic protections:

- a mutual duty of support during the relationship
- an equal right to occupy the shared residence and the surrounding residential land during the relationship, including a right to the use of related household goods
- imposition of the “accrual system” as a default property regime unless this would lead to serious injustice or unless the partners have made a written agreement to apply some other property arrangement
- a right to maintenance when the relationship ends on the same basis as spouses in a divorce
- where the partnership ends by death, a right to apply for maintenance from the deceased estate, continued occupation a shared residence, and an equitable share of the deceased estate.

Examples from other countries are summarised in the table below.<sup>138</sup>

|   |  |
|---|--|
| <b>South Africa<br/>(proposed bill)</b> | <ul style="list-style-type: none"> <li>• equitable distribution of joint or separate property of the partners upon termination of relationship</li> <li>• maintenance upon termination of relationship</li> <li>• intestate succession</li> </ul>  |
| <b>Sweden</b>                           | <ul style="list-style-type: none"> <li>• consent requirement for dealing with joint home and joint furniture or other household goods during relationship</li> <li>• right to equal division of the joint home and joint furniture or other household goods when relationship ends (adjusted if necessary for fairness)</li> </ul>   |
| <b>New Zealand</b>                      | <ul style="list-style-type: none"> <li>• right to equal division of “relationship property” upon termination of relationship</li> </ul>  |
| <b>New South Wales,<br/>Australia</b>   | <ul style="list-style-type: none"> <li>• right to equitable property division upon termination of relationship</li> <li>• limited right to maintenance upon termination of relationship</li> <li>• right to intestate inheritance and maintenance from the deceased estate</li> <li>• right to make certain claims against third parties in respect of the injury or death of a partner</li> </ul> |
| <b>Scotland</b>                         | <ul style="list-style-type: none"> <li>• equitable division of property upon termination of relationship</li> <li>• limited right to maintenance for cohabiting partner who was financially disadvantaged during the relationship</li> <li>• right to apply for intestate inheritance</li> </ul>   |

Providing for a right to live in the shared residence during the existence of a domestic partnership which can be terminated without any formalities would not seem to be very helpful. If there were a dispute, the person who owns or leases the home could simply declare that the relationship is at an end. Since it is the fact of living together which gives rise to the domestic partnership in the first place, it would not seem to make sense for the law to *require* that the partners continue living together – how would a partner then ever end a cohabitation relationship if the other partner wanted it to continue?

We also believe that automatic application of a complete “marital property regime” would go farther than can reasonably be inferred from the conduct of the parties since cohabitation takes place in such a variety of circumstances, and since there may be a spouse simultaneously in the picture.

In discussing issues pertaining to maintenance, it should be noted that there is no need for any law reforms pertaining to child maintenance since children are already fully catered for regardless of their parent’s marital status.<sup>139</sup> Thus, it is only the possibility of providing for maintenance between partners which requires consideration.

<sup>138</sup> Already discussed in detail above at pages 218-221.

<sup>139</sup> See pages 131-133.

## Mutual duty of support during the relationship

In **South Africa**, the Domestic Partnerships Bill 2008 specifically provides that “[u]nregistered domestic partners are not liable to maintain one another”, although it does provide a procedure for a partner to apply for a maintenance order after separation of the death of the other partner.<sup>140</sup> The South African Law Reform Commission put forward two options for unregistered domestic partnerships: a “*de facto*” model and an “*ex post facto*” model. But even the “*de facto*” model proposed only a limited duty of support, by making partners jointly liable only for household expenses.<sup>141</sup> The Commission asserted that there should be no general reciprocal duty of support in the absence of a formal public commitment.<sup>142</sup> However, many stakeholders who commented on the proposals asserted that there could be other valid justifications for imposing a mutual duty of support – including informal commitment, a certain level of interdependency or the intention to live together and share a household and a life.<sup>143</sup> The Alliance for the Legal Recognition of Domestic Partnerships advocated for the inclusion of a mutual duty of support in the South African bill:

*Unregistered domestic partnerships create relationships of dependency that should attract legal obligations of mutual support. The law needs to be brought in line with the realities of our society. Our common law notion of ‘duty of support’ that flows from Roman-Dutch law is well known for its flexibility and capacity to adapt to changed social and familial formations (as evidenced in recent case law).<sup>144</sup>*

Providing for a legal duty of support would technically entitle a domestic partner to apply for a maintenance order under the Maintenance Act if financial responsibilities were not being fairly shared between the partners – just as spouses can theoretically do now.<sup>145</sup> However, it is uncommon for spouses to take this step,<sup>146</sup> and it would probably be even more uncommon for cohabitating partners to do so. Having to resort to legal assistance during a relationship would usually be a sign that the relationship is breaking down, and it is more likely that the focus would be fairness between the parties upon the termination of the relationship.

More importantly, providing for a legal duty of mutual support would be important, not just between cohabitants, but with respect to third parties. For example, this would give a surviving partner the ability to claim damages for loss of support if the deceased partner were negligently killed in an accident caused by the third party – since a contractual duty is not sufficient to found such a claim. It would also give clearer entitlements to domestic partners to benefits such as coverage under medical aid schemes. In fact, this concern is probably the strongest argument in favour of providing for a mutual duty of support during a relationship.

We would also assert that there should be a joint liability, in proportion to the partners’ respective means, to contribute to household necessities – just as there is in the case of marriages out of community of property.<sup>147</sup> (There is no need for such a liability in the case of marriages in

<sup>140</sup> South African Domestic Partnerships Bill 2008, sections 27-29.

<sup>141</sup> SALRC Discussion Paper at paragraph 10.3.12, SALRC at paragraph 7.5.3-ff.

<sup>142</sup> SALRC Discussion Paper at paragraph 10.3.12.

<sup>143</sup> SALRC at paragraph 7.5.7.

<sup>144</sup> Alliance Submission at 11.

<sup>145</sup> Section 2(a) of the Maintenance Act 9 of 2003 states: “*This Act applies where a person has a legal duty to maintain another person, regardless of the nature of the relationship which creates the duty to maintain.*”

<sup>146</sup> See the forthcoming Legal Assistance Centre publication on the operation of the Maintenance Act 9 of 2003, to be released in 2011.

<sup>147</sup> Married Persons Equality Act 1 of 1996, section 15.

community of property since the assets of the partners form a joint estate in that situation.) This might seldom be applied in practical terms, given that there are few court cases on this issue involving married couples, but it would provide an important benchmark for notions of fairness in cohabitation relationships. It should be noted in this regard that “household necessities” would extend only to normal and reasonable necessities, determined in light of the circumstances of the couple, and would normally encompass only such things as food, utilities and household appliances and furnishings.<sup>148</sup>

The majority of persons consulted on this issue in Namibia thought that there should be some protection in this regard to prevent women and children suffering in such relationships. One Nama woman in Karas Region elaborated: *“There should be a legal duty upon the partners to support each other equally. Because we live together as if we are married and maintain each other, we should be allowed to put each other on each others’ medical aid schemes.”* A Nama couple in Karas Region concurred: *“There should be a duty to support each other when living together, because the woman already takes care of the house even if she is also working. The man should support the woman financially as a sign of appreciation and as “paying for services rendered.”* However, some persons consulted offered notes of caution. One participant thought that it is already difficult to get men to pay maintenance for their children, so it will be nearly impossible to get them to pay “cohabitant maintenance”. Another thought that a man or a woman must put work into the household in order to deserve something.

#### **RECOMMENDATION:**

**Provide for a mutual duty of support during the existence of a domestic partnership which will give domestic partners entitlements to appropriate benefits and a right to make claims against third parties for loss of support.**

**This would enable partners to make use of the Maintenance Act in the same way as spouses, but this would probably be uncommon as the need to resort to a court for maintenance would probably signal an imminent relationship breakdown.**

**Provide additionally that cohabiting partners are liable to contribute to household necessities (basic furnishings and supplies) in proportion to their respective financial means, in the same way as spouses.**

<sup>148</sup> According to HR Hahlo, *The South African Law of Husband and Wife*, 4<sup>th</sup> edition, Wynberg: Juta & Co, Ltd, 1975 at 448, household necessities “...must be such as are normally contracted for by a spouse in managing the household. The concept is a relative one and the power extends only to contracts that the court considers reasonable in relation to the circumstances of the spouses.” Specifically, he continues, “a spouse may purchase items such as food, clothing, crockery, linen, medicines and liquor, and appliances for the household or any of its members...”. Additionally, at 449, “expensive, non-recurring items would generally not be regarded as household necessities. In exceptional circumstances, where a couple are wealthy and live on a grand scale, furs, jewels, and motor cars may qualify as household necessities.”

### **Mutual duty of support during existence of domestic partnership**

(1) Domestic partners owe each other a duty of support during the existence of the relationship in accordance with their respective financial means and needs.

(2) Domestic partners are jointly and severally liable to third parties for all debts incurred by either of them in respect of necessities for the joint household.

(3) Unless the domestic partners agree otherwise, a domestic partner is liable after the commencement of this Act to contribute to necessities for the joint household pro rata according to his or her financial means.

(4) Where a domestic partner can show that he or she has contributed more in respect of necessities for the joint household than for which he or she is liable in terms of subsection (3), this may be taken into consideration in an application for division of assets in terms of section x.

### **Maintenance after the partners separate**

A mutual duty of support can logically give rise to a request for maintenance payments after the relationship breaks up. In the case of a marriage, a spouse can ask for maintenance payment at the time of the divorce – but the mutual duty of support comes to an end upon divorce, and there can be no request for maintenance later on if no spousal maintenance was included in the divorce order.<sup>149</sup> Spousal maintenance is in fact rare in divorce cases in Namibia.<sup>150</sup> In general, courts are increasingly reluctant to award spousal maintenance in divorce cases, preferring to achieve equity between the parties through an appropriate division of property where this is possible.<sup>151</sup> Similarly, the draft bill on divorce proposed by the Law Reform and Development Commission includes a provision directing a court in a divorce case to take into consideration “*the goal of promoting, as far as practicable, the economic self-sufficiency of each spouse within a reasonable period of time*”.<sup>152</sup>

Persons consulted were split on the issue of post-relationship maintenance for the financially weaker partner, with men being particularly opposed to the idea. For example, one young man

<sup>149</sup> Legal Assistance Centre (LAC), *Proposals for Divorce Law Reform in Namibia*, Windhoek: LAC, 2000 at 32: “A request for spousal maintenance must be made during the divorce proceeding. If no such order is issued by the High Court at the time when the divorce is granted, neither ex-spouse can later approach either the High Court or a maintenance court seeking such an order. This is because the spouses’ legal duty to support one another ends when the marriage ends – thus if there is no court order extending that duty beyond the time of divorce, there is no basis for finding that one spouse is obligated to support the other.”

<sup>150</sup> Id at 61: “Spousal maintenance was awarded in only 34 cases of the 407 which resulted in final divorce orders (8% of the total cases).”

<sup>151</sup> Elsje Bonthuys & Catherine Albertyn, *Gender, Law and Justice*, Cape Town: Juta & Co, 2007 at 216-222; L van Zyl, *Handbook of the South African Law of Maintenance*, Goodwood, Western Cape: Interdoc Consultants Pty Ltd, 2000 at 31, 36-37. See also *Beaumont v Beaumont*, 1987 1 SA 967 (A) where the court held that the courts should attempt to ensure the complete financial independence of both parties following divorce where possible, favoring the use of a redistribution [of assets] order instead of a maintenance order.

<sup>152</sup> Law Reform and Development Commission (LRDC), *Report on Divorce* (LRDC 13), Windhoek: LRDC, 2004 at Annexure A, Draft Divorce Bill, section 18(1)(h). The explanatory note to this section states: “The underlying idea behind spousal maintenance is to serve as a means of enabling an ex-spouse to get on his or her feet, after the sacrifices that he or she might have endured during the course of the marriage.”



said, *“If the relationship ends, then it ends.”* Participants in one focus group worried that allowing for post-relationship maintenance would cause problems: *“Girls will leave guys for maintenance money and then come back to them again. They will not learn to be independent and it will become a money-making scheme.”* A woman who was opposed to maintenance after the end of the relationship said, *“Even if they have been together for 20 years, she should not get anything like this. It is not the man’s fault that I don’t get a job and support myself.”* One focus group participant said that men cannot afford to pay maintenance for a cohabitant – and that she will have often gone to another man already and no longer be in need of maintenance. A cohabiting couple in Karas Region thought that cohabiting partners should no longer be obliged to support each other if they separated: *“Only the children should still be supported. They may have found other partners that will need support. This would be double payment if you had to support your ex-partner too. It would cost too much.”*

Others spoke in favour of allowing for post-relationship maintenance. For example, one woman said, *“Raising children is work! Why shouldn’t she be compensated for that? Especially after she has been raising his children to please him and maybe even treating them better than her own.”* Similar concerns about unremunerated effort in housework and child-rearing were raised by many participants. One focus group suggested that a once-off payment to compensate for this kind of contribution would be better than ongoing maintenance. There was some suggestion that women are often forced not to work, so when the relationship ends they have no immediate income and no means of supporting themselves. Some thought that the financially-weaker partner, who would usually be the woman, should have a limited right to maintenance – such as maintenance for only a specified amount of time or until this partner enters a new relationship or becomes financially self-sufficient.

***You have to pay if you leave so you  
can’t just throw a woman away.***

female focus group participant

***But I would just keep cheating and  
not leave if I knew I had to pay.***

male focus group participant

After considering the pros and cons, we suggest that maintenance should be available only where an equitable division of relationship assets will be, in the court’s view, insufficient to compensate for the financial inequalities resulting from the relationship. For example, this might be appropriate in a case where a woman was unable to take on full-time employment because she assumed the bulk of the housework or child care responsibilities in the relationship, and the resulting inequities cannot be addressed through the allocation of assets between the partners – such as in a case where there are few or no relationship assets.

In cohabitation, as opposed to marriage, it is harder to be sure of the parties’ intentions in establishing the relationship. The recommendation is therefore based, not on intention, but on economic facts. But, in the same vein as divorce cases, it is probably better to strive for a clean break between parties who are no longer in a relationship rather than emphasising maintenance, which often leads to difficulties of enforcement. Thus, it is better to allocate assets fairly between the parties where possible so that they can each make a fresh start without suffering any financial disadvantage from the relationship which has ended. An equivalent to

spousal maintenance should be available only where the allocation of assets is insufficient to fairly compensate both parties for their respective contributions.

Before considering maintenance for a partner, a court should be required to take into account each partner's respective financial obligations and responsibilities. This would mean that any financial duties to a spouse of one of the partners would be taken into consideration, as well as responsibilities for maintaining children of the domestic partnership or any other relationships.

#### **RECOMMENDATION:**

**Provide a limited possibility for partner maintenance after the end of a domestic partnership, only to cater for situations where there is a need to account for the partners' respective contributions to the relationship, or for some economic disadvantage which one partner suffered as a result of the relationship, where this cannot be accomplished through a division of assets.**

#### ***Maintenance for partner after end of relationship***

*(1) Where a domestic partnership ends other than by the death of a partner, a partner may in an application for the allocation of assets in terms of section 4 also make a request for maintenance payments for a specified period from the other partner.*

*(2) The court may make an order for maintenance payments for a specified period only if*

- (a) the partner requesting maintenance was in some way economically disadvantaged by the roles or responsibilities assumed by the respective partners to the relationship;*
- (b) the allocation of assets between the partners will be insufficient to compensate for such disadvantage; and*
- (c) the financial position of the partner making the request is significantly weaker than that of the other party, taking into account the economic circumstances of each spouse at the time the partnership ends including their respective income, earning capacity, assets and other financial resources, and their respective financial obligations.*

## **Division of assets and liabilities upon termination of relationship other than by death**

A fair division of assets and liabilities is probably the key component needed to ensure equity between cohabiting partners when the relationship comes to an end, and it would address a concern that was frequently cited in the field research. However, there are a number of different options for how assets could be divided and how property could be shared. Several simplified models were proposed to the persons interviewed to elicit responses (see the following box).<sup>153</sup>

<sup>153</sup> The focus group participants were not asked to consider the allocation of liabilities.

## OPTIONS FOR PROPERTY DIVISION

*In the 2009 field research, the following options were put to the persons interviewed.*

**Should cohabitating partners be able to share the property (including land) when the couple breaks up?**

- a. **Option 1:** If a couple breaks up, the partners would divide equally any items that were bought for their shared use or benefit while they were living together. They would each keep things that they owned before they began living together. They would also keep items they bought while they were living together for their sole use or benefit (such as their own clothing). Does this seem fair? Why or why not?
- b. **Option 2:** If a couple breaks up, the partners would divide equally all items that were bought while they were living together. They would each keep things they owned before the couple began living together. Does this seem fair? Why or why not?
- c. **Option 3:** If a couple breaks up, all items that the partners owned before they started living together and anything that either of them buys while they are living together is divided in half once they break up. Does this seem fair? Why or why not?
- d. **Percent contribution:** In some places, property is divided according to the amount that a partner contributed to buying it. So, if Thomas put in \$80 and Veronica put in \$20, 80% of the property will go to Thomas and 20% of the property will go to Veronica if they break up. If it is not possible to determine how much they each contributed, their contributions will be considered equal.
  - i. Would a system like this one work well in Namibia? Why or why not?
  - ii. **Household work:** If this system is adopted, should work done in the household count as contribution toward owning property?

Most participants agreed that cohabiting partners should be able to share property (including land) if the couple separates. A number of personal stories were offered by the participants indicating that women often contribute financially in a way which means that no property would fall to them without legal intervention – such as by paying for consumable goods like food and utilities while the male partner buys durable goods such as furniture and appliances.

When given various options as to how property could be divided, the most popular were (a) the partners should divide equally any items bought for their shared use or benefit while they were living together, with each partner keeping belongings they owned before they began living together, and (b) all items owned before the couple started living together and anything that either of them buys while they are living together should be divided in half once they break up (as in a marriage in community of property). However, the extent to which many of the participants understood all of the options being presented to them was unclear, especially since some individuals thought all of the different options suggested were ‘fair’ or ‘good’ despite the distinctions between them.

What came through strongly from the responses was that the persons consulted generally believed property should be divided “50/50”, and it seemed that they selected their preferences based on their understanding of whether the options presented to them achieved this. Some focus groups also thought that property should be divided 50/50, same as in a marriage. These participants were obviously thinking of marriages in community of property, which is the

most common marital property regime in Namibia.<sup>154</sup> However, others specifically said that the property should not be divided in the same way as in a marriage.

Many participants felt that contribution towards household work should be taken into account in any system which divided the couple's assets according to the contribution made by each partner towards their attainment. A typical example of this opinion came from a woman from the Erongo Region who said, *"I do not work but I also contribute to the maintenance of the household because I do the cooking, laundry, ironing and cleaning. If I were employed, we would have been paying someone to do these chores. I therefore feel that I should at least have a share of the assets from our relationship"*.

*One focus group participant said she and her boyfriend bought a refrigerator in her partner's name, but she made all of the payments. When they broke up, she went to the police for help to get her refrigerator back, but they said she could get nothing because it was in his name. The problem is compounded by the fact that usually men are the breadwinners, and so shared property has to be in their names.*

notes of focus group facilitator, Katutura, 2009

The following comments from some of the focus group discussions give a good idea of the opinions and concerns put forward:

- *"I am buying things on my own so why should she get half of my sweat? I am the one working for her benefit while we are together. Maybe if she is working too it is different."* (male participant, with whom other men in the group agreed)
- *"It [sharing the property] is a good thing. Women put something into the relationship and could have been with someone better that whole time."* (female participant)
- *"The female should get maintenance to pay her for the services that she rendered, but she should not get my property."* (young male participant)
- *"A lady deserves her things, and it should be a 50/50 split."* (female participant, with whom other women in the group agreed)
- *"I would just give her everything because she was caring for me."* (male participant)
- *"The woman should only get the kitchen materials."* (sex of participant not recorded)
- *"A man's property should be split between his family and his partner."* (sex of participant not recorded)
- *"The law should protect a person's means of supporting themselves, such as a woman's sewing machine."* (sex of participant not recorded)

Despite the preference of a majority of persons consulted for a 50/50 split of assets, we would not recommend applying such a rule to a cohabitation relationship where the couple have made no clear agreement about division of property and may even be unaware that living together has property consequences. We suggest apportioning assets in the manner applied to universal partnerships, where partnership assets are divided in proportion to each party's contribution – taking into account contributions in the form of capital, shares, labour or

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<sup>154</sup> See Legal Assistance Centre (LAC), *Proposals for Divorce Law Reform in Namibia*, Windhoek: LAC, 2000 at 47, reporting that almost 72% of the divorce cases in the sample studied involved marriages in community of property.

services – or dividing assets equally where it is not possible to determine the respective contributions of the parties.<sup>155</sup>

This approach would also have some similarities to the accrual system which is one marital property regime used in Namibia, albeit not a common one. The Canadian HIV/AIDS Legal Network discusses the appropriateness of an accrual approach to cohabitation:

*This approach would leave largely intact the value of autonomy in domestic partnerships while acknowledging the economic interdependency that arises from such unions. Under an accrual regime, each partner administers his or her property separately during the relationship, but shares equally in all of the gains to both individuals' property during the existence of the relationship. Thus, accrual provides some measure of protection for those couples if their relationship ends, which in some cases may be the only time they specifically consider their property.*<sup>156</sup>

Under the recommended approach, assets owned independently by either partner prior to the partnership would remain the separate property of that partner, and each partner would remain independently responsible for liabilities incurred before or during the relationship. The only assets to be shared would be those which accrued to either partner during the existence of the partnership – excluding any inherited assets – since these are the only ones which can fairly be seen to result from the contributions of both partners. There would be a presumption that any such gains will be equally shared, unless either partner can show that it would be more equitable to share such gains in some other proportion to reflect the respective contributions of the partners.<sup>157</sup>

We also propose a time limit of one year for requesting a division of assets accrued during a domestic partnership, so that partners can confidently move on with their lives.<sup>158</sup>

We do not propose that parties in a domestic partnership should be required to obtain each other's consent before dealing with their separate property during the relationship, unless they

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<sup>155</sup> See pages 69-74.

<sup>156</sup> Canadian HIV/AIDS Legal Network at 2-21.

<sup>157</sup> This is similar to the approach to property division in respect of cohabitation by the American Law Institute's *Principles of the Law of Family Dissolution* of 2000: "Perhaps the most important effect of the Principles is the way that they remedy inequality within relationships. First, they remedy inequality within many affiliations by shifting the burden of proof for establishing the right to equitable distribution of assets upon dissolution from the person trying to establish agreement between the parties to share assets to the person trying to prevent the sharing of assets. In short, the Principles shift the default rule from being no financial obligations between cohabitants to financial obligations in the form of property distribution and post-divorce income sharing. This change in the default rule, in many situations, will effectively shift the burden of proof from the economically and socially weaker party (where it currently rests) to the more powerful one." Martha M Ertman, "The ALI Principles' Approach to Domestic Partnerships, 8 *Duke Journal of Gender Law & Policy* 107 (2001) at 112.

This is also similar to the approach used in Sweden, where object acquired prior to cohabitation are presumed *not* to have been acquired for joint use, but objects acquired after the relationships began *are* presumed to have been acquired for mutual use. Partners can ask for equal division of all property acquired for joint use, although exceptions to equal division can be made if equal division would be unfair. See SALRC at paragraph 4.3.36, note 170.

New Zealand is another example where there is a presumption of equal sharing that can be adjusted to ensure fairness between partners. "If the Court considers that there are extraordinary circumstances that make equal sharing of property or money under section 11 or section 11A or section 11B or section 12 repugnant to justice, the share of each spouse or partner in that property or money is to be determined in accordance with the contribution of each spouse to the marriage or of each civil union partner to the civil union or of each *de facto* partner to the *de facto* relationship." Property (Relationships) Act 1976, section 13(1).

<sup>158</sup> Sweden and New South Wales similarly impose one-year and two-year time limits, respectively. See SALRC at paragraph 4.3.39 and New South Wales Property (Relationships) Act 1984, section 18. South Africa has proposed a two-year time limit. Domestic Partnerships Bill 2008, section 33(1).



have made an explicit agreement to this effect – on the theory that requiring consent for transactions in separate property would seem to go beyond valid inference from the mere conduct of cohabiting.

### RECOMMENDATION:

We suggest the following approach, which is modelled loosely on the division of assets in a universal partnership and on the accrual system as applied to marriages:

- Parties remain responsible for their own liabilities.
- The assets of each partner prior to the establishment of the partnership remain the separate property of each partner.
- Assets inherited by either partner during the subsistence of the partnership remain the separate property of that partner.
- Divide other assets accrued during the course of the relationship in accordance with each party's respective contributions, taking into account contributions in the form of housework, child care and other unpaid labour.
- If the partners' respective contributions cannot be proved, then the assets accrued during the course of the relationship will be divided equally between the partners.
- A request for a division of property between cohabiting partners must be made within one year of the termination of the cohabitation.

*This [requiring a division of assets] might make people marry, which is a good thing. If they knew that there was no use to just living together since they would have to share everything anyway, that might just get married.*

focus group participant in Keetmanshoop, 2009

*Not everyone you date is 'the one'. Marriage is more important. There should be compensation for children, property, and time, but you can't get in too much legal trouble every time you break up with someone.*

focus group participant in Khomasdal, 2009

### **If there is also a spouse**

Persons consulted were about evenly divided on the question of whether a cohabiting partner should have some rights over the assets of the relationship when it comes to an end if the other partner also has a spouse. Amongst those who believed that the cohabiting partner should have some claim in this situation, the most common suggestion was that she should be able to keep the house she was living in as well as her own possessions. Notably, a married woman whose husband cohabits with another woman told researchers, "*the things that [the cohabiting couple] have should stay with the cohabiting partners. If my husband broke up with that lady, she should keep the things she has over there. And that lady has children*". As noted previously, this view probably has its origins in the customary law practice of assigning assets to the 'houses' of different wives in formal polygamy.

*If a married cohabitant dies, the girlfriend should only have a right to the things she and he own together, and not the wife's property. She [the girlfriend] deserves this. The wife cannot come claim her things.*

focus group participant in Ongwediva, 2009

The recommendations already put forward for equitable sharing of assets would be consistent with protecting the interests of the spouse of either cohabiting partner. Dividing only assets accrued during the subsistence of the relationship would work well when there is also a spouse who is separated from one of the partners, and a division based on each partner's respective contributions would work best to achieve equity where there is a spouse who still has an active relationship with one of the partners.

#### **RECOMMENDATION:**

To ensure that the rights of any spouse of a domestic partners are fully protected, we recommend a provision stating that the division of assets in such circumstances must come only out of the married partner's separate property (if the marriage is out of community of property), or out of the married partner's half share of the joint estate (if the marriage is out of community of property) with a corresponding adjustment at the time of the dissolution of the marriage. However, the court should also be given the power to make an appropriate adjustment in the case of a marriage which has ceased to exist in all but name prior to the existence of the domestic partnership.

#### ***Division of assets when domestic partnership terminates other than by death***

(1) *Regardless of whether the existence of a domestic partnership or its termination has been registered in terms of Part 2, one or both domestic partners may apply to court within one year of the termination of a domestic partnership other than by the death of a partner, for an order to divide any assets accrued during the existence of the domestic partnership jointly, or separately by either partner, after allowing for the liabilities of both partners.*

(2) *Upon an application for the division of assets, a court may order any division of assets which it deems fair and equitable in accordance with each party's respective contributions to the accrual of such assets, taking into account direct and indirect contributions in the form of money and labour, including housework, child care and other unpaid labour and any other relevant factors.*<sup>159</sup>

<sup>159</sup> Alternative wording could be modelled on section 20 of the New South Wales Property (Relationship) Act 1984:

- (1) *On an application by a party to a domestic relationship for an order under this Part to adjust interests with respect to the property of the parties to the relationship or either of them, a court may make such order adjusting the interests of the parties in the property as to it seems just and equitable having regard to:*
- (a) *the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the*

(3) *If the party's respective contributions to the assets accrued during the existence of the partnership cannot be proved, then such assets will be divided equally between the partners.*

(4) *Any money or property acquired by either party by bequest or inheritance during the course of the domestic partnership, or any assets acquired in exchange for such money or property, shall be excluded from the application of this section.*

(5) (a) *If either partner has a spouse or spouses during the existence of the domestic partnership, then a division of property in terms of this section shall be made only in respect of that partner's separate property or that partner's half-share of any joint estate and a spouse of that partner shall have a right to request an appropriate corresponding adjustment in the division of property upon the dissolution of the marriage.*

(b) *Notwithstanding subsection (a), where a marriage of one of the domestic partners exists but the spouses have lived completely separately and operated their finances independently for a substantial period of time, the court may deem that a marital property regime involving community of property or accrual between the spouses shall be considered to have terminated upon a date identified by the court, and the court may divide assets accrued after that date without reference to the marital property regime if this would be fair and equitable to all parties concerned.*

## ***Division of assets and liabilities upon termination of relationship by death***

When people were asked whether a surviving partner should have rights to some or all of the property belonging to a cohabiting partner who died without a will, results were divided into two main groups. The most popular answer was that the surviving partner should inherit all of the property of the deceased. Perhaps unsurprisingly, this answer was overwhelmingly favoured by female participants. The second most frequent response was that the surviving partner should inherit some of the property of the deceased. There was support for this proposition by both male and female respondents. Of those who supported this view, the most common suggestion was that half of the property should be given to the surviving partner and the remaining half should go to the family of the deceased. Other suggestions were that the surviving partner and the children of the deceased should inherit all of the property, and also that the surviving partner should receive “*at least the house and furniture*” she had lived in with her partner during his lifetime. Only one participant believed the surviving partner should not inherit any property at all.

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*property of the parties or either of them or to the financial resources of the parties or either of them, and*

(b) *the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the parties to the relationship to the welfare of the other party to the relationship or to the welfare of the family constituted by the parties and one or more of the following, namely:*

(i) *a child of the parties,*

(ii) *a child accepted by the parties or either of them into the household of the parties, whether or not the child is a child of either of the parties.*

(2) *A court may make an order under subsection (1) in respect of property whether or not it has declared the title or rights of a party to a domestic relationship in respect of the property.*

In one focus group, concerns about witchcraft were cited: “Some women are bad and take men who are rich and then take their property by killing the men with witchcraft.” This concern must be taken seriously, as it affects the exercise of various rights in some Namibian communities.<sup>160</sup>

In **South Africa**, a number of proposals were put forward for dealing with intestate inheritance:

- (1) One proposal was that the surviving partner should be treated like a spouse for purposes of intestate inheritance<sup>161</sup> – which in Namibia would mean inheriting the entire estate if there were no descendents or other close family members, or otherwise inheriting a child’s share of the estate or N\$50 000 (whichever is greater). The N\$50 000 also includes the surviving spouse’s share in the joint estate if there was a marriage in community of property;<sup>162</sup> an appropriate corresponding calculation would be more difficult in the case of cohabiting partners without a specific marital property regime.
- (2) Perhaps with this difficulty in mind, the South African Law Reform Commission recommended that, where there are other heirs, a surviving domestic partner should inherit a child’s share of the estate or a maximum amount fixed by the Minister of Justice from time to time.<sup>163</sup>
- (3) Some recommended that the surviving partner should be awarded a reasonable share, or an amount commensurate with that partner’s contributions, after a consideration of the facts of each individual case.<sup>164</sup> This is similar to one of the approaches recommended by the Canadian HIV/AIDS Legal Network in its model legislation for Southern Africa; it suggests that a surviving domestic partner should be able to apply to court for maintenance from a deceased estate, for the right to continue occupying the family home or for the right to inherit “*a just and equitable share*” of the estate, with “*due regard*” to the interests of the other beneficiaries of the estate.<sup>165</sup>

The question of intestate inheritance is particularly difficult because the underlying law on this issue is in also in the process of being revised at the time of writing.<sup>166</sup>

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<sup>160</sup> See Wolfgang Werner, *Protection for Women in Namibia’s Communal Land Reform Act: Is it Working?*, Windhoek: Legal Assistance Centre, 2008 at 22 for a brief reference to the problem of witchcraft and ownership of land; see Robert Gordon, ed, *The Meanings of Inheritance*, Windhoek: Legal Assistance Centre, 2005 at 88 for a brief reference to the problem of witchcraft and inheritance. See also Maintenance Act 9 of 2003, section 41:

*Any person who with intent to compel or induce a complainant not to file a complaint at the maintenance court or not to lay a criminal charge against a defendant for his or her failure to support a specific person, in any manner threatens by whatever means, including the use of witchcraft, to kill, assault, injure the complainant or any other person or to cause damage to that complainant or any other person, or that complainant’s property or another person’s property, commits an offence and is liable to a fine which does not exceed N\$20 000 or to imprisonment for a period which does not exceed five years.* (emphasis added)

<sup>161</sup> SALRC at paragraph 7.5.26. This is also one of two optional recommendations of the Canadian HIV/AIDS Legal Network in its model legislation for Southern Africa. Canadian HIV/AIDS Legal Network at 2-26 to 2-28.

<sup>162</sup> Intestate Succession Ordinance 12 of 1946.

<sup>163</sup> SALRC at paragraph 7.5.29-7.5.30.

<sup>164</sup> Id at paragraph 7.5.27.

<sup>165</sup> Canadian HIV/AIDS Legal Network at 2-26 to 2-28.

<sup>166</sup> A draft Intestate Succession Bill is under preparation by the Law Reform and Development Commission at the time of writing.

One key issue will be whether or not the new law on intestate inheritance will make provision for the maintenance of dependants from the deceased's estate, as this would be one way to ensure fairness between different parties. Under the current law, only children of the deceased (whether born inside or outside marriage) can apply for such maintenance. The Legal Assistance Centre has submitted the following motivation for allowing anyone who was in fact dependent upon the deceased at the time of the deceased's death to apply for maintenance from the estate.

*One practical approach to ensure equitable economic protection of vulnerable women and children is to transform some inheritance issues into issues of maintenance. Special legislative provision should be made to provide maintenance for those who were dependents of the deceased, and who were made vulnerable or had their vulnerability increased by the death of their main source of maintenance.*

*If the deceased had been supporting any extended family members (such as elderly parents), a portion of the estate (especially money) should go to these dependent family members, much like any debts would have to be paid up before any property can be distributed amongst heirs. Making continued maintenance a priority would provide for the least disruption to needy family members, and would likely avert many disputes about succession. Estates may not be adequate to address all maintenance claims, but it makes sense that basic maintenance needs of genuine dependents should take priority. Such priority should not be at the expense of minor children, however.*

*Zimbabwe and Zambia have made provision for the maintenance of the deceased's dependants in situations where a testator has not made adequate provision for their reasonable needs. It is submitted that Namibia should do the same. Maintenance should be available to all dependents of the deceased whose reasonable maintenance needs are not adequately provided for by will or in terms of the intestate succession rules. For example, if the spouse and children receive an adequate portion of the estate as a result of a will or through application of the rules for intestate inheritance, or as a result of the division of marital property shared with the deceased, then they would not need to apply for maintenance from the estate.<sup>167</sup>*

If this proposal is adopted, domestic partners would be able to apply for maintenance if they were in fact dependent on the deceased partner.

Looking beyond maintenance to division of the estate, the treatment of the surviving domestic partner upon the death of the other partner should be based on what would happen if the relationship otherwise terminated. Therefore, we suggest that the law must be flexible in such a case, so that the same factors could be taken into account as on termination of the relationship other than by death. We suggest further that the surviving partner should have two avenues of recourse in the event of the other partner's death:

- (1) **The surviving partner could assert rights to some of the assets of the deceased in advance of the distribution of the estate, in the same way as if the relationship had terminated other than by death.** So, for example, if the surviving partner could show that he or she had actually made all of the payments for a car which was registered in the name of the deceased, then the surviving partner should be able to take that car or its value rather than having it become part of the estate for distribution amongst the heirs. This is consistent with the approach taken in respect of marriage, where the estate of a deceased spouse who was married in community of property would consist only of that spouse's

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<sup>167</sup> Legal Assistance Centre, "Submission to Master of the High Court in respect of proposed Intestate Succession Bill", 2010.



share of the joint marital property; the surviving spouse's share of the joint marital property is allocated to the surviving spouse before the estate can devolve upon the heirs.

- (2) **Once the contents of the deceased estate are settled, the surviving partner should be able to apply (a) to be treated as a spouse for purposes of intestate inheritance, or (b) to be granted a fair and equitable share of the deceased's estate in light of the nature and duration of the domestic partnership and the legitimate interests of any other intestate heirs.** (The latter alternative would be particularly appropriate when there was also a spouse.) This would be the fairest approach, although possibly the most burdensome to administer.

We suggest that the practicality of these proposals should be discussed in connection with the forthcoming law reforms on intestate inheritance which are currently under consideration.

### ***If there is also a spouse***

Respondents in the Namibian field research were also asked what they thought should happen when one partner dies, leaving behind both a cohabiting partner and a married spouse. A narrow majority of respondents believed that the cohabiting partner should inherit nothing from the deceased partner in this circumstance. Most of these participants believed the wife should inherit everything, though a significant number believed that provision should be made for all children of the deceased. Just under half of the respondents believed that the cohabiting partner should inherit something in this situation. But ideas varied on what this 'something' should entail. Some thought that this question should be decided by the family of the deceased. Another common suggestion was that the wife and partner should inherit in equal proportions, or that the assets should be divided between the wife, the partner and all of the deceased's children. A number of participants thought that the law should stipulate a certain percentage of the deceased's property to go to the partner. Other less popular suggestions were that the partner should keep the house she was living in, or that the partner should inherit everything to the detriment of the 'estranged wife'.

We submit that the proposal outlined above in respect of intestate inheritance by surviving cohabitants would be sufficiently flexible to give proper account to the interests of any spouses of the same deceased.

### **RECOMMENDATION:**

**Include domestic partners in any future law reform allowing spouses or dependants to apply for maintenance from the deceased's estate.**

**Allow the surviving domestic partner to apply for (1) a division of property in accordance with the section on termination of the partnership other than by death, before the estate is distributed and (2) to be treated in the same manner as a spouse for purposes of intestate inheritance, unless (a) there is a surviving spouse of the deceased or (b) there are reasonable objections from any of the other intestate heirs, in which case the surviving partner shall be granted a fair and equitable share of the deceased's estate in light of the nature and duration of the domestic partnership and the legitimate interests of any other intestate heirs.**

### **Surviving partner's rights when domestic partnership terminates by death**

(1) *Regardless of whether the existence of a domestic partnership or its termination has been registered in terms of Part 2, when a domestic partner dies, a surviving domestic partner may apply to [the Master of the High Court / the court] for a division of assets accrued during the existence of the domestic partnership jointly, or separately by either partner, after allowing for the liabilities of both partners, on the same basis as under section x.*

(2) *A surviving domestic partner may also apply to [the Master of the High Court / the court] to be treated in the same manner as a spouse for purposes of intestate inheritance: Provided that –*

*(a) where there is a surviving spouse of the deceased; or*

*(b) where there is a reasonable objection from any of the other intestate heirs;*

*the surviving partner shall be granted a fair and equitable share of the deceased's estate in light of the nature and duration of the domestic partnership and the legitimate interests of any other intestate heirs including any surviving spouse or spouses.*

## **11.4.3 Optional declaration and registration of cohabitation relationships**

The recommendations on this topic have been discussed above in section 11.2.2. They are fairly straightforward and could be enacted by means of the draft provisions proposed below.

### **RECOMMENDATION:**

Supplement automatic protection with a system which allows couples to register the existence of their relationship to facilitate proof if they wish to do so, with registration resulting in the issue of a certificate of registration.

Allow couples to register a contract between themselves at the same time (or later) if they wish to do so, and encourage this with a simple template accompanied by accessible educational material on what issues should be considered. This could be accompanied by a popularisation campaign encouraging cohabiting couples to make contracts and wills. But authorise courts to depart from the provisions of such private contracts to take into account changed circumstances or to prevent manifest unfairness.

Provide for termination of registered relationships without official intervention upon the death of one partner or when one partner ceases to fulfil one of the requirements for registration – such as by abandoning the relationship or ceasing to occupy a mutual residence. Additionally allow both partners to file for termination to facilitate proof that the partnership has ended. Official termination should be recorded on a certificate of termination.

Allow aggrieved partners to approach the courts for appropriate financial redress, regardless of whether the partnership was registered – or if registered, regardless of whether it was officially terminated.

## **PART 2 – OPTIONAL REGISTRATION OF DOMESTIC PARTNERSHIPS**

### **Registration of declaration of a domestic partnership**

(1) *Any two persons aged 18 or older of the same or opposite sex who have an intimate relationship and share or intend to share a common residence, provided that their relationship does not constitute incest, may appear before a clerk of court and complete a declaration of a domestic partnership in the prescribed form, setting forth the date on which the domestic partnership began or shall begin.*

(2) *This declaration shall be entered by the clerk of court into the prescribed register if he or she is satisfied that it is being made freely and voluntarily.*

(3) *The clerk of court shall provide partners who have registered a declaration of a domestic partnership with a registration certificate in the prescribed form.*

(4) *Any such declaration shall constitute prima facie proof of the existence of a domestic partnership and the date on which such partnership came into existence for the purpose of this or any other relevant law.*

### **Termination of a registered domestic partnership**

(1) *A registered domestic partnership shall terminate automatically when –*

- (a) *one or both of the partners dies, on the date of death*
- (b) *the partners cease to share a common residence, on the day after the last date on which they shared such a common residence.*

(2) *Both domestic partners may appear before a clerk of court and complete a declaration of termination of a domestic partnership in the prescribed form, setting forth the date on which the domestic partnership has ended.*

(3) *This declaration of termination shall be entered by the clerk of court into the prescribed register.*

(4) *A declaration of termination may be registered by the clerk of court even if it was not preceded by a declaration of domestic partnership.*

(5) *The clerk of court shall provide partners who have registered a declaration of a domestic partnership with a termination certificate in the prescribed form.*

(6) *A declaration of termination shall constitute prima facie proof of the termination of a domestic partnership and the date on which such partnership was terminated for the purpose of this or any other relevant law.*

## **PART 3 – OPTIONAL DOMESTIC PARTNERSHIP AGREEMENTS**

### **Domestic partnership agreements**

(1) *Any two persons aged 18 or older of the same or opposite sex who have an intimate relationship and who are or intend to become partners in a domestic relationship, provided that their relationship does not constitute incest, may conclude a written domestic partnership agreement between themselves concerning maintenance of each other, the sharing of property and assets and any other financial matters pertaining to the partnership which they wish to regulate.*

(2) *An agreement made in terms of subsection (1) may be amended or terminated by mutual agreement, in the same manner.*

(3) *Where such an agreement has been signed by both partners in the presence of two witnesses, it will be enforceable between them to the extent that it is not inconsistent with any of the provisions of Part 1.*

### **Registration of domestic partnership agreements**

(1) *Where a domestic partnership has been registered in terms of section x, the partners may appear jointly before the clerk of the court, at the same time as registering the domestic partnership or subsequently, to register a domestic partnership agreement concluded in terms of section x.*

(2) *If the clerk of court is satisfied that the agreement has been made freely and voluntarily, he or she shall enter a notation of the agreement in the prescribed register and file a copy of the agreement as prescribed.*

(3) *Where a domestic partnership agreement is registered with the clerk of the court in terms of this section, any amendment or termination of the agreement by the partners becomes enforceable only if such amendment or termination is registered with the clerk of the court in the same manner.*

### **Effect of agreements**

(1) *One or both domestic partners may approach a court for enforcement of a domestic partnership agreement pursuant to this section.*

(2) *A court shall not enforce any provision of such an agreement which purports to waive any of the rights set forth in Part 1.*

(3) *In the event of –*

- (a) *a dispute pertaining to a domestic partnership, or*
- (b) *an application for division of property under section x or*
- (c) *an application for a division of property or a right of intestate inheritance under section x, a court [and/or the Master of the High Court] is not obliged to give effect to any such agreement if it would be unjust to do so, considering –*

- (i) *the provisions of the agreement;*
- (ii) *the time that has elapsed since the agreement was made;*
- (iii) *whether, in light of the circumstances existing at the time the agreement was made, the agreement is unfair or unreasonable;*
- (iv) *whether any changes in circumstances since the agreement was made (whether or not such changes were contemplated by the parties) render the agreement unfair or unreasonable;*
- (v) *any other matter which it considers relevant to any proceedings.*

(4) *Except in so far as a domestic relationship agreement provides otherwise, the provisions of such an agreement relating to maintenance, property or assets may, on the death of one of the partners, be enforced on behalf of, or against, the estate of the deceased party.*

### 11.4.4 Forum

The question of forum is a vexed one. On the one hand, it is important for remedies to be accessible if they are to have any positive effect other than as a backdrop which may influence private action and agreement. On the other hand, if redress in the case of cohabitation is more accessible than for marriage, this may have the undesired effect of making cohabitation more attractive than marriage – for the wrong reasons.

Therefore, since law reform on divorce is also under consideration, we would propose that both be adjudicated in varying forums which are dependent on the amounts involved – with partners and spouses with total assets below a set amount being entitled to adjudicate their cases in either community courts or magistrates' courts, as they prefer, whilst those with total assets above the set amount must adjudicate their cases in the High Court.

The reasoning is that the larger the amount at stake, the more likely that the parties will be able to engage legal assistance to assist them with High Court procedures. It is also more likely that higher assets will be correlated with more complex financial issues.

#### RECOMMENDATION:

**Allow cohabiting partners with total assets below a set amount to adjudicate their cases in either community courts or magistrates' courts, as they prefer. Require those with total assets above the set amount to adjudicate their cases in the High Court.**

**To avoid encouraging parties to choose cohabitation over marriage simply because of the accessibility of the forum, make similar law reforms in respect of the forum for divorces.**



## Forum

(1) For purposes of this Act, except where a children's court is specified, "court" small mean either a community court or a magistrate's court in any case involving total assets of less than the prescribed amount, and the High Court in any case involving total assets of less than the prescribed amount.

(2) The Minister of Justice may prescribe an amount for the purposes of subsection (1) from time to time by notice in the Government Gazette.

### 11.4.5 Joint responsibility for children

As has been explained, there are few reforms required in respect of cohabiting partners and their children since the treatment of children born inside and outside marriage has already been harmonised. However, as explained above, one area of concern is the current inability of cohabiting parents to assume true joint responsibility for their children.<sup>168</sup>

#### RECOMMENDATION:

Make it possible for cohabiting parents to be joint custodians and equal guardians during the subsistence of the cohabitation relationship. Should the cohabitation terminate, such parents would fall under the provisions of the Children's Status Act which apply to unmarried parents.

#### Children of parents in a domestic partnership

(1) The parents of a child born outside of marriage who are cohabiting may make a written agreement between themselves before or after the birth of the child which establishes joint custody and equal guardianship between themselves for the duration of their cohabitation, and may petition the children's court to make this agreement an order of court if the court is of the opinion that it will be in the best interests of the child.

(2) An agreement made in terms of subsection (1) shall become valid only when it is made into an order of a children's court.

(3) Where the parents are sharing a common home, there shall be a rebuttable presumption for the purposes of subsection (a) that joint custody and equal guardianship are in the best interests of the child.

(4) If the parents of the child cease to cohabit, custody and guardianship of the child shall be determined in accordance with the Children's Status Act, unless a competent court directs otherwise.

<sup>168</sup> See section 7.2 at pages 133-137.

### 11.4.6 Consequential amendments

If the law allows an equitable division of assets between all affected parties where a domestic partnership which exists simultaneously with a civil or customary marriage, it would be unfair to treat putative marriages more restrictively. Recent cases in Namibia, South Africa and Zimbabwe have taken varying approaches to this issue, as already discussed in detail,<sup>169</sup> so it would be useful to have statutory clarification on this issue. We recommend that the approach proposed for the co-existence of a marriage and a domestic partnership be applied to putative marriages.

#### **RECOMMENDATION:**

**Apply the recommendations on the division of assets where there is a simultaneous marriage and domestic partnership to the situation where there is a simultaneous marriage and a putative marriage.**

#### ***Putative marriages***

*The provisions of section x and section x shall apply with the necessary changes to a situation where one or both partners to a putative marriages have another spouse or spouses.*

### 11.4.7 Amendments to existing statutes

The previous sections of this report have identified a number of statutory provisions which should be amended to meet the needs of domestic partnerships. The following is a summary of recommendations. No draft provisions have been provided for these points, on the theory that this can best be done at the technical drafting stage.

#### **RECOMMENDATION:**

**Amend section 70(1) of the Children's Act 33 of 1960 (or the provisions on adoption in the forthcoming Child Care and Protection Act) to allow domestic partners *who have registered their partnership* to adopt children jointly, provided that a social worker investigation has confirmed that the partnership is a stable one. *Note that this is one of the few instances where we suggest that registered domestic partners should be treated any differently from unregistered domestic partners.***

**Amend the definition of “domestic relationship” in section 3(1) of the Domestic Violence Act 4 of 2003, the definition of “dependant” in section 4(1) of the Employees' Compensation Act 30 of 1941 and the definition of “spouse” in the Insolvency Act 24 of 1936, to include cohabiting partners of the same or opposite sexes.**

<sup>169</sup> See section 5.5 at pages 82-86.

Amend the Judges' Pensions Act 28 of 1990 to provide for the payment of benefits to a domestic partner, or to remove the Minister's discretion to overrule a judge's designation of a specific beneficiary. Amend the Former Presidents' Pension and Other Benefits Act 18 of 2004 to provide for the payment of benefits to a domestic partner.

If the recommendation to give domestic partners a mutual duty of support is adopted, then the Motor Vehicle Accidents Fund Act 10 of 2007 would cover cohabitants as it stands. However, to leave no doubt, amend the definition of "dependant" to explicitly include domestic partners.

Amend section 1 of the Medical Aid Fund Act 23 of 1995 to require coverage of domestic partners in the same manner as spouses, rather than leaving this to the rules of the particular fund, and make other statutes which refer to medical aid schemes consistent with this change.

Define spouse in the Administration of Estates Act 66 of 1965 and the Wills Act 7 of 1953 to include a domestic partner.

Amend the Labour Act 11 of 2007 to include domestic partners in the definition of dependant and family in sections section 5(1)(c) (family responsibilities), section 25 (compassionate leave), section 28 (in connection with employees residing on agricultural land) and section 35 (severance pay).

Amend the Social Security Act 34 of 1994 to provide for the division of benefits between a surviving spouse and a domestic partner as appropriate.

After consultation with persons with specific tax expertise, amend the references to "spouse" and "relative" in the Income Tax Act 24 of 1981, Value-Added Tax Act 10 of 2000 and the Transfer Duty Act 14 of 1993 to include domestic partners, and make any maintenance payments to a domestic partner in terms of a court order following the termination of the partnership tax exempt in the same way as maintenance paid in terms of a divorce order.

Define spouse in the Communal Land Reform Act 5 of 2002 to include a domestic partner for purposes of having the right to remain on land which was occupied together with the other partner after that partner's death.

Amend sections 47 and 50 of the Long-term Insurance Act 5 of 1998 to treat domestic partners in the same way as spouses for the purpose of protecting insurance policies in favour of domestic partners against attachment as part of a civil judgment or inclusion in an insolvent estate, and protecting life policies in respect of domestic partners where the policy-holder is struggling to pay the premiums.

Amend section 195-196 and 198-199 of the Criminal Procedure Act 51 of 1977 and sections 219-220 and 223-224 of the Criminal Procedure Act 25 of 2004 (passed by Parliament but not in force) to include domestic partners in the same manner as spouses for purposes of marital privilege. Amend sections 10-12 of the Civil Proceedings and Evidence Act 25 of 1965 in the same way (re: marital privilege in civil cases). Amend the definition of "dependant" in section 1 of the Criminal Procedure Act 25 of 2004 to include a domestic partner (in connection with victim impact

statements). Consider also including domestic partners in the provisions on private prosecutions in section 7(1)(b)-(c) of the Criminal Procedure Act 51 of 1977 and section 5(1)(b)-(c) of the Criminal Procedure Act 25 of 2004.

Include surviving domestic partners in section 9(1) of the Inquests Act 9 of 1992 (regarding notice of an inquest).

Re-examine the various provisions on conflicts of interest outlined in Chapter 6 to harmonise them and include domestic partners as appropriate, using the broad coverage of section 43(3)(a) of the Anti-Corruption Act 8 of 2003 as a benchmark. Similarly, consider including domestic partners in the various statutory provisions outlined in Chapter 6 which extend the consequences of actions by one spouse to the other spouse – such as in the case of exemptions, presumptions and limitations of liability.

# Appendix

## DRAFT BILL ON DOMESTIC PARTNERSHIPS

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### INTRODUCTORY

#### 1. Forum

(1) For purposes of this Act, except where a children's court is specified, "court" shall mean either a community court or a magistrate's court in any case involving total assets of less than the prescribed amount, and the High Court in any case involving total assets of less than the prescribed amount.

(2) The Minister of Justice may prescribe an amount for the purposes of subsection (1) from time to time by notice in the Government Gazette.

### PART 1 – AUTOMATIC PROTECTION

#### 2. Establishing a domestic partnership

(1) The provisions of this Part apply to any persons who are or were in a domestic partnership, provided that their relationship does not constitute incest.

(2) For the purposes of this Part, a domestic partnership is an intimate relationship between two persons aged 18 or older of the same or opposite sex, who have shared a common residence for a significant amount of time.

(3) A domestic partnership shall be presumed to exist between two persons who—

- (a) are both aged 18 years or older; and
- (b) have an intimate relationship; and
- (c) have shared a common residence for at least two years, whether continually or on an habitual basis,

Provided that either partner may rebut this presumption by showing that the relationship should not be considered to be a domestic partnership with reference to the criteria in subsection (4).



(4) A court may on application make a declaration that a domestic partnership exists between two persons aged 18 years or older in an intimate relationship who have shared a common residence, whether continually or on an habitual basis, for a period of less than two years, after consideration of the following factors:

- (a) the duration and nature of the relationship;
- (b) the nature and extent of common residence;
- (c) the degree of financial dependence or interdependence between the parties;
- (d) the degree of mutual commitment to a shared life;
- (e) the arrangements for care and support of any children in the household;
- (f) the performance of household duties; and
- (g) the reputation and public aspects of the relationship.

Provided that no finding in respect of any of the matters mentioned in this subsection, or in respect of any combination of them, is to be regarded as necessary for the existence of a domestic partnership, and a court determining whether such a partnership exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(5) Any domestic partnership registered under section 7 shall automatically be subject to this part.

### **3. Mutual duty of support during existence of domestic partnership**

(1) Domestic partners owe each other a duty of support during the existence of the relationship in accordance with their respective financial means and needs.

(2) Domestic partners are jointly and severally liable to third parties for all debts incurred by either of them in respect of necessities for the joint household.

(3) Unless the domestic partners agree otherwise, a domestic partner is liable after the commencement of this Act to contribute to necessities for the joint household pro rata according to his or her financial means.

(4) Where a domestic partner can show that he or she has contributed more in respect of necessities for the joint household than for which he or she is liable in terms of subsection (3), this may be taken into consideration in an application for division of assets in terms of section 4.

### **4. Division of assets when domestic partnership terminates other than by death**

(1) Regardless of whether the existence of a domestic partnership or its termination has been registered in terms of Part 2, one or both domestic partners may apply to court within one year of the termination of a domestic partnership other than by the death of a partner, for an order to divide any assets accrued during the existence of the domestic partnership jointly, or separately by either partner, after allowing for the liabilities of both partners.

(2) Upon an application for the division of assets, a court may order any division of assets which it deems fair and equitable in accordance with each party's respective contributions to the accrual of such assets, taking into account direct and indirect contributions in the form of

money and labour, including housework, child care and other unpaid labour and any other relevant factors.

(3) If the party's respective contributions to the assets accrued during the existence of the partnership cannot be proved, then such assets will be divided equally between the partners.

(4) Any money or property acquired by either party by bequest or inheritance during the course of the domestic partnership, or any assets acquired in exchange for such money or property, shall be excluded from the application of this section.

(5) (a) If either partner has a spouse or spouses during the existence of the domestic partnership, then a division of property in terms of this section shall be made only in respect of that partner's separate property or that partner's half-share of any joint estate and a spouse of that partner shall have a right to request an appropriate corresponding adjustment in the division of property upon the dissolution of the marriage.

(b) Notwithstanding subsection (a), where a marriage of one of the domestic partners exists but the spouses have lived completely separately and operated their finances independently for a substantial period of time, the court may deem that a marital property regime involving community of property or accrual between the spouses shall be considered to have terminated upon a date identified by the court, and the court may divide assets accrued after that date without reference to the marital property regime if this would be fair and equitable to all parties concerned.

## **5. Maintenance for partner after end of relationship**

(1) Where a domestic partnership ends other than by the death of a partner, a partner may in an application for the allocation of assets in terms of section 4 also make a request for maintenance payments for a specified period from the other partner.

(2) The court may make an order for maintenance payments for a specified period only if

- (a) the partner requesting maintenance was in some way economically disadvantaged by the roles or responsibilities assumed by the respective partners to the relationship;
- (b) the allocation of assets between the partners will be insufficient to compensate for such disadvantage; and
- (c) the financial position of the partner making the request is significantly weaker than that of the other party, taking into account the economic circumstances of each spouse at the time the partnership ends, including their respective income, earning capacity, assets and other financial resources, and their respective financial obligations.

## **6. Surviving partner's rights when domestic partnership terminates by death**

(1) Regardless of whether the existence of a domestic partnership or its termination has been registered in terms of Part 2, when a domestic partner dies, a surviving domestic partner may apply to [the Master of the High Court / the court] for a division of assets accrued during the existence of the domestic partnership jointly, or separately by either partner, after allowing for the liabilities of both partners, on the same basis as under section 4.

(2) A surviving domestic partner may also apply to [the Master of the High Court / the court] to be treated in the same manner as a spouse for purposes of intestate inheritance: Provided that –

- (a) where there is a surviving spouse of the deceased; or
- (b) where there is a reasonable objection from any of the other intestate heirs;

the surviving partner shall be granted a fair and equitable share of the deceased's estate in light of the nature and duration of the domestic partnership and the legitimate interests of any other intestate heirs including any surviving spouse or spouses.

## **PART 2 – OPTIONAL REGISTRATION OF DOMESTIC PARTNERSHIPS**

### **7. Registration of declaration of domestic partnership**

(1) Any two persons aged 18 or older of the same or opposite sex who have an intimate relationship and share or intend to share a common residence, provided that their relationship does not constitute incest, may appear before a clerk of court and complete a declaration of a domestic partnership in the prescribed form, setting forth the date on which the domestic partnership began or shall begin.

(2) This declaration shall be entered by the clerk of court into the prescribed register if he or she is satisfied that it is being made freely and voluntarily.

(3) The clerk of court shall provide partners who have registered a declaration of a domestic partnership with a registration certificate in the prescribed form.

(4) Any such declaration shall constitute prima facie proof of the existence of a domestic partnership and the date on which such partnership came into existence for the purpose of this or any other relevant law.

### **8. Termination of a registered domestic partnership**

(1) A registered domestic partnership shall terminate automatically when –

- (a) one or both of the partners dies, on the date of death
- (b) the partners cease to share a common residence, on the day after the last date on which they shared such a common residence.

(2) Both domestic partners may appear before a clerk of court and complete a declaration of termination of a domestic partnership in the prescribed form, setting forth the date on which the domestic partnership has ended.

(3) This declaration of termination shall be entered by the clerk of court into the prescribed register.

(4) A declaration of termination may be registered by the clerk of court even if it was not preceded by a declaration of domestic partnership.

(5) The clerk of court shall provide partners who have registered a declaration of a domestic partnership with a termination certificate in the prescribed form.

(6) A declaration of termination shall constitute prima facie proof of the termination of a domestic partnership and the date on which such partnership was terminated for the purpose of this or any other relevant law.

### **PART 3 – OPTIONAL DOMESTIC PARTNERSHIP AGREEMENTS**

#### **9. Domestic partnership agreements**

(1) Any two persons aged 18 or older of the same or opposite sex who have an intimate relationship and who are or intend to become partners in a domestic relationship, provided that their relationship does not constitute incest, may conclude a written domestic partnership agreement between themselves concerning maintenance of each other, the sharing of property and assets and any other financial matters pertaining to the partnership which they wish to regulate.

(2) An agreement made in terms of subsection (1) may be amended or terminated by mutual agreement, in the same manner.

(3) Where such an agreement has been signed by both partners in the presence of two witnesses, it will be enforceable between them to the extent that it is not inconsistent with any of the provisions of Part 1.

#### **10. Registration of domestic partnership agreements**

(1) Where a domestic partnership has been registered in terms of section 7, the partners may appear jointly before the clerk of the court, at the same time as registering the domestic partnership or subsequently, to register a domestic partnership agreement concluded in terms of section 9.

(2) If the clerk of court is satisfied that the agreement has been made freely and voluntarily, he or she shall enter a notation of the agreement in the prescribed register and file a copy of the agreement as prescribed.

(3) Where a domestic partnership agreement is registered with the clerk of the court in terms of this section, any amendment or termination of the agreement by the partners becomes enforceable only if such amendment or termination is registered with the clerk of the court in the same manner.

#### **11. Effect of agreements**

(1) One or both domestic partners may approach a court for enforcement of a domestic partnership agreement pursuant to this section.

(2) A court shall not enforce any provision of such an agreement which purports to waive any of the rights set forth in Part 1.

- (3) In the event of –
- (a) a dispute pertaining to a domestic partnership, or
  - (b) an application for division of property under section 4, or
  - (c) an application for a division of property or a right of intestate inheritance under section 6, a court [and/or the Master of the High Court] is not obliged to give effect to any such agreement if it would be unjust to do so, considering-
    - (i) the provisions of the agreement;
    - (ii) the time that has elapsed since the agreement was made;
    - (iii) whether, in light of the circumstances existing at the time the agreement was made, the agreement is unfair or unreasonable;
    - (iv) whether any changes in circumstances since the agreement was made (whether or not such changes were contemplated by the parties) render the agreement unfair or unreasonable; and
    - (v) *any other matter which it considers relevant to any proceedings.*

(4) Except in so far as a domestic relationship agreement provides otherwise, the provisions of such an agreement relating to maintenance, property or assets may, on the death of one of the partners, be enforced on behalf of, or against, the estate of the deceased party.

## **12. Children of parents in a domestic partnership**

(1) The parents of a child born outside of marriage who are cohabiting may make a written agreement between themselves before or after the birth of the child which establishes joint custody and equal guardianship between themselves for the duration of their cohabitation, and may petition the children's court to make this agreement an order of court if the court is of the opinion that it will be in the best interests of the child.

(2) An agreement made in terms of subsection (1) shall become valid only when it is made into an order of a children's court.

(3) Where the parents are sharing a common home, there shall be a rebuttable presumption for the purposes of subsection (a) that joint custody and equal guardianship are in the best interests of the child.

(4) If the parents of the child cease to cohabit, custody and guardianship of the child shall be determined in accordance with the Children's Status Act, unless a competent court directs otherwise.

## **13. Putative marriages**

The provisions of section 4(5) and section 6(2) shall apply with the necessary changes to a situation where one or both partners to a putative marriage have another spouse or spouses.

## **SCHEDULE**

*The Schedule would contain amendments to existing laws based on the recommendations in section 11.4.7 of the report.*