

TRUSTS AND ESTATES ALERT

24 October 2012

A SPOUSE BY ANY OTHER NAME

With the advent of our democratic Constitution and against a backdrop of universal secularisation many social and political structural changes to our societal institutions have occurred over the last two decades.

These in turn have given rise to changes in the law overall. Adopting a Bill of Rights that acknowledges our diverse society has been the most notable legislative reformation.

Many legislative changes have had an impact on the Law of Succession and the Administration of Estates, more specifically the law associated with the traditional form of marriage and the nuclear family.

Constitutional safeguards notwithstanding, changes to the meaning and application of the law governing traditional forms of marriage and family relationships have been brought about largely as a result of challenges to earlier legislation. The approach has been piecemeal rather than systematic, often placing the onus and risk on the party challenging the custom.

Before the Constitution, the only legally recognised intimate partnership that had implications for the Law of Succession was the so-called civil marriage, which was limited to the voluntary union between one man and one woman.

Loosely defined, this suggests that many now recognised forms of relationship would be excluded. So any union not constituted under the Marriage Act, No 25 of 1961 but according to religious or cultural tenets, relationships between same gender partners and relationships that involve more than one partner (eg forms of polygamous marriages), are excluded.

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- **A spouse by any other name**

The Law of Succession

In this area two statutes feature prominently in the law of Succession:

- The Intestate Succession Act, No 81 of 1987, which covers the rights of a spouse to inherit intestate. The Act uses the word 'spouse' but does not define the word. Since there is no definition, where the word spouse is used, reference must be had to the concept of marriage, so a spouse in terms of any of the permutations mentioned above, would be excluded.
- The Maintenance of Surviving Spouse Act, No 27 of 1990, which governs spousal maintenance. In this Act, the term 'survivor' is used and is defined as the surviving spouse of a marriage dissolved by death.

Religious marriages

One of the first challenges to the definition of the word 'spouse' led to the judgment in *Daniels v Campbell NO and Others 2004 (5) SA 331 (CC)*. The judgment brought recognition and protection for a spouse in a marriage solemnised according to Islamic Law in a de facto monogamous union (a union existing in fact, whether legally recognised or not).

In this case the court maintained that for the purpose of the Intestate Succession Act and the Maintenance for Surviving Spouse Act, the

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ordinary and commonly understood meaning of the word spouse was broad enough to include a marriage formalised under Islamic Law.

Similarly the case of *Govender v Ragavayah [2009] 1 All SA 371 (D)* concerned an application for an order that the word spouse as used in s1 of the Intestate Succession Act includes a surviving partner of a monogamous Hindu marriage.

In this matter, the applicant and her husband had concluded a marriage according to Hindu rites but not registered in terms of the Marriage Act. The marriage had been monogamous at all times. The judge held that there was judicial support for the proposition that the definition of a spouse in the Intestate Succession Act can be interpreted to include the surviving partner of a monogamous Hindu marriage, and made such an order.

In the matter *Hassam v Jacobs 2009 (5) 572 (CC)*, the husband had died leaving two spouses. One of the wives approached the court to decide whether a surviving spouse of polygamous marriage contracted according to Muslim Private Law could be regarded as a spouse in terms of the Intestate Succession Act and the Maintenance of Surviving Spouse Act.

The court a quo found that the marriage conformed to Muslim rites. It ordered that the word 'survivor', as used in the Maintenance of Surviving Act includes the surviving partner to a polygamous marriage. The court also found that the word 'spouses', as used in the Intestate Succession Act, includes the surviving partner to a polygamous Muslim marriage. But it held that the Act is unconstitutional as it makes provision for only one spouse.

The matter was referred to the Constitutional Court. The court stated that undue strain would be placed on the language, to interpret the word 'spouse' as bearing reference to more than one spouse. To remedy this, the court ordered that the words 'or spouses' must appear after the word 'spouse' in the relevant section of the Act.

Customary marriages

The matter, *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA 2005 (1) SA 580 (CC)*, turned the spotlight onto so-called customary marriages.

The deceased (the husband) had died intestate leaving two daughters and their mother, with whom he had lived for many years as man and wife. The father of the deceased argued that, as the only living male who qualified, he was the sole intestate heir in terms of the Black Administration Act, No 38 of 1927. African customary intestate succession was based on the rule of primogeniture (a rule of inheritance at common law through which the oldest male child

has the right to succeed to the estate of an ancestor to the exclusion of younger siblings, both male and female, as well as other relatives). In terms of the Constitution, the rule was discriminatory and unconstitutional.

In this matter the estate devolved on the daughters, but their mother was excluded as no customary civil union had taken place.

In applying s(1)(c)(i) and 1(4)(f), the judge laid down the rules to be implemented where the deceased is survived by more than one spouse: under such circumstances, each spouse will receive a child's share.

In *Kambule v The Master of the High Court and Others 2007(3) SA 403(E)*, the couple were married by civil rights in terms of the Black Administration Act. The husband died; and another woman claimed that she was also married to the deceased according to customary law in 1985, although the marriage was never registered. She lodged a claim against the estate in terms of the Maintenance of Surviving Spouses Act.

The deceased marriage relationship was therefore polygamous. The court held that in light of the confusion of the recognition of Customary Marriage's Act and because of the Constitution's wide interpretation of s2(A) of the Maintenance of Surviving Spouse's Act, if the third person could prove there was a valid customary marriage, she would fall within the definition of survivor for the Act.

In *Gumede (born Shange) v President of the Republic of South Africa and Others 2009 (3) BCLR 243 (CC)*, the court found recognition of the Customary Marriage's Act, No 120 of 1998 to be unconstitutional to the extent that it distinguishes between marriages entered into before and after the commencement of the Act.

Same sex relationships

In *Gory v Kolver NO and Others (Stark and Others Intervening) 2007 (4) SA 97 (CC)* The deceased died intestate, leaving parents and a surviving partner in a permanent same sex relationship. The deceased and the surviving partner were not married as they were prohibited from doing so in terms of the Marriage Act. There were no children involved.

The parents argued that they were the sole intestate beneficiaries. The court found that the deceased had been in a relationship in which the partners assumed reciprocal duties of support. Therefore, the Intestate Succession Act was regarded as being unconstitutional. To remedy the omission of a permanent same sex partner with reciprocal duty or support being regarded as a spouse, the words 'or partner in a permanent same sex life partnership in which the partners have undertaken reciprocal duties of support' were to be included after the word 'spouse' wherever it appears in s1(91) of the relevant Act.

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Unmarried life partners

The position of unmarried heterosexual life partners is governed by *Volks NO v Robinson and Others 2005 (5) BCLR 446 (CC)*.

To place this in context, reference must be made to the earlier decision of *Robinson and Another v Volks NO and Others 2004 (6) SA 288 (C)*.

Mrs Robinson had been in a permanent life partnership with the deceased for many years. The parties had not married, though there was no legal obstacle to a marriage. The executor refused Mrs Robinson's claim to maintenance in terms of the Maintenance of the Surviving Spouse's Act. The court found that it would be unfair to ignore the financial independence simply because they had not married. The court argued that a permanent life partnership is akin to a marriage. Mrs Robinson was therefore unfairly discriminated against and that this was unconstitutional.

However, the executor appealed the ruling and the Constitutional Court found that marriage imposes rights and obligations on parties, in other words reciprocal duties of support, which is not the case where unmarried persons live together. It adopted the so-called objective test, stating that if heterosexual couples seek the consequences described to a marriage, they must signify their

acceptance by entering into a marriage relationship. Those who do not want such consequences remain free to enter into some other form of relationship and decide what consequences should flow from that relationship.

The court held that it could not impose an obligation on the estate of the person if the law did not place such duty on him during his lifetime. It therefore found that the relevant provision does not discriminate unfairly against heterosexual couples involved in permanent life partnership and so, was not unconstitutional.

Conclusion

To the extent that there has not been legislative intervention* or the same has been slow in being promulgated, partners seeking recognition of their alternative relationships often face a long and courageous walk. However, society at large has benefited in those matters where the Constitutional Court acknowledges and extends the protection of the law on such diverse relationships.

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*We will focus on this legislation in the next alert

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