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# TRUSTS & ESTATES ALERT

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### The (un)intended consequences of living together – why you should have a valid Will

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## The (un)intended consequences of living together – why you should have a valid Will

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Ms Bwanya met the deceased in February 2014 in Camps Bay while waiting on a taxi to take her to the Cape Town train station. He offered her a lift. Their connection was instantaneous. They went on their first date that same evening. They spent more and more time together in the coming months. In time, she moved in with the deceased, socialised with his friends and he bought gifts for her family. She continued her employment as a domestic worker, but they intended to start a domestic cleaning business together. They undertook reciprocal duties of support; he provided financially, and she contributed love, care, and emotional support. They intended to start a family together and the deceased asked her to marry him. During April 2016, the deceased passed away unexpectedly. He was never married, had no children and was an only child. His Will appointed his predeceased mother as sole heiress of his estate. The Intestate Succession Act therefore applied to the distribution of his estate worth some R10,2 million. Did Ms Bwanya stand to inherit?

### The landscape and law of South African relationships

The traditional monogamous civil marriage between opposite sex partners has permutated to make space for various alternative arrangements. An inexhaustive list: married same sex spouses in terms of the Civil Union Act, partners of the same

or opposite sex living together sharing resources and having children, contractual domestic partnerships, and open relationships of cohabitation. The law, however, has developed at a slower pace.

The draft legislation in respect of registered and unregistered Domestic Partnerships is a prime example of the law lagging behind. A domestic partnership (or cohabitation) is a relationship between two people of the same or opposite sex that are living together, in a permanent relationship, as if they are married, but are not.

During 2008 the Department of Home Affairs sought commentary on the draft Domestic Partnership Bill which would regulate such partnerships. No further steps have been taken since to advance the Bill.

The result is that partners in established relationships are excluded from the rights and obligations which attach automatically to a formal marriage even though they often function in a manner similar to a traditional married couple. Contrary to popular belief, partners who live together are not deemed to be legally married after a set period of time.

The freedom to arrange your relationship in the manner that suits your lifestyle and personal and religious views comes with great financial and legal consequences. Such consequences usually become relevant upon the termination of the relationship by death, divorce, or

## The (un)intended consequences of living together – why you should have a valid Will...*continued*

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separation, and can turn contentious especially when it involves an inheritance, a pension, medical aid dependants, maintenance or insurance.

### Who qualifies as a spouse in South African law?

The definition of the word 'spouse' in the realm of the law of succession has been the focal point of a plethora of cases over the past few decades. The differentiations between married, unmarried and life partners of the same or opposite sex have led to unfair discrimination based on marital status and sexual orientation – prohibited grounds in terms of the 1996 Constitution.

Many of these discriminatory provisions have been addressed, including the extension of the interpretation of the definition of the word 'spouse' in the Intestate Succession Act, 1987 which has been interpreted to include monogamous and polygamous spouses in a Muslim marriage dating as far back as 2004.

A partner in a subsisting monogamous or polygamous customary marriage which is recognised in terms of the Recognition of Customary Marriages Act, 1998 also qualifies as a 'spouse' for purposes of intestate succession.

In terms of the Estate Duty Act, 1955 and Income Tax Act, 1962, the definition of 'spouse' includes partners of the same or opposite sex in a permanent relationship. This means that spousal deduction relief in respect of estate duty, exempt donations between spouses and capital gains tax roll over relief also applies to these unmarried partners.

### The Gory judgment

Before the promulgation of the Civil Union Act, 2006 in terms of which same sex partners were able to conclude a marriage akin to a civil marriage in terms of the Matrimonial Property Act – same sex partners were excluded from the interpretation of the definition of the word 'spouse'. A same sex partner was therefore disqualified as an intestate heir.

In *Gory v Kolver 2007 (4) SA 97 (CC)*, the Constitutional Court declared this definition unconstitutional and ordered that the definition be interpreted to include a "*partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*" [own emphasis].

The effect of the *Gory* judgment was that same-sex life partners in a permanent relationship who had undertaken reciprocal duties of support, qualified as intestate heirs. Partners of the opposite sex in a similar permanent life partnership who had also undertaken reciprocal duties of support were, however, excluded from the application of the extension of the definition and could not inherit as intestate heirs.

Since the decision in *Gory*, the introduction of the Civil Union Act made it possible for same-sex partners to enter into a marriage like couples of the opposite sex. Despite this change, the application of the interpretation excluding unmarried partners of the opposite sex from qualifying as intestate heirs, continued and remained unchallenged for a number of years until last year.

## The (un)intended consequences of living together – why you should have a valid Will...*continued*

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The court “*equalised up*” and extended the benefit to opposite sex partners instead of depriving same sex partners of the benefit to inherit intestate.

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### The *Bwanya* case

The recent case, as introduced in the beginning of this article, *Bwanya v Master of the High Court, Cape Town and Others* (20357/18) [2020] ZAWCHC 111; 2020 (12) BCLR 1446 (WCC); 2021 (1) SA 138 (WCC) (28 September 2020) renewed focus on the definition of ‘spouse’ in the Intestate Succession Act. This Act deals with the succession of the estate of a person who has died without executing a valid Will, more specifically if survived by a spouse only, the surviving spouse will inherit the entire estate.

Based on the interpretation of the word ‘spouse’ as per the Gory case, if the *Bwanya* case had involved same sex partners, the surviving partner would have qualified to inherit his entire estate. Ms *Bwanya* was, however, disqualified as she was of the opposite sex. Ms *Bwanya* therefore applied to the Western Cape High Court, to have the definition of ‘spouse’ declared unconstitutional. She requested the definition to be extended to include not only same sex permanent life partners but also life partners of the opposite sex.

The court held that a life partnership itself, even in the presence of co-habitation, does not give rise to reciprocal duty of support. The parties must support and maintain each other, agreed contractually or tacitly (to be inferred from the facts). It was clear from the facts that Ms *Bwanya* and the deceased were life partners who undertook reciprocal duties of support. She was being unfairly discriminated against based on her gender and marital status, which violated her dignity as a surviving life partner of the opposite sex.

The High Court declared the definition unconstitutional. Going forward, the definition must be interpreted to further include “*a partner in a permanent opposite sex life partnership in which the partners had undertaken reciprocal duties of support*”.

In a generous approach, the court “*equalised up*” and extended the benefit to opposite sex partners instead of depriving same sex partners of the benefit to inherit intestate.

### Maintenance of Surviving Spouses Act

The definition of ‘spouse’ is also relevant to the Maintenance of Surviving Spouses Act, 1990 which makes provision for a surviving spouse in a marriage (civil or civil union) dissolved by death, to have a claim against the estate of deceased spouse for reasonable maintenance until death or remarriage, subject to their own resources being inadequate.

In the 2005 *Volks v Robinson and Others* (CCT12/04) [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (21 February 2005) case, the Constitutional Court - despite sympathising with the differential treatment between married persons and permanent life partners who live together - rejected the interpretation of the word ‘spouse’ to include an opposite sex life partner for purposes of a claim in terms of the Maintenance of Surviving Spouses Act.

Departing from the flexible approach, the court in the *Bwanya* case applied the same rationale as in the *Robinson* case, and held that the deceased must have had a legal duty to support such a surviving partner by operation of law, and not contract. As unmarried partners, there was no such legal duty and therefore the definition could not be extended.

## The (un)intended consequences of living together – why you should have a valid Will...*continued*

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If you wish to avoid uncertainty and prevent the unintended consequences of such extended interpretations being applied to your estate then the best solution is to execute a professionally drafted Will and update it when necessary.

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### Comment

The *Bwanya* judgment is a conflicting and bittersweet victory for permanent life partners of the opposite sex. They now qualify as intestate heirs but are excluded from claiming maintenance from the estate of a deceased partner. The matter is yet to be confirmed by the Constitutional Court.

There is a general movement of inclusivity in respect of different forms of relationships, irrespective of whether the option exists to formalise such a relationship. The practical difficulty faced by the industry is exactly at which point an unformalized relationship is intended by the parties to attract the rights, duties

and benefits associated with a formalised relationship, deserving of constitutional protection. Based on the modus operandi of the courts and our constitutional dispensation, it is likely that this movement will continue.

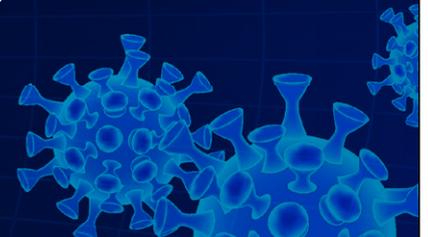
In the meantime, the ramifications especially for married or unmarried individuals who die without a Will but with life partner/s (secret or otherwise) is clear and could be devastating. If you wish to avoid uncertainty and prevent the unintended consequences of such extended interpretations being applied to your estate then the best solution is to execute a professionally drafted Will and update it when necessary.

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*Linda Coffee-Kotze*

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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