

TRUSTS AND ESTATES ALERT

11 March 2013

SAME SEX MARRIAGES

The evolution of our law to the extent that it falls short of the imperatives of the Bill of Rights is dependent on the interaction between judicial decisions to develop the common law or amend statutes and the intervention of the legislature to pass new laws.

The last Alert focused on the impact of Constitutional Court judgments on the re-definition of the family concept and the impact on the law of succession. We now consider the legislature's contribution.

In terms of common law, a traditional definition of marriage is "a legally recognised lifelong voluntary union between one man and one woman to the exclusion of all other persons" (*Ex Parte Inkley and Inkley 1995 3 SA 528 (C) at 553-536*).

The Marriage Act, No 25 of 1961 as amended, regulates the formalities and consequences of marriage and was formulated on the assumption that the common law definition applied only to opposite sex marriages.

Section 3(1) of the Marriages Act reads "in solemnising any marriage, any marriage officer designated under s3 shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:

"do you, AB, declare that as far as you know there is no lawful impediment to your proposed marriage to CD here present and that you call all here present to witness that you take CD as your lawful wife (or husband)"

In the light of recent constitutional developments in South Africa, this definition has been found to be wanting, particularly with regards same sex life partnerships and unions based on religious tenets, customary practices and polygamy. In *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs 2006 3 BCLR 355 (CC)* and *Minister of Home Affairs v Fourie 2006 (1) 524 (CC)*, the Marriage Act as well as the common law definitions were challenged on the basis that the common law definition of marriage was unconstitutional and invalid to the extent that it does not permit same sex couples to enjoy the same status, benefits and responsibilities afforded to heterosexual couples.

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The court unanimously agreed that the omission from the Marriages Act, after the words 'or husband' of the words 'or spouse', was inconsistent with the Constitution.

The order was suspended for 12 months from the date of the judgment allowing Parliament until 1 December 2006 to enact remedial legislation. If Parliament failed to do so, s30(1) would automatically be amended to read as including 'or spouse' after the word 'or husband'.

As it transpires the Civil Union Act, No 17 of 2006 was passed by the National Assembly on 14 November 2006 with 229 votes to 41. It was signed by the Deputy President (acting on behalf of the President) on 29 November 2006 and was promulgated in the Government Gazette No. 29441. It came into effect on 30 November 2006 within the time period allowed by the aforementioned judgment.

Interestingly, the judgment in *Gory v Kolver 2007 (4) SA 97 (CC)* had extended the definition of spouse in the Intestate Succession Act, No 81 of 1987 to read "...or partner in a same sex partnership in which the parties have undertaken reciprocal duties of support", just some seven days before the promulgation of the Act.

The Act provides for the solemnisation of civil unions by way of marriage or civil partnership and sets out the legal consequences of a civil union.

A civil union is defined as the voluntary union of two persons who are 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedure in the Civil Union Act to the exclusion of all others. In simple terms, the Act legalises same sex marriages through a parallel Act to the Marriages Act.

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The legal consequences of a marriage concluded under the Marriage Act also apply to a civil union. With the exception of the Marriage Act and the Customary Marriage Act, any reference to a marriage in any other law, including the common law, includes a civil union partner, husband, wife or spouse.

We will now briefly consider the application and some of the implications of these laws within the context of the law of succession.

In respect of any estate planning exercise by prospective partners, the provision of the Matrimonial Property Act, No 88 of 1984 provides the parties to a civil union the mechanism to consider the consequences of their marriages *inter partes* and in respect of third parties, by either entering into an ante-nuptial contract with or without the accrual regime or a marriage in community of property.

On the death of either party, the surviving civil union partner will, if the deceased should have died without a valid Will, be entitled to a spousal share of the inheritance in terms of the Intestate Succession Act.

Should the surviving partner has inadequate funds of their own and/or receives inadequate benefits as a result of the death of their partner from whatever source, they are entitled to lodge a claim against the estate of the surviving partner in terms of the Maintenance of Surviving Spouses Act, No 27 of 1992.

Any inheritance received by a surviving partner will not be subject to estate duty as a result of the spousal exemption of s4(q) of the Estate Duty Act, No 45 of 1955, nor will any capital gains tax be payable on the death of the first-dying partner pursuant to the roll-over provisions of paragraph 67 of the Eighth Schedule of the Income Tax Act, No 58 of 1962.

The Administration of Estates Act, No 66 of 1965 has some six sections where specific obligations exist or rights created for so-called spouses, which will find application for civil union partners.

In respect of the extension of rights of partners in permanent relationships (whether opposite or same sex), often known as domestic partners, the clauses making provisions for registered and unregistered domestic partnerships that were included in the Bill that preceded this Act (Civil Union Bill B 26-2006), were not carried through and the legal position in respect of succession for these individuals was put on hold and thus largely remains vulnerable.

To the extent that the ad hoc judicial extension granted in the *Gory* judgment still stands, an anomaly now exists as to the rights of opposite and same sex partners who have not formalised their relationship.

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