



The Law and Cohabitation

An interesting look at common law marriage. By **Debi Godwin**, Director - Independent Executor & Trust.

Cohabitation, also referred to as a common law marriage, living together or a domestic partnership, is not recognised as a legal relationship by South African law. There is no law that regulates the rights of parties in a cohabitation relationship.

Cohabitation generally refers to people who, regardless of gender, live together without being validly married to each other. Put simply, men and women living together do not have the rights and duties married couples have. This is the case irrespective of the duration of the relationship. Contrary to popular belief, the assumption that if you stay with your partner for a certain amount of time a common law marriage comes into existence whereby you will obtain certain benefits is incorrect. In South Africa, cohabitation has become more common over the past few years and the number of cohabitants increases by almost 100% each year.

Unlike marriage, which is regulated by specific laws that protect the individuals in the relationship, cohabitation offers no such comfort. For example, when a cohabitant dies without a valid will, their partner has no right to inherit under the Intestate Succession Act. A cohabitant can also not rely on the provisions of the Maintenance of Surviving Spouses Act to secure maintenance on the death of a partner. There is no obligation on cohabitants to maintain each other and they have no enforceable right to claim maintenance.

The law, as it stands, is unsatisfactory. Fortunately, the South African law on cohabitation may soon be rectified by the draft Domestic Partnerships Bill that was published in January 2008. Until the Bill is adopted into legislation, however, the status of cohabitants in South Africa will remain significantly different from spouses in a marriage and partners in a civil union.

Cohabitation agreements

It is becoming more common for partners in a

cohabitation relationship to draw up a contract. Life partners are permitted to enter into a contract similar to an antenuptial contract that regulates their respective obligations during the subsistence of their union and the consequences of the termination thereof. Such agreements are referred to as **cohabitation contracts or domestic partnership agreements**. Such an agreement will usually contain regulations regarding finances during the existence of the cohabitation relationship and deal with the division of property, goods and assets upon its termination.

When the relationship ends - Claiming back

As no reciprocal duty of support between partners in a domestic partnership exists, there is no enforceable right to claim maintenance, either during or upon termination by death or otherwise of the relationship, unless maintenance is regulated in a cohabitation agreement. There is also no action for claiming damages in the event of the unlawful death of a partner.

There is no law that allows for a person's pension assets to be transferred in a cohabitation partnership. A cohabitation agreement will have no effect either, as it would not be enforceable against the pension fund. Even those who are able to prove the existence of a universal partnership and a joint estate cannot share in their partner's pension assets on termination of the relationship.

In the absence of a cohabitation agreement or a proven universal partnership, private property acquired by the cohabitants prior to their relationship belongs to the partner who originally acquired it and no community of property can be established. It therefore follows that a cohabitant who is not the owner of the property has no special right to occupy the common home. ■

(with reference to: article by Bertrus Peller and Associates; FISA Focus article by Charles Evison of Legacy Fiduciary Services)



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