The constitutional implications of the evolving "family unit" concept in the law of intestate succession

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Abstract

The family unit has been continuously developed for the purposes of intestate succession law. Initially, a "family unit" comprised of a couple married in terms of the *Mariage Act* 25 of 1961 and their biological children. The terms "spouse", "descendant" and "parent" in intestate succession law have been continuously developed to include persons other than married spouses and their biological children. The enactment of the *Constitution* and the recognition of the rights to equality, human dignity, culture, religion and the best interest of children demanded significant changes to the terms "spouse", "descendant" and "parent" under the *Intestate Succession Act* 81 of 1987.

In terms of the common law, the term "spouse" for the purposes of intestate succession has been developed to include same-sex partners and persons who underwent a sex-change operation. In terms of customary law, the term "spouse" includes spouses who concluded a valid customary law marriage. Additionally, women who concluded seed-raiser agreements and women in woman-to-woman marriages are also included in the intestate succession law term "spouse". Persons who entered into Muslim and Hindu marriages are also included in the term "spouse" for the purposes of intestate succession. Life partners in permanent life-partnerships resembling marriages have also been included in the term "spouse".

Currently, under consideration is the *Marriage Bill* which aims to recognise all marriages, including marriages concluded in terms of the *Marriage Act*, civil unions concluded in terms of the *Civil Union Act*, marriages concluded in terms of customary law and marriages concluded in terms of a religion, under one act. If enacted, the *Marriage Bill* may influence the term "spouse" by recognising persons married in terms of the *Marriage Bill* under the *Intestate Succession Act*.

Excluded from the term "spouse" is persons in life partnerships where their partner is in a valid marriage or civil union concluded in terms of the *Marriage Act* 25 of 1961, the *Civil Union Act* 17 of 2006 and the *Recognition of Customary Marriages Act* 120 of 1998, and, presumably, partners in polygamous life partnerships.

The terms "descendant" and "parent" were extended to include unmarried fathers as "parents" and their biological children as their "descendants". Additionally, children adopted in terms of the *Children's Act* 38 of 2005 and their adoptive parents also qualify as "descendants" and "parents" in terms of the *Intestate Succession Act* 81 of 1987. Additionally, commissioning parents in surrogacy agreements have also been included as "parents" in terms of intestate succession law, and children born from surrogacy agreements qualify as "descendants".

Beneficiaries for artificial insemination are also "parents" in terms of the *Intestate Succession Act* 81 of 1987, while donors are specifically excluded. Same-sex partners also qualify as "parents" in terms of the *Intestate Succession Act* 81 of 1987. Persons who acquired parental rights and responsibilities in terms of the *Children's Act* 38 of 2005 have also been recognised as "parents" for the purposes of intestate succession. Children adopted in terms of customary law ceremonies have also been included in the term "descendant", and their adoptive parents in the term "parent" by the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009. Excluded from the terms "descendant" and "parent" are children informally adopted and their parents, who have accepted children, other than their biological children as their own.

This study explores the development of the terms "spouse", "descendant" and "parent" in the *Intestate Succession Act* 81 of 1987 in terms of the common law, customary law, Muslim law and Hind law. This study also examines who is excluded from the terms "spouse", "descendant" and "parent" in the *Intestate Succession Act* 81 of 1987. Legislation that could provide further development of the terms "spouse", "descendant" and "parent" is also discussed. Additionally, this study provides recommendations for the further development of the terms "spouse", "descendant" and "parent".

Keywords

Family unit; intestate succession law; spouse; descendant; parent; common law marriage; customary law marriage; Muslim law; Hindu law; adoption; artificial insemination; surrogacy agreements; unmarried parents

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List of Abbreviations

BAA	Black Administration Act 38 of 20054
Children's Act	Children's Act 38 of 2005
CILSA	Comparative and International Law Journal of Southern Africa
Civil Union Act	Civil Union Act 17 of 2006
Domestic Partnerships Bill	Gen Not 36 in GG 30663 of 14 January 2008
ISA	Intestate Succession Act 81 of 1987
Marriage Act	Marriage Act 25 of 1961
Muslim Marriages Bill	Gen Not 37 of GG 33946 of 21 January 2011
MSSA	Maintenance of Surviving Spouses Act 27 of 1990
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
PELJ	Potchefstroom Electronic Law Journal
RCLSA	Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009
RCMA	Recognition of Customary Marriages Act 120 of 1998
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SAPL	South African Public Law
Stell LR	Stellenbosch Law Review

THRHR	Tydskrif vir die Hedendaagse Romeins-Holandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

Chapter 1: Introduction

1.1 Problem statement and definition of concepts

South African families are diverse; consequently no concise definition for the concept "family unit" can be offered.[1] For instance, families may consist of married persons and their biological children; families may include children from a previous marriage and/or distant relatives such as grandparents, aunts and uncles; or families may be centred around permanent life partnerships.[2] Married persons may refer to individuals who are married in terms of common law, customary law or religious tradition.[3] Life partnerships refer to unmarried partners in a relationship similar to a marriage.[4] Despite the lack of a definition, the "family unit" has nevertheless been recognised as an institution of "vital importance" to society.[5]

Considering the importance of the "family unit" in society, legal regulation of certain aspects pertaining to family life is necessary. The "family unit" fulfils a social function by demanding, both socially and legally, support between family members and provides a basic family structure for raising children.[6] Legal regulation of aspects of family life ensures the protection of vulnerable family members, such as women and

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1 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) paras 31-32; *QG v CS* 2021 JDR 1212 (GP) paras 53-54; Barratt and Domingo "Introduction" 127; Barratt and Domingo "Parent and Child" 150; Boniface 2015 *Scientific Cooperations International Journal of Law and Politics* 6; Bonthuys 2002 *SALJ* 752; Clark and Van Heerden 2024 *SALJ* 467; De Vos 2004 *SAJHR* 193; Lind 1995 *SALJ* 482, 498-499; Louw 2005 *Journal of Homosexuality* 151; Mosikatsana 1996 *SAJHR* 549; Robinson 2005 *Obiter* 500; Sachs 1990 *Agenda* 45; Williams 2004 *SAJHR* 44.

2 Barratt and Domingo "Introduction" 127-129; Barratt and Domingo "Parent and Child" 150; Bekker 1991 *Acta Juridica* 2; Boniface 2015 *Scientific Cooperations International Journal of Law and Politics* 1-2; Bonthuys 2018 *PELJ* 27; Heaton "Introduction" 1; Lind 1995 *SALJ* 482; Sachs 1990 *Agenda* 45-46; Ziehl 1997 *African Sociological Review* 44.

3 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 32; Boniface 2015 *Scientific Cooperations International Journal of Law and Politics* 2; De Vos 2004 *SAJHR* 191-192, 195; De Waal 1997 *Stell LR* 164; Heaton "Introduction" 1; Lind 1995 *SALJ* 482; Mosikatsana 1996 *SAJHR* 551; Sachs 1990 *Agenda* 45. See chapters 2-4 of this study for a discussion of common law marriages, customary law marriages and religious marriages.

4 Barratt 2015 *Stell LR* 113; Goldblatt 2003 *SALJ* 611; Heaton and Roos *Family and Succession Law in South Africa* 124; Madzika 2020 *De Jure* 396. See Chapter 5 of this study for a discussion of life partnerships.

5 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 30; De Vos 2004 *SAJHR* 193; Ferreira 2025 *THRHR* 198; Mosikatsana 1996 *SAJHR* 550; Williams 2004 *SAJHR* 36.

6 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 31; Mosikatsana 1996 *SAJHR* 550; Reddy 2006 *Agenda* 153; Williams 2004 *SAJHR* 36.

children.[7] The legal regulation of the "family unit" is complicated by the above-mentioned lack of a precise definition of the "family unit".[8]

Accordingly, the concept of the "family unit" is of considerable importance in South African law, particularly in the context of this study that focuses on the law of intestate succession. The law of intestate succession directs to whom a deceased person's estate devolves and the portion of the estate the person is entitled to if a person dies intestate.[9] A person dies intestate if *inter alia* they leave no valid will,[10] leave a will that cannot be implemented, leave a will that contains a condition that cannot be met or if the will has been revoked during the lifetime of the deceased.[11] Currently, the *Intestate Succession Act*[12] (hereafter the *ISA*) and the *Reform of Customary Law of Succession and Regulation of Related Matters Act*[13] (hereafter the *RCLSA*) regulates the South African law of intestate succession.[14]

The *ISA* and the *RCLSA* bestow the right of intestate succession on particular and often vulnerable dependent members of the "family unit" of a deceased person.[15] For this study, only the intestate inheritance rights of a "spouse",[16] "descendant" and "parent"[17] is considered. The *ISA* however fails to define the terms "spouse", "descendant" and "parent".[18] As a result, the common law definition of the "family

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7 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 30; De Vos 2004 *SAJHR* 193; Goldblatt 2003 *SALJ* 611; Mosikatsana 1996 *SAJHR* 550; Williams 2004 *SAJHR* 36.

8 Barratt and Domingo "Introduction" 126; Mosikatsana 1996 *SAJHR* 549.

9 De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 20; De Waal and Schoeman-Malan *Erfreg* 3, 14; Gildenhuys "Wills and Succession" 253; Himonga and Nhlapo *African Customary Law* 246; Osman and Rautenbach "Law of Succession and Inheritance" 193.

10 See the *Wills Act* 7 of 1983 for the requirements for executing a valid will.

11 De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 20; Hofmeyr and Paleker *The Law of Succession in South Africa* 4; Heaton and Roos *Family and Succession Law in South Africa* 196; Wood-Bodley 2022 *SALJ* 768.

12 81 of 1987. See paras 2.2.1, 2.3.1, 3.2 and 3.3 of this study for a discussion of the relevant rules of intestate succession contained in the *ISA*.

13 11 of 2009. See paras 3.2 and 3.3 for a discussion of the relevant provisions in the *RCLSA*.

14 Heaton and Roos *Family and Succession Law in South Africa* 197; Hofmeyr and Paleker *The Law of Succession in South Africa* 4; Rautenbach 2014 *Acta Juridica* 134.

15 De Waal 1997 *Stell LR* 164-165; De Waal and Schoeman-Malan *Erfreg* 2; Du Toit 2009 *SALJ* 464; Meyerson 2010 *Constitutional Court Review* 302; Smith 2010 *PELJ* 270; Smith 2016 *SALJ* 290.

16 See paras 2.2, 3.2, 4.2 and 5.1-5.2 of this study for a comprehensive discussion of the development of the term "spouse".

17 See paras 2.3, 3.3, 4.3 and 5.3 of this study for a comprehensive discussion of the development of the terms "descendant" and "parent".

18 Du Toit 2009 *SALJ* 464; Du Toit 2021 *Journal of Civil Law Studies* 370; Hofmeyr and Paleker *The Law of Succession in South Africa* 845; Rautenbach "State Intervention in the Customary Law of

unit" is relied upon to provide meaning to the terms "spouse", "descendant" and "parent".[19] The common law, that comprises of Roman-Dutch common law, was incorporated into South African law during the period of colonisation, along with certain aspects of English law.[20] The South African common law has been continuously amended by legislation and case law.[21] Where this study refers to common law, unless stated otherwise, it means Roman-Dutch common law as amended by legislation, excluding customary law.[22]

The sole legally recognised "family unit" in terms of the common law consisted of a man and a woman in a legal common law marriage[23] and their biological children born from the marriage.[24] Applying the original limited common law definition of the "family unit" to the terms "spouse", "descendant" and "parent" in intestate succession law, certain persons were excluded from the terms "spouse", "descendant" and "parent" with regard to intestate succession law.

Excluded from the term "spouse"[25] were same-sex partners,[26] unmarried opposite-sex partners,[27] and spouses in customary law[28] and religious[29] marriages (irrespective of

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Succession in South Africa" 48. The definition of "spouse", "descendant" and "parent" in the *RCLSA* is discussed below and paras 3.2-3.3 of this study.

19 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 118; Hofmeyr and Paleker *The Law of Succession in South Africa* 845.

20 Heaton and Roos *Family and Succession Law in South Africa* 25; Rautenbach 2008 *Journal of Comparative Law* 119; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 83; Rautenbach and Tshivhase "The Phenomenon of Legal Pluralism" 5; Schoeman-Malan 2007 *PELJ* 107-108.

21 See Chapter 2 of this study for a discussion of certain developments of the common law.

22 See Chapter 2 of this study for a comprehensive discussion of the "family unit" in terms of the common law.

23 Where this study refers to common law marriage, it means a marriage concluded in terms of the *Marriage Act* 25 of 1961, which amended the common law marriage. See para 2.2 of this study.

24 *Bronn v Fritz Bronn's Executors* 1860 3 Searle 313 (CSC) 318, 322; *Ismail v Ismail* 1983 1 SA 1006 (A) 1019H; *QG v CS* 2021 JDR 1212 (GP) para 53; *Seedat's Executors v The Master* 1917 AD 302 309; Barratt and Domingo "Introduction" 128; Bekker 1991 *Acta Juridica* 2-3; De Vos 2004 *SAJHR* 188; De Waal 1997 *Stell LR* 165; Du Toit 2021 *Journal of Civil Law Studies* 370; Lind 1995 *SALJ* 482; Reddy 2006 *Agenda* 154; Ziehl 1997 *African Sociological Review* 43-44, 48, 55.

25 Despite being recognised as a "spouse" for various areas of the law, spouses initially had no intestate succession rights. See para 2.2.1 for the recognition of spouses in intestate succession law.

26 See paras 2.2.2 and 5.2.1 of this study.

27 See para 5.2.2 of this study.

28 See para 3.2 of this study.

29 For this study, only marriages in terms of Muslim and Hindu law are considered, since intestate succession rights have been explicitly developed for spouses in Muslim and Hindu marriages. See para 4.2.3 of this study.

whether the marriages were monogamous or polygynous).[30] Initially, the terms "descendant" and "parent" excluded adopted children and adoptive parents, who were only allowed to inherit from their natural parents and descendants.[31] An unmarried father[32] was also initially excluded from the term "parent", along with same-sex partners,[33] commissioning parents in surrogacy agreements,[34] donors for artificial insemination[35] and persons who have accepted parental rights and responsibilities in respect of a child.[36]

The original common law concept of the "family unit" and specifically the terms "spouse", "descendant" and "parent" have been continuously subject to development, either by legislation or court decisions, especially in reaction to the enactment of the *Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the *Constitution*).[37] Important to the development of the concept of the "family unit" and the terms "spouse", "descendant" and "parent" has been and still is public policy. Development of the terms "spouse", "descendant" and "parent" is predominantly justified by taking public policy considerations into account.[38]

Prior to the introduction of the *Constitution*, public policy was determined with reference to public welfare and by what was regarded by the community as a general sense of justice.[39] Public policy was largely informed by state policy infused with Christian values, which adopted the common law understanding of the concept of the

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30 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 32; De Vos 2004 *SAJHR* 190; De Waal 1997 *Stell LR* 173; Du Toit 2009 *SALJ* 465; Kruuse 2017 *The International Survey of Family Law* 343; Lind 1995 *SALJ* 461, 491. Polygyny refers to the marriage of a man to more than one woman, whereas polyandry refers to the marriage of a woman to more than one man. Polygamous relationships may refer to either a man who has more than one wife or a woman who has more than one husband. Bekker 1991 *Acta Juridica* 3; Bekker and Boonzaaier 2007 *De Jure* 285; Himonga and Nhlapo *African Customary Law* 169; Osman 2021 *PELJ* 5-6; Van Schalkwyk 2003 *De Jure* 292-293. See paras 3.2 and 4.2 of this study.

31 See para 2.3.3 of this study.

32 See para 2.3.2 of this study.

33 See para 2.3.6 of this study.

34 See para 2.3.4 of this study.

35 See para 2.3.5 of this study.

36 See para 2.3.7 of this study.

37 See chapters 2-5 of this study.

38 See chapters 2-5 of this study.

39 *Ismail v Ismail* 1983 1 SA 1006 (A) 1013F; *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 2 SA 906 (A) 913F-G; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 8C-D.

"family unit" and justified the exclusion of the above-mentioned persons from the "family unit".[40] The *Constitution* introduced a new canvas of rights and values that inform public policy and tasked courts to develop all laws in line with the *Constitution*.[41] Freed from the shackles of the narrow common law understanding of the "family unit", a wider, more inclusive understanding of the concept of the "family unit" now underlies the concept of "spouse", "descendant" and "parent" in intestate succession law.[42]

However, despite the early identification of the possible need for changes to the law of intestate succession to encompass a wider "family unit", a comprehensive overhaul of the law of intestate succession has not been realised.[43] Instead, changes to the law of intestate succession have been implemented on a piecemeal basis. From the inception of the *Constitution*, the concept of the "family unit" has been continuously evolving to extend the terms "spouse", "descendant" and "parent".[44] The primary motivation for including formally excluded persons is the need to protect vulnerable members of society.[45] To justify developments, the existence of a reciprocal duty of support, a commitment to invest in a relationship and a joint household are among the chief factors considered by the courts.[46]

Prior to the enactment of the *Constitution*, the development of the terms "spouse", "descendant" and "parent" in intestate succession law in terms of common law was largely left to the legislature. After the adoption of the *Constitution*, the development of the terms "spouse", "descendant" and "parent" was predominantly initiated by the courts. The *Constitution* inspired the inclusion of same-sex partners in the term "spouse".[47] Developments of the terms "descendant" and "parent" before the

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40 *Ismail v Ismail* 1983 1 SA 1006 (A) 1013F; *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 2 SA 906 (A) 913G-H; Moosa 1996 *Yearbook of Islamic and Middle Eastern Law* 130.

41 *Minister of Education v Syfrets Trust Ltd* 2006 4 SA 205 (C) para 47; Rautenbach 2000 *Recht van de Islam* 55; Smith and Heaton 2012 *THRHR* 478. See para 1.1.3 of this study.

42 Lind 1995 *SALJ* 483-484.

43 See for example where De Waal wrote as far back as 1997, "(i)f the law is to reflect social realities, there is a strong case to be made in favour of the reform of the law of intestate succession". De Waal 1997 *Stell LR* 170.

44 De Waal and Schoeman-Malan *Erfreg* 2.

45 See chapters 2-5 of this study.

46 Barratt and Domingo "Introduction" 127. See chapters 2-5 of this study.

47 Barratt and Domingo "Introduction" 129; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 21. See paras 2.2.2-2.2.3 of this study.

enactment of the *Constitution* included the recognition of adopted children and adoptive parents and unmarried fathers under the terms "descendant" and "parent".[48] Following the enactment of the *Children's Act* (hereafter the *Children's Act*),[49] the *Children's Act* regulates adoptions.[50] The *Children's Act* defines "adopted child" as "a child adopted by a person in terms of law" and "adoptive parent" as "a person who has adopted a child in terms of any law".[51]

Additionally, commissioning parents were included in the term "parent".[52] The *Children's Act* defines a "commissioning parent" as "a person who enters into a surrogate motherhood agreement with a surrogate mother".[53] For artificial insemination, parentage is determined by the *Children's Act*.[54] The *Children's Act* defines "artificial fertilisation" as "the introduction, by means other than natural means, of a male gamete[55] into the internal reproductive organs of a female person for the purpose of human reproduction".[56] Persons who exercised parental rights and responsibilities pertaining to a child have also been recognised as a "parent".[57]

The *Children's Act* specifically excludes the biological father from the term "parent" if the child was conceived by rape or incest, and likewise the donor of gametes for the purpose of artificial insemination and a parent who had their parental rights and responsibilities terminated.[58]

As indicated above, also excluded from the "family unit" were families living in terms of customary law. Limited recognition of "family units" constructed under customary law was granted by the *Black Administration Act*[59] (hereafter referred to as the *BAA*).

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48 Sections 231, 242 of the *Children's Act* 38 of 2005; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 21; Wood-Bodley 2022 *SALJ* 768. See paras 2.3.2-2.3.3 of this study.

49 38 of 2005.

50 Section 1 of the *Children's Act*.

51 Section 1 of the *Children's Act*.

52 De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 21. See paras 2.3.4 and 2.3.6 of this study.

53 Section 1 of the *Children's Act*.

54 De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 21. See para 2.3.5 of this study.

55 Gamete refers to "either of the two generative cells essential for human reproduction". S1 of the *Children's Act*.

56 Section 1 of the *Children's Act*.

57 See para 2.3.7 of this study.

58 Section 1 of the *Children's Act*.

59 38 of 1927. See para 3.2 of this study.

Critical to customary intestate succession law, the *BAA* captured the customary law principle of male primogeniture.[60] In terms of the principle of male primogeniture, a single male heir is identified to the exclusion of females and other male family members.[61]

Notably, the *Constitution* fully recognised customary law.[62] In consideration of the rights contained in the *Constitution*, the rule of male primogeniture was declared unconstitutional, and the customary law of succession is now governed by the *ISA* as modified by the *RCLSA*.[63] The rules of intestate succession contained in the *ISA* were made applicable by the *RCLSA* to the estates of deceased persons who lived in terms of customary law.[64] Unlike the *ISA*, the *RCLSA* provides definitions of the terms "spouse" and "descendant".[65] The definitions of the terms "spouse" and "descendant" in the *RCLSA* are, however, problematic and may benefit from further development.[66]

Spouses in customary marriages, concluded in terms of the *Recognition of Customary Marriages Act*[67] (hereafter referred to as the *RCMA*), including monogamous and polygynous marriages, are now explicitly included in the term "spouse" of the *RCLSA*.[68] Additionally, the *RCLSA* recognises as a spouse a woman who entered into a union with the deceased to procure children for the deceased, and a woman who was in a woman-to-woman marriage with a deceased woman.[69] For the terms "descendant"

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60 Himonga and Nhlapo *African Customary Law* 263; Rautenbach, Himonga and Ntlama-Makhanya "Recognition, Application, and Ascertainment of Customary Law" 40. See para 3.2 of this study.

61 De Waal 1997 *Stell LR* 174. See para 3.3.1 of this study.

62 Bonthuys 2007 *SAJHR* 527. See para 3.2 of this study.

63 See paras 3.2-3.3 of this study.

64 Chikaonda 2020 *Journal of Comparative Law in Africa* 84; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 21, 24; De Waal and Schoeman-Malan *Erfreg* 20; Du Toit 2009 *SALJ* 467; Himonga 2005 *Acta Juridica* 93; Himonga 2017 *Southern African Public Law* 5; Hofmeyr and Paleker *The Law of Succession in South Africa* 207, 839; Jamneck 2014 *PELJ* 977; Maunatlala and Maimela 2020 *De Jure* 37; Mochela and Smith 2020 *TSAR* 484; Ntlama 2009 *Stell LR* 344; Osman "The Communal Nature of South African Customary Law of Succession" 69; Osman and Baase 2022 *SAJHR* 19; Osman and Rautenbach "Law of Succession and Inheritance" 196; Pienaar 2006 *SAJHR* 111; Rautenbach 2008 *Journal of Comparative Law* 127; Rautenbach 2014 *Acta Juridica* 137, 139; Rautenbach "State Intervention in the Customary law of Succession in South Africa" 31; Rautenbach and Meyer 2012 *TSAR* 151; Smith 2016 *SAJHR* 137; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 373. See para 3.3.1 of this study.

65 See paras 3.2-3.3 of this study.

66 See paras 3.2-3.3 of this study.

67 120 of 1998.

68 See para 3.2 of this study.

69 Sections 2(2)(b)-(c) of the *RCLSA*; Himonga and Nhlapo *African Customary Law* 268; Rautenbach "State Intervention in the Customary law of Succession in South Africa" 48; Rautenbach and Meyer

and "parent", children adopted through customary law procedures are considered "descendants" and adoptive parents who adopted children through customary law are considered "parents".[70]

Unlike "family units" governed by customary and common law, "family units" living in accordance with religious laws, such as Hindu and Muslim law, do not enjoy extensive legislative recognition, despite the constitutional recognition of the right to religion.[71] As a result, spouses from Muslim and Hindu marriages needed to resort to the aid of the courts to be included within the ambit of the *ISA*.[72] Presently, the *Marriage Bill*[73] (hereafter referred to as the *Marriage Bill*) is under consideration. If enacted, all marriages in terms of the common law, customary law and religious marriages will be regulated by a single statute.

Like religious marriages, life partnerships are not comprehensively governed by legislation.[74] Where individuals are in a permanent relationship without the relationship being formalised by a marriage, such relationships are referred to as life partnerships, domestic partnerships or cohabitation.[75] Life partners, of the same or opposite sex, similar to spouses in Muslim and Hindu law marriages, had to obtain inclusion as "spouses" in terms of the *ISA* from the courts.[76]

Considering the above, this study critically evaluates the development of the concept of the "family unit" with specific focus, for the purpose of intestate succession, on the

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2012 *TSAR* 152; Sloth-Nielsen and van Heerden 2014 *International Journal of Law, Policy and the Family* 108. See paras 3.2.3-3.2.4 of this study.

70 See para 3.3.2 of this study.

71 See para 1.1.3 of this study for a discussion of the right to religion. See paras 4.2-4.3 for a discussion of a discussion of the recognition of Muslim and Hindu spouses as "spouses" in terms of the *ISA*.

72 De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 21. See paras 4.2 and 4.3 of this study.

73 Gen Not 3648 in GG 48914 of 7 July 2023. See para 6.4 of this study for a discussion of the *Marriage Bill*.

74 See paras 5.1-5.2 of this study.

75 Barratt 2015 *Stell LR* 113; Goldblatt 2003 *SALJ* 611; Heaton "Life Partnerships" 303; Heaton and Roos *Family and Succession Law in South Africa* 124; Madzika 2020 *De Jure* 396; Meyerson 2010 *Constitutional Court Review* 295; Mochela and Smith 2020 *TSAR* 481, 699; Monareng and Zounmenou 2007 *Agenda* 122; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 161. This study uses the term "life partnership", in accordance with the preference of "life partnership" in various court decisions. See paras 5.2-5.3 of this study.

76 See paras 5.2-5.3 of this study for a discussion of the inclusion of life partnerships in the term "spouse" in the *ISA*.

development of the terms "spouse", "descendant" and "parent". This study analyses the development of the terms "spouse", "descendant" or "parent" in the common law,[77] customary law,[78] Muslim and Hindu law[79] and life partnerships.[80] Additionally, this study identifies how the concepts "spouse", "descendant" and "parent" could be further developed in reaction to constitutional considerations.[81]

It is evident that the evaluation of the constitutional development of the terms "spouse", "descendant" and "parent" is critical to this study. Therefore, in this chapter the role and duty of courts to develop law in line with the *Constitution* is explained.[82] Additionally, in this chapter the remedies available to courts when dealing with law that is unconstitutional and invalid in terms of the *Constitution* are explained.[83] Furthermore, the rights protected by the *Constitution* justifying the development of the terms "spouse", "descendant" and "parent" for intestate succession law are identified and discussed in this chapter.[84] Finally, the possible justifiable limitation of the rights is highlighted.[85]

The discussion in paragraphs 1.1.1 to 1.1.4 provides an overview of the relevant constitutional provisions that the courts have employed to develop the terms "spouse", "descendant" and "parent". An in-depth explanation of the constitutional development is provided in chapters 2-5, where the court judgments developing the terms "spouse", "descendant" and "parent" are discussed.

77 See Chapter 2 of this study.
78 See Chapter 3 of this study.
79 See Chapter 4 of this study.
80 See Chapter 5 of this study.
81 See Chapter 6 of this study.
82 See para 1.1.1 of this study.
83 See para 1.1.2 of this study.
84 See para 1.1.3 of this study.
85 See para 1.1.4 of this study.

1.1.1 The duty of the courts towards constitutional development

The primary obligation to advance human rights rests on the state.[86] Where the state, either through legislation or lack of conduct, fails to give effect to or infringes a right contained in the Bill of Rights, the courts may be requested to intervene.[87]

When a court is called upon to adjudicate a matter pertaining to a right in the Bill of Rights, the court must advance the fundamental values and rights based on human dignity, equality and freedom. However, the rights and freedoms granted in terms of common law, customary law or legislation remain applicable so long as such laws are consistent with the Bill of Rights.[88] A court must apply and develop common law in line with the *Constitution* where legislation does not adequately protect the relevant right.[89] Customary law must also be applied to the extent that it is consistent with the *Constitution* and applicable legislation regulating customary law.[90]

In exercising their duty to develop law in line with the *Constitution*, various remedies are available to courts to cure a constitutional defect. In paragraph 1.1.2 the constitutional remedies available to the courts are briefly set out.

1.1.2 Constitutional remedies

Where legislation is found to be deficient in protecting human rights, various remedies are available to a court to remedy the deficiency. A process of reading-down or reading-in may be followed to ensure that the legislation complies with the rights

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86 Section 7(2) of the *Constitution*.

87 Section 39(1)(a) of the *Constitution*; Albertyn and Goldblatt 1998 *SAJHR* 254; Robinson 2005 *Obiter* 492.

88 Section 39(3) of the *Constitution*; *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 41; Du Toit 2014 *Ars Aequi* 284; Ntlama 2009 *Stell LR* 336.

89 Sections 8(2), 8(3)(a) of the *Constitution*; *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 41; Bennett 2009 *The American Journal of Comparative Law* 17; Bonthuys 2002 *SALJ* 748; Bonthuys 2018 *PELJ* 3; Du Toit 2014 *Ars Aequi* 284; Goldblatt 2006 *Feminist Legal Studies* 262; Himonga and Bosch 2000 *SALJ* 316; Hofmeyr and Paleker *The Law of Succession in South Africa* 3; Jagwanth 2005 *Acta Juridica* 142; Madzika 2020 *De Jure* 399; Ntlama 2009 *Stell LR* 341; Osman and Baase 2022 *SAJHR* 5, 19; Rautenbach 2000 *Recht van de Islam* 47; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 363; Williams 2004 *SAJHR* 40.

90 Section 211(3) of the *Constitution*; Fishbayn 1999 *International Journal of Law, Policy and the Family* 148; Himonga and Bosch 2000 *SALJ* 313-314, 316; Maunatlala and Maimela 2020 *De Jure* 39; Nhlapo 2017 *SAJHR* 12; Ntlama 2009 *Stell LR* 341; Osman 2019 *PELJ* 3; Schoeman-Malan 2007 *PELJ* 108.

protected by the *Constitution*.[91] Reading-in of words is employed to avoid declaring legislation or part thereof unconstitutional if such reading-in would bring legislation in line with the *Constitution*.[92] Reading-down narrows the scope of a law whereas reading-up refers to a more generous interpretation.[93]

Where legislation is found to be inconsistent with the *Constitution*, such legislation must be declared invalid. [94] Following an order of declaration of invalidity, a court must make any order that is just and equitable.[95] The courts may also develop the common law by extending the protection of common law remedies to ensure that the rights contained in the *Constitution* are protected.[96] Where there is no other remedy available for a particular situation, new constitutional remedies may be created.[97] A court may also award constitutional damages.[98]

The Bill of Rights introduces various rights and demands to ensure that these rights are protected. In paragraph 1.1.3 the rights relevant to the development of the "family unit" is identified. In chapters 2-5 the rights identified in paragraph 1.1.3 are utilised and it is explained how the terms "spouse", "descendant" and "parent" have been interpreted and must be developed to better protect the rights in the Bill of Rights.[99]

1.1.3 Relevant constitutional rights

Despite the importance of the "family unit", the *Constitution* contains no right to family life.[100] To give legal protection to families not recognised under common law,

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91 Bonthuys 2002 *SALJ* 750.
92 Smith 2016 *SAJHR* 134.
93 Smith 2016 *SAJHR* 134.
94 Section 172(1)(a) of the *Constitution*; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC) para 91; Smith 2016 *SAJHR* 134.
95 Section 172(1)(b) of the *Constitution*; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC) paras 91-92.
96 Bonthuys 2002 *SALJ* 722, 750; Jagwanth 2005 *Acta Juridica* 142.
97 Bonthuys 2002 *SALJ* 722.
98 Bonthuys 2002 *SALJ* 722.
99 Sections 7-39 of the *Constitution*.
100 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) paras 28, 36; Boniface 2015 *Scientific Cooperations International Journal of Law and Politics* 7; Bonthuys 2002 *SALJ* 751; De Vos 2004 *SAJHR* 193; Heaton and Roos *Family and Succession Law in South Africa* 29; Kruuse 2017 *The International Survey of Family Law* 344; Manjoo 2004 *International Journal of Legal Information* 276; Scott 2019 *TSAR* 801.

arguments in court have relied on the infringement of other constitutionally protected rights to ensure that "family units" receive the necessary protection.[101]

The rights to equality,[102] human dignity,[103] religion[104] and culture[105] are particularly important in the context of the "family unit" and intestate law of succession.[106] These rights are briefly explained in paragraphs 1.1.3.1-1.1.3.4.

1.1.3.1 The right to equality

The right to equality determines that every individual is equal before the law and "has the right to equal protection and benefit of the law".[107] The right to equality demands that persons must be treated similarly, despite the unique and diverse characteristics they may have.[108]

Sections 9(3) and (4) of the *Constitution* direct that neither the state nor any other person may unfairly discriminate on the grounds of:

> race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[109]

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101 Boniface 2015 *Scientific Cooperations International Journal of Law and Politics* 7; Bonthuys 2002 *SALJ* 751; Heaton and Roos *Family and Succession Law in South Africa* 29; Manjoo 2004 *International Journal of Legal Information* 276.

102 See para 1.1.3.1 of this study.

103 See para 1.1.3.2 of this study.

104 See para 1.1.3.3 of this study.

105 See para 1.1.3.4 of this study.

106 See para 1.1 of this study.

107 Section 9(1) of the *Constitution*; *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) para 19; *Flynn v Farr* 2009 1 SA 584 (C) para 22; *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) paras 4, 75; *MM v MN* 2013 4 SA 415 (CC) para 62; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC) para 10; *VJV v Minister of Social Development* 2023 6 SA 87 (CC) para 40; Amien and Leatt 2014 *Maryland Journal of International Law* 512; Bakker 2009 *THRHR* 394; Ferreira 2025 *THRHR* 217; Heaton and Roos *Family and Succession Law in South Africa* 28; Himonga and Nhlapo *African Customary Law* 62; Jagwanth 2005 *Acta Juridica* 13; Goldblatt 2006 *Feminist Legal Studies* 262; Madzika 2020 *De Jure* 398; Rautenbach "Families and Legal Pluralism in South Africa" 65; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 150; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 325, 331.

108 Maunatlala and Maimela 2020 *De Jure* 44; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 326.

109 Section 9(3) of the *Constitution*; *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 50; *Flynn v Farr* 2009 1 SA 584 (C) para 22; *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) paras 4, 76; *MM v MN* 2013 4 SA 415 (CC) para 63; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC) para 10; Amien and Leatt 2014 *Maryland Journal of International Law* 512; Bakker 2009 *THRHR* 394; Bonthuys 2007 *SAJHR* 528; De Ru 2013 *Fundamina* 232-233; De Vos 2004 *SAJHR* 181; De Vos and Barnard 2007 *SALJ* 798-799; Ferreira 2025 *THRHR* 217; Heaton "Introduction" 3; Heaton and Roos *Family and Succession Law in South Africa* 28; Jagwanth

Discrimination based on one of the grounds mentioned above is presumed unfair unless proven fair.[110] Discrimination may be on one or more of the above-mentioned grounds.[111] Where more than one of the grounds are infringed, the discrimination may be treated as more serious.[112] For this study, race, gender, sex, marital status, sexual orientation, age, religion, belief, culture and birth are raised as grounds of unfair discrimination when interpreting "spouse", "descendant" and "parent".[113]

Equality may be applied substantively or formally.[114] The courts have determined that an enquiry into the right to equality must be a substantive consideration, rather than a formal one.[115] Formal equality is based on achieving equality without consideration of other factors.[116]

Substantive equality focuses on the consequences of discriminatory measures rather than whether there is similar treatment.[117] Substantive equality considers social, political and economic conditions of groups and individuals.[118] Substantive equality

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2005 *Acta Juridica* 133; Kruuse 2014 *International Journal of Law, Policy and the Family* 162; Kult 2001 *Indiana International and Comparative Law Review* 703; Louw 2005 *Journal of Homosexuality* 142; Madzika 2020 *De Jure* 398; Ntlama 2009 *Stell LR* 333; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 150; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 325, 333; Robinson and Swanepoel 2004 *PELJ* 1; Williams 2004 *SAJHR* 40; Wolhuter 1997 *SALJ* 395, 397.

110 Section 9(5) of the *Constitution*; *Flynn v Farr* 2009 1 SA 584 (C) para 22; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC) para 10; Amien and Leatt 2014 *Maryland Journal of International Law* 512; Ferreira 2025 *THRHR* 217; Jagwanth 2005 *Acta Juridica* 133; Maunatlala and Maimela 2020 *De Jure* 44; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 325, 333-334; Wolhuter 1997 *SALJ* 395-396.

111 Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 331.

112 Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 331.

113 See chapters 2-5 of this study.

114 Bilchitz and Judge 2007 *SAJHR* 467; Jagwanth 2005 *Acta Juridica* 132; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 326; Robinson 2005 *Obiter* 493.

115 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 50; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC) para 62; Albertyn and Goldblatt 1998 *SAJHR* 250, 257; Bilchitz and Judge 2007 SAJHR 468; Bonthuys 2002 *SALJ* 777; De Vos 2004 *SAJHR* 184; Pieterse-Spies 2013 *TSAR* 677; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 326.

116 Bilchitz and Judge 2007 *SAJHR* 467; Robinson 2005 *Obiter* 493.

117 De Vos 2000 *SALJ* 19-20; Jagwanth 2005 *Acta Juridica* 133.

118 Albertyn and Goldblatt 1998 *SAJHR* 260; Bilchitz and Judge 2007 *SAJHR* 467; De Vos 2000 *SALJ* 19; De Vos 2004 *SAJHR* 184; Jagwanth 2005 *Acta Juridica* 132; Pieterse-Spies 2013 *TSAR* 677; Robinson 2005 *Obiter* 493; Williams 2004 *SAJHR* 51.

may demand that, to promote the equal worth of all people, differential treatment may be required.[119] For instance, in *Blind SA v Minister of Trade*,[120] the court explained that

> (s)ometimes, for the state to avoid unfair discrimination, it must treat people in the same way or make available the same entitlements. But sometimes what is required of the state is to recognise the differences between persons and to provide different or more favourable treatment to some, so as to secure non-discriminatory outcomes for all. This may appear paradoxical, but it is not…[121]

Apart from the courts' duty to ensure equality, section 9(4) of the *Constitution* demands that legislation must be enacted to prohibit unfair discrimination.[122] The *Promotion of Equality and Prevention of Unfair Discrimination Act*[123] (hereafter referred to as *PEPUDA*) was enacted to ensure that the right to equality is adequately protected.[124] *PEPUDA* tasks the state to develop plans and enact legislation to deal with equality issues.[125] *PEPUDA* also prohibits unfair discrimination in the public and private spheres across all sectors of society.[126]

In order to determine unfair discrimination, the court in *Harksen v Lane* (hereafter the *Harksen* case),[127] set out the test (hereafter referred to as the *Harksen* test) to determine whether the right to equality has been substantially infringed.[128] Although the *Interim Constitution*[129] applied to this case, the *Harksen* test is still employed by the courts.[130]

The first step in the *Harksen* test is to determine whether an act differentiates between "people or categories of people".[131] If there is no differentiation, then there is no

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119 Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 326.

120 *Blind SA v Minister of Trade, Industry and Competition* 2022 JDR 2649 (CC).

121 *Blind SA v Minister of Trade, Industry and Competition* 2022 JDR 2649 (CC) para 68; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 326-327.

122 Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 335.

123 4 of 2000.

124 Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 335.

125 Jagwanth 2005 *Acta Juridica* 146.

126 Meyerson 2010 *Constitutional Court Review* 685.

127 *Harksen v Lane* 1998 1 SA 300 (CC).

128 *Bwanya v Master of the High Court* 2022 3 SA 250 (CC) para 167; Albertyn and Goldblatt 1998 *SAJHR* 256; Kruuse 2014 *International Journal of Law, Policy and the Family* 162; Madzika 2020 *De Jure* 398; Robinson 2005 *Obiter* 493; Robinson and Swanepoel 2004 *PELJ* 16.

129 *Constitution of the Republic of South Africa Act* 200 of 1993.

130 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC) paras 15, 17; Bonthuys 2002 *SALJ* 752; De Ru 2013 *Fundamina* 234.

131 Section 14(2) of *PEPUDA*; *Harksen* case para 43; *Flynn v Farr* 2009 1 SA 584 (C) para 22; Madzika 2020 *De Jure* 399; Pieterse-Spies 2013 *TSAR* 68; Rautenbach and Malherbe *Rautenbach-Malherbe*

violation of the right to equality.[132] If there is differentiation, it must be determined whether there is a rational connection between the differentiation and a legitimate government purpose.[133] If there is no rational connection, the right to equality is infringed and the test need not be further applied.[134] If there is a rational connection between the a legitimate purpose and the identified differentiation, the differentiation might still amount to unfair discrimination.[135]

The second step is to determine whether the differentiation amounts to unfair discrimination.[136] Discrimination is presumed to be unfair if the differentiation is on one of the specified grounds listed in section 9(3) of the *Constitution* set out above.[137] If the discrimination is not related to a specified right, a person must demonstrate that the discrimination has the potential to impair human dignity.[138] Once potential discrimination has been identified, it must be proven that the discrimination did not take place or that the discrimination is not unfair.[139]

The context surrounding the discrimination and whether the differentiation is reasonable and justifiable is considered to determine whether the discrimination is

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Constitutional Law 329, 344; Robinson 2005 *Obiter* 493; Robinson and Swanepoel 2004 *PELJ* 16; Williams 2004 *SAJHR* 49.

132 Madzika 2020 *De Jure* 399; Robinson 2005 *Obiter* 493; Robinson and Swanepoel 2004 *PELJ* 16.

133 *Harksen* case paras 43-44, 54; *Flynn v Farr* 2009 1 SA 584 (C) para 22; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC) para 17; Lind 2005 *Acta Juridica* 125; Madzika 2020 *De Jure* 399; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 344; Robinson 2005 *Obiter* 493; Robinson and Swanepoel 2004 *PELJ* 16; Williams 2004 *SAJHR* 49.

134 *Harksen* case para 44-45, 54; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC) para 17; Robinson 2005 *Obiter* 493; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 344; Robinson and Swanepoel 2004 *PELJ* 16.

135 *Harksen* case paras 43-45, 54; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC) para 17; Jagwanth 2005 *Acta Juridica* 133; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 344; Robinson 2005 *Obiter* 493; Robinson and Swanepoel 2004 *PELJ* 16; Williams 2004 *SAJHR* 49.

136 *Harksen* case paras 46, 54; *Bwanya v Master of the High Court* 2022 3 SA 250 (CC) para 162; Jagwanth 2005 *Acta Juridica* 134; Kruuse 2014 *International Journal of Law, Policy and the Family* 162; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 344; Robinson and Swanepoel 2004 *PELJ* 16.

137 *Harksen* case paras 47, 54; *Flynn v Farr* 2009 1 SA 584 (C) para 22; Kruuse 2014 *International Journal of Law, Policy and the Family* 162; Jagwanth 2005 *Acta Juridica* 134; Lind 2005 *Acta Juridica* 125; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 344-345; Robinson and Swanepoel 2004 *PELJ* 16.

138 *Flynn v Farr* 2009 1 SA 584 (C) para 22; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 344.

139 Section 13 of *PEPUDA*; Lind 2005 *Acta Juridica* 125; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 344.

unfair in a particular case.[140] Additionally, the following factors listed in section 14(3) of *PEPUDA* must be taken into consideration:

> (a) whether the discrimination impairs or is likely to impair human dignity;
> (b) the impact or likely impact of the discrimination on the complainant;
> (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
> (d) the nature and extent of the discrimination;
> (e) whether the discrimination is systemic in nature;
> (f) whether the discrimination has a legitimate purpose;
> (g) whether and to what extent the discrimination achieves its purpose;
> (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
> (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-
> (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
> (ii) accommodate diversity[141]

If the discrimination is not unfair, the right to equality is not violated.[142] If the discrimination is unfair, it has to be tested against the limitation clause.[143]

In this study, the infringement of the right of equality is discussed in matters dealing with the recognition of same-sex couples;[144] rights of same-sex couples to enter into marriage;[145] the failure to extend rights to an unmarried father;[146] informal adoption matters;[147] matters dealing with surrogate parentage;[148] parentage of same-sex couples;[149] the right of life partners to register jointly as the parents of children born

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140 Section 14(2) of *PEPUDA*.

141 *King v De Jager* 2021 4 SA 1 (CC) para 232; Amien, Moosa and Rautenbach "Muslim Personal Law" 76-77; De Vos 2000 *SALJ* 19-20; De Vos and Barnard 2007 *SALJ* 799; Robinson and Swanepoel 2004 *PELJ* 16.

142 Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 345.

143 *Harksen* case para 41; Kruuse 2014 *International Journal of Law, Policy and the Family* 162; Robinson and Swanepoel 2004 *PELJ* 16; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 345. See para 1.1.4 of this study.

144 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC). See para 2.2.2 of this study.

145 *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC); Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 339. See para 2.2.2 of this study.

146 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC); Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 339. See para 2.3.2 of this study.

147 *Flynn v Farr* 2009 1 SA 584 (C). See para 2.2.3 of this study.

148 *AB v Minister of Social Development* 2017 3 SA 570 (CC). See para 2.3.4 of this study.

149 *CM v NG* 2012 4 SA 452 (WCC); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *J v Director General, Department of Home Affairs* 2003 5 SA 621 (CC). See paras 2.3.5-2.3.6 of this study.

as a result of artificial insemination;[150] the rule of male primogeniture in customary law of succession;[151] requirements for a valid customary law marriage;[152] the recognition of spouses in Muslim and Hindu marriages for a variety of common law rights;[153] the recognition of permanent life partnerships for a variety of rights available to married spouses;[154] and the exclusion of same-sex partners for benefits available to opposite-sex married spouses.[155]

1.1.3.2 The right to human dignity

Section 10 recognises that every individual has "inherent dignity" and that such dignity must be "respected and protected".[156] Human dignity demands the acknowledgement of the intrinsic worth of human beings, who are entitled to respect.[157] Specifically for this study, the inability to participate in family life infringes on the right to human

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150 *VJV v Minister of Social Development* 2023 6 SA 87 (CC); *QG v CS* 2021 JDR 1212 (GP). See para 2.2.2 of this study.

151 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC); *Mthembu v Letsela* 2000 3 SA 867 (SCA); *Shilubana v Nwamitwa* 2009 2 SA 66 (CC); Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 338. See para 3.2.1 of this study.

152 *MM v MN* 2013 4 SA 415 (CC). See para 3.2.2 of this study.

153 *AM v RM* 2010 2 SA 223 (ECP); *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA); *Hassam v Jacobs* 2009 5 SA 572 (CC); *Hoosein v Dangor* 2009 JDR 1212 (WCC); *Khan v Khan* 2005 2 SA 272 (T); *Moosa v Minister of Justice and Correctional Services* 2018 5 SA 13 (CC); *NR v NK* 2019 JDR 1788 (GJ); *Ryland v Edros* 1997 2 SA 690 (CC); *Singh v Ramparsad* 2007 3 SA 445 (D); *TM v ZJ* 2016 1 SA 71 (KZD); *Women's Legal Centre Trust v President of the Republic of South Africa* 2022 JDR 1733 (CC); Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 339. See para 4.2 of this study.

154 *Bwanya v Master of the High Court* 2022 3 SA 250 (CC); Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 339. See para 5.3 of this study.

155 *Bwanya v Master of the High Court* 2022 3 SA 250 (CC*)*; *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA); *Gory v Kolver* 2007 4 SA 97 (CC); *Jacobs v Road Accident Fund* 2019 2 SA 275 (GP); *Langemaat v Minister of Safety and Security* 1998 19 ILJ 240 (T); *Laubscher v Duplan* 2017 2 SA 264 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Paixão v Road Accident Fund* 2012 6 SA 377 (SCA); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC); *Volks v Robinson* 2009 JDR 1018 (CC); Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 339. See para 5.3 of this study.

156 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 48; *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) paras 34, 36-37; *MM v MN* 2013 4 SA 415 (CC) para 67; *VJV v Minister of Social Development* 2023 6 SA 87 (CC) para 60;*Volks v Robinson* 2009 JDR 1018 (CC) paras 61, 74; Bonthuys 2018 *PELJ* 12; De Ru 2013 *Fundamina* 232; De Vos 2004 *SAJHR* 193; Heaton and Roos *Family and Succession Law in South Africa* 28; Himonga and Nhlapo *African Customary Law* 64; Madzika 2020 *De Jure* 399; Maunatlala and Maimela 2020 *De Jure* 49; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 347.

157 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 48; *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) paras 34, 36-37; *Volks v Robinson* 2009 JDR 1018 (CC) paras 61, 74; Bonthuys 2018 *PELJ* 12; De Ru 2013 *Fundamina* 232; De Vos 2004 *SAJHR* 193; Heaton and Roos *Family and Succession Law in South Africa* 28; Maunatlala and Maimela 2020 *De Jure* 49; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 347.

dignity.[158] The infringement of the right of dignity mostly coincides with the violation of other rights, such as the right to equality.[159] If the right to human dignity is infringed, the infringement must be justified.[160] As with all rights, the right to human dignity may be limited by the limitation clause.[161]

In this study, judgments analysed that infringes the right to human dignity is the same judgments listed in paragraph 1.1.3.1 above. The infringement of the right to equality and human dignity runs concurrent in these judgments.

1.1.3.3 The right to religion and culture

Section 15 determines that "(e)veryone has the right to freedom of conscience, religion, thought, belief and opinion".[162] To give effect to this right, legislation may be enacted to recognise marriages concluded in terms of a religion or tradition, insofar as such recognition adheres to the *Constitution*.[163]

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158 Boniface 2015 *Scientific Cooperations International Journal of Law and Politics* 7; De Vos 2004 *SAJHR* 194; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 350.

159 Bonthuys 2002 *SALJ* 751; Jagwanth 2005 *Acta Juridica* 132; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 349.

160 Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 348.

161 Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 353-354.

162 Section 15(1) of the *Constitution; Bwanya v Master of the High Court* 2022 3 SA 250 (CC) para 132; Amien 2006 *Human Rights Quarterly* 748; Amien and Leatt 2014 *Maryland Journal of International Law* 514; Amien, Moosa and Rautenbach "Muslim Personal Law" 68; Cordier and Rautenbach 2009 *Obiter* 585; Fishbayn 1999 *International Journal of Law, Policy and the Family* 148; Heaton and Roos *Family and Succession Law in South Africa* 26; Kruuse 2014 *International Journal of Law, Policy and the Family* 150, 157; Manjoo 2004 *International Journal of Legal Information* 274; Moosa 1996 *Yearbook of Islamic and Middle Eastern Law* 145, 153; Moosa and Abduroaf 2022 *Ahkam* 6; Rautenbach 2000 *Recht van de Islam* 37, 52; Rautenbach 2001 *International Journal of Discrimination and the Law* 106; Rautenbach 2003 *Fundamina* 136; Rautenbach "Families and Legal Pluralism in South Africa" 63; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 150; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 388; Heaton and Roos *Family and Succession Law in South Africa* 28; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 108; Ziehl 1997 *African Sociological Review* 42.

163 Section 15(3) of the *Constitution*; Amien, Moosa and Rautenbach "Religious, Personal, and Family Law Systems in South Africa" 68; Bakker 2009 *THRHR* 394, 398; Cordier and Rautenbach 2009 *Obiter* 585; Fishbayn 1999 *International Journal of Law, Policy and The Family* 148; Himonga and Bosch 2000 *SALJ* 313; Manjoo 2004 *International Journal of Legal Information* 274-275; Mokotong 2015 *THRHR* 352; Moosa 1996 *Yearbook of Islamic and Middle Eastern Law* 145, 153; Rautenbach 2003 *Fundamina* 147; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 388; Robinson 2005 *Obiter* 493; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and The Family* 108; Ziehl 1997 *African Sociological Review* 42.

Every individual also has the right to practice a culture or religion of their choice as long as such practice does not infringe a right contained in the Bill of Rights.[164] Culture may be defined as a way of life that is common to a group of people who shares certain customs.[165] As with all other rights, these rights may be limited under section 36.[166]

Judgments dealing with the infringement of cultural and religious rights include the development of the rule of male primogeniture,[167] customary law adoption[168] and the recognition of various rights for spouses in religious marriages.[169]

1.1.3.4 Children's rights

The *Constitution* places a child's best interest at the centre of every matter pertaining to the child.[170] A child is an individual under the age of 18 years.[171] The *Children's Act* outlines the factors to be considered when determining the best interests of a child in matters involving them.[172] The factors to be taken into account include the nature of relationship formed between a child and a parent, whether the parents fulfilled their

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164 Sections 30, 31(1)(a), 31(2) of the *Constitution*; Amien, Moosa and Rautenbach "Religious, Personal, and Family Law Systems in South Africa" 68; Bennett 2009 *The American Journal of Comparative Law* 7; Bonthuys and Pieterse 2000 *THRHR* 617; Fishbayn 1999 *International Journal of Law, Policy and the Family* 147; Heaton and Roos *Family and Succession Law in South Africa* 29; Himonga and Bosch 2000 *SALJ* 306, 310, 313; Maunatlala and Maimela 2020 *De Jure* 44; Monye 2018 *Journal of Law, Society and Development* 12; Ntlama 2009 *Stell LR* 336; Oomen 2000 *THRHR* 279; Osman "Customary Marriages" 300; Pieterse-Spies 2013 *TSAR* 683; Rautenbach 2000 *Recht van de Islam* 37; Robinson 2005 *Obiter* 494-495; Schoeman-Malan 2007 *PELJ* 109.

165 Maunatlala and Maimela 2020 *De Jure* 44.

166 Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 392.

167 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC); *Mthembu v Letsela* 2000 3 SA 867 (SCA); *Shilubana v Nwamitwa* 2009 2 SA 66 (CC); Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 338. See para 3.2.1 of this study.

168 *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TkA); *Maneli v Maneli* (G) (unreported) case number 14/3/2/2-234/05 of 19 April 2010; *Metiso v Padongelukfonds* 2001 3 SA 1142 (T); *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T). See para 3.3.3 of this study.

169 *AM v RM* 2010 2 SA 223 (ECP); *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA); *Hassam v Jacobs* 2009 5 SA 572 (CC); *Hoosein v Dangor* 2009 JDR 1212 (WCC); *Khan v Khan* 2005 2 SA 272 (T); *Moosa v Minister of Justice and Correctional Services* 2018 5 SA 13 (CC); *NR v NK* 2019 JDR 1788 (GJ); *Ryland v Edros* 1997 2 SA 690 (CC); *Singh v Ramparsad* 2007 3 SA 445 (D); *TM v ZJ* 2016 1 SA 71 (KZD); *Women's Legal Centre Trust v President of the Republic of South Africa* 2022 JDR 1733 (CC); Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 339. See para 4.2 of this study.

170 Section 28(2) of the *Constitution*; *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 52; *J v Director General, Department of Home Affairs* 2003 5 SA 621 (CC); para 8; *Wilsnach v TM* 2021 3 SA 568 (GP) para 46; Barratt and Domingo "Parent and Child" 139; Bonthuys 2002 *SALJ* 779; Heaton and Roos *Family and Succession Law in South Africa* 29; Kruger "Children's Rights" 342; Wolhuter 1997 *SALJ* 409.

171 Section 1 of the *Children's Act*; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 5.

172 Section 7 of the *Children's Act*; Barratt and Domingo "Parent and Child" 139.

parental responsibilities in relation to the child or exercised their rights regarding the child, and the capacity of the parents to provide for the needs of the child.[173]

In this study, the best interest principle is considered in intestate succession matters in terms of the *ISA* and customary law of intestate succession, customary law adoption and common law adoption.[174]

The rights outlined above do not operate without limit. In paragraph 1.1.4 the limitation clause contained in the *Constitution* is set out.

1.1.4 Limitation of rights

Where a right is infringed, such infringement may be validated in terms of section 36.[175] The limitation clause is strictly applied because of the consequences of unfair discrimination.[176] A right may be limited provided that the limitation

> is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> a) the nature of the right;
> b) the importance of the purpose of the limitation;
> c) the nature and extent of the limitation;
> d) the relation between the limitation and its purpose; and
> e) less restrictive means to achieve the purpose.[177]

If a limitation qualifies under section 36, an infringement will be deemed fair and justifiable and therefore not unconstitutional.[178]

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173 Section 7 of the *Children's Act*; Barratt and Domingo "Parent and Child" 139.

174 *JT v Road Accident Fund* 2015 1 SA 609 (GJ); *MB v NB* 2010 3 SA 220 (GSJ); *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TkA); *Maneli v Maneli* (G) (unreported) case number 14/3/2/2-234/05 of 19 April 2010; *Metiso v Padongelukfonds 2001 3 SA 1142 (T)*; *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T); *Wilsnach v TM* 2021 3 SA 568 (GP).

175 Section 7(3) of the *Constitution*; *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC); para 69; Amien, Moosa and Rautenbach "Religious, Personal, and Family Law Systems in South Africa" 75; Kruuse 2014 *International Journal of Law, Policy and the Family* 162; Madzika 2020 *De Jure* 398; Maunatlala and Maimela 2020 *De Jure* 44; Rautenbach 2000 *Recht van de Islam* 50; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 326, 335; Robinson 2005 *Obiter* 497; Wolhuter 1997 *SALJ* 401; Williams 2004 *SAJHR* 59.

176 Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 335.

177 Section 36(1) of the *Constitution*; *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC); para 69; *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 34; Heaton and Roos *Family and Succession Law in South Africa* 29; Robinson 2005 *Obiter* 497; Maunatlala and Maimela 2020 *De Jure* 44; Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 336; Wolhuter 1997 *SALJ* 402.

178 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 69; Wolhuter 1997 *SALJ* 402.

1.2 Research question

The research question that this study attempts to answer is: what is the impact on the law of intestate succession of the evolution of the "family unit" concept in response to constitutional developments?

1.3 Research aims and objectives

The primary aim of this study is to answer the research question stated in paragraph 1.2, namely, what is the impact on the law of intestate succession of the evolution of the 'family unit' concept in terms of common law in response to constitutional developments"? In order to answer the research question, this study aims to provide a detailed analysis of the development of the terms "spouse", "descendant" and "parent" in intestate succession prior to and in reaction to the *Constitution*. The analysis is compartmentalised in areas of law, namely common law, customary law, Muslim and Hindu law, as well as the institution of life partnerships.

A further objective is to evaluate pending legal developments yet to be enacted. This study also provides recommendations as to how the concept of the "family unit" and specifically the concepts "spouse", "descendant" and "parent" could be developed to further the rights contained in the *Constitution*.

Specific objectives of this study are:

- to discuss the development of the term "spouse" in terms of the common law, to include same-sex partners and persons who underwent a same-sex operation;
- to discuss the development of the terms "descendant" and "parent" to include unmarried parents, adopted children and adoptive parents, commissioning parents in surrogacy agreements, recipients of artificial insemination and persons who acquired parental rights and responsibilities in terms of the *Children's Act;*
- to discuss the development of the term "spouse" in terms of the customary law to include spouses in customary law marriages, seed-raiser agreements and woman-to-woman marriages;

- to discuss the development of the terms "descendant" and "parent" to include children adopted in terms of customary law and parents who adopted children in terms of customary law;
- to discuss the development of the term "spouse" to include spouses in Muslim and Hindu marriages; and
- to discuss the development of the term "spouse" to include partners in life partnerships.

1.4 Premise

The concept "family unit" traditionally referred to an opposite-sex married couple and their biological children. The definition of the "family unit" has been developed through legislation and case law, considering constitutional values and rights. For example, "spouse" includes same-sex couples and spouses of monogamous and polygynous customary marriages. "Descendant" and "parent" include adopted children and adoptive parents adopted through legislative procedures and customary law procedures. The development of the traditional meaning of the concept of "family unit" through the interpretation of constitutional rights and values must be examined to make recommendations for further development.

1.5 Assumptions

This study accepts that the *ISA* governs the devolution of estates where a person died, *inter alia*, without leaving a valid will. Additionally, it is accepted that customary law formed part of South African law prior to the enactment of the *Constitution* and received partial recognition. It is also accepted that the *Constitution* is the supreme law in South Africa and the *ISA* must comply with its provisions.

Further, it is accepted that the *Marriage Act,*[179] *Civil Union Act* and the *RCMA* are the only acts in terms of which a legislatively regulated marriage or civil union may be concluded. When statutes are interpreted, a reasonable interpretation in relation to

[179] 25 of 1961.

the textual meaning of the statute, without unduly straining the language used in the statute, must be given to the statute.

The common law must be reformed to give effect to the values and/or rights advanced by the *Constitution*. Parents attain certain automatic parental rights and responsibilities attached to their child. Parental rights and responsibilities of parents may be terminated where circumstances warrant such termination.

1.6 Hypothesis

In consideration of the theoretical context and definitions in section 1.1 of this study where the theoretical framework is set out in detail, the development of the "family unit" concept, the terms "spouse", "descendant" and "parent" must, for purposes of the law of intestate succession, be reconsidered with due regard to applicable constitutional rights and values.

1.7 Research methodology

This study is a literature study of relevant legislation, case law and relevant academic texts (including textbooks, journal articles and electronic material) dealing with the development of the "family unit" and, in particular, the development of the terms "spouse", "descendant" and "parent". A detailed analyses and critique of court cases dealing with the constitutional development of the terms "spouse", "descendant" and "parent" are provided.

1.8 Structure of the study

In Chapter 2, the development of common law, both prior to and following the introduction of the *Constitution*, of the "family unit" concept is evaluated, specifically focusing on the evolution of the terms "spouse", "descendant" and "parent". In Chapter 3, the development of the "family unit" in terms of the customary law, both prior to and following the enactment of the *Constitution* is discussed, focusing on the terms "spouse", "descendant" and "parent" in intestate succession.

The development, prior to and following the enactment of the *Constitution*, of the "family unit" in Muslim and Hindu law is discussed in Chapter 4, focusing on the

intestate succession terms "spouse", "descendant" and "parent". In Chapter 5, the post-constitutional introduction of the institution of the life partnership is discussed and the evolution of the inclusion of life partners in the terms "spouse", "descendant" and "parent" is examined. In Chapter 6, the legal development under consideration by Parliament yet to be enacted that could have or could in the future further develop the terms "spouse", "descendant" and "parent" is analysed.

In Chapter 7, a conclusion on how the concept of the "family unit" and, in particular, the terms "spouse", "descendant" and "parent" could be further developed to further adhere to constitutional demands is drawn.

Chapter 2: The development of the concept of the "family unit" in the law of intestate succession in terms of common law

2.1 Introduction

As indicated in Chapter 1,[180] there are various forms of the "family unit" that exist in South Africa. The "family unit" is of importance to the law of intestate succession, particularly as it relates to the development of the terms "spouse", "descendant" and "parent".[181] In this chapter the development of the terms "spouse", "descendant" and "parent" in intestate succession law in terms of the common law is explained.

In relation to the term "spouse", the common law initially only recognised spouses in a valid marriage as the starting point of a "family unit".[182] As stated in Chapter 1,[183] a "spouse" for intestate succession law was thus limited to a husband and wife in a marriage concluded in terms of the *Marriage Act*.[184] In this chapter, the development of the rights of "spouses," "descendants" and "parents" to inherit intestate in terms of the common law is discussed. Specifically, the common law and legislation recognising and regulating the right of "spouses" to inherit intestate from each other is examined.

In paragraph 2.2, the development of the term "spouse" in the context of the common law is analysed. Prior to the discussion of common law developments of "spouse", the development of the right of spouses to inherit from each other is discussed.[185] Specifically, the legislation regulating intestate inheritance in terms of the common law, is analysed.[186]

The analysis of the development of the term "spouse" pertains to the inclusion of same-sex partners[187] and persons who had undergone sex-change operations.[188] As

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180 See para 1.1 of this study.
181 See para 1.1 of this study.
182 See para 1.1 of this study.
183 See para 1.1 of this study.
184 25 of 1961.
185 See para 2.2.1 of this study.
186 See para 2.2.1 of this study.
187 See para 2.2.2 of this study.
188 See para 2.2.3 of this study.

stated previously, same-sex partners fell outside the ambit of the term "spouse".[189] Accordingly, the court case decriminalising same-sex relationships,[190] the court case and legislation recognising the right of same-sex partners to enter into a valid marriage,[191] and the resultant recognition of same-sex partners as "spouses" in intestate succession[192] are comprehensively discussed.

Additionally, the court judgments and legislation to initially exclude and subsequently include persons who had undergone a sex-change operation in the term "spouse" are also discussed.[193] Specifically, the ability of persons who had undergone a sex-change operation to inherit under the *ISA* is examined.[194]

In paragraph 2.3, the development of the terms "descendant" and "parent" is analysed. Specifically, the rights of "descendants and "parents" to inherit intestate are discussed.[195] The terms "descendent" and "parent" were extended to include unmarried parents,[196] adopted children and adoptive parents,[197] commissioning parents in surrogacy agreements,[198] beneficiaries of donations for artificial insemination,[199] same-sex parents,[200] and persons who acquired parental rights and responsibilities in terms of the *Children's Act*.[201]

The discussion of the development of the term "parent" to include unmarried fathers refers to specific legislation and court decisions dealing with unmarried fathers.[202] Specifically, the chapter discusses the question when unmarried fathers are to be recognised as "parents" for the purposes of the *ISA*.[203] Also discussed is the development of the term "descendant" to recognise biological children of unmarried

189 See para 2.1 of this study.
190 See para 2.2.2 of this study.
191 See para 2.2.2 of this study.
192 See para 2.2.2 of this study.
193 See para 2.2.3 of this study.
194 See para 2.2.3 of this study.
195 See para 2.3.1 of this study.
196 See para 2.3.2 of this study.
197 See para 2.3.3 of this study.
198 See para 2.3.4 of this study.
199 See para 2.3.5 of this study.
200 See para 2.3.6 of this study.
201 See para 2.3.7 of this study.
202 See para 2.3.2 of this study.
203 See para 2.3.2 of this study.

fathers as the "descendants" of their unmarried biological fathers.[204] The inclusion of adopted children and adoptive parents in the terms "descendant" and "parent" is also discussed, with specific reference to legislation and court judgments dealing with adoption.[205] Specifically, the development of the rights of adopted children and adoptive parents to inherit intestate is discussed.[206]

Additionally, the recognition of commissioning parents in surrogacy agreements as "parents" is examined, also with specific reference to relevant legislation and case law.[207] Whether and when commissioning parents have the right to inherit as "parents" is specifically discussed.[208] The right of a surrogate mother to inherit as a "parent" is also discussed.[209] Also examined is the right of a child born from a surrogate agreement to inherit from commissioning parents and/or surrogate mothers.[210] Who qualifies as a "parent" where a child is born as a result of artificial insemination is also examined.[211] Specifically, the position of the donor is examined, alongside the position of the beneficiary and the beneficiary's partner or spouse.[212] Legislation and court cases focussing on artificial insemination are analysed.[213]

The development of the term "parent" to include same-sex partners is also examined.[214] Specifically, court cases arguing for the exclusion of same-sex partners as well as for the inclusion of same-sex partners as "parents" are analysed.[215] Also, the right of persons to inherit intestate from children over whom they acquired parental rights and responsibilities is examined.[216]

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204 See para 2.3.2 of this study.
205 See para 2.3.3 of this study.
206 See para 2.3.3 of this study.
207 See para 2.3.4 of this study.
208 See para 2.3.4 of this study.
209 See para 2.3.4 of this study.
210 See para 2.3.4 of this study.
211 See para 2.3.5 of this study.
212 See para 2.3.5 of this study.
213 See para 2.3.5 of this study.
214 See para 2.3.6 of this study.
215 See para 2.3.6 of this study.
216 See para 2.3.7 of this study.

Persons, apart from persons in customary, Muslim and Hindu marriages, who fall outside the ambit of the terms "spouse", "descendant" and "parent" are identified in paragraph 2.4. Suggestions to include such persons are also provided.[217]

As stated above, the development of the terms spouse in the context of the common law is comprehensively analysed in paragraph 2.2.

2.2 The intestate succession law term "spouse" in terms of common law

As indicated in Chapter 1,[218] the meaning attributed to the term "spouse" in intestate succession law is derived from the common law definition of the "family unit".[219] A "spouse" in terms of intestate succession law is a person in a valid marriage under the common law.[220] Considering the importance of a marriage for determining who a "spouse" is in intestate succession law, it is important to understand what a marriage in terms of the common law is. At common law, marriage was defined as a

> legally recognised, voluntary union between one man and one woman to the exclusion, while it lasts, of all others.[221]

To regulate the conclusion of a marriage, the *Marriage Act*[222] (hereafter referred to as the *Marriage Act*) was enacted.[223] The *Marriage Act* does not define marriage or

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217 See para 2.4 of this study.

218 See para 1.1 of this study.

219 Osman-Hyder 2022 *Stell LR* 262-263.

220 Heaton 2008 *Stell LR* 452; Mochela and Smith 2020 *TSAR* 483. See para 1.1 of this study. See Chapters 3-4 of this study for marriages in terms of customary law and religious law systems and Chapter 5 of this study for a discussion of life partnerships.

221 *Ismail v Ismail* 1983 1 SA 1006 (A) 1020A; *Flynn v Farr* 2009 1 SA 584 (C) para 29; *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) paras 3, 63; *W v W* 1976 2 SA 308 (W) 310D-E; Amien, Moosa and Rautenbach "Muslim Personal Law" 376; Amien, Moosa and Rautenbach "Religious, Personal, and Family Law Systems in South Africa" 67; Bakker 2009 *THRHR* 395; Barratt "Requirements for Civil Marriages" 184; Bekker and Koyana 2014 *THRHR* 28; Church 1995 *CILSA* 290; Clark and Van Heerden 2024 *SALJ* 468; De Ru 2013 *Fundamina* 221; De Vos 1996 *SAPL* 361; De Vos 2004 *SAJHR* 189; Dlamini 1991 *Acta Juridica* 76; Du Toit 2021 *Journal of Civil Law Studies* 370; Goldblatt 2006 *Feminist Legal Studies* 261; Heaton "The Legal Requirements for a Civil Marriage" 17; Heaton and Roos *Family and Succession Law in South Africa* 73; Kerr 1984 *SALJ* 499; Mosikatsana 1996 *SAJHR* 550; Peart 1984 *THRHR* 163; Rautenbach 2000 *Recht van de Islam* 36; Rautenbach "Families and Legal Pluralism in South Africa" 66; Reddy 2006 *Agenda* 152; Robinson 2005 *Obiter* 488; Robinson and Swanepoel 2004 *PELJ* 2; Schäfer 2006 *SALJ* 627, 634; Williams 2004 *SAJHR* 32-33, 40; Wolhuter 1997 *SALJ* 394; Wood-Bodley 2018 *Obiter* 276; Ziehl 1997 *African Sociological Review* 43, 49; Zitzke 2018 *TSAR* 183.

222 25 of 1961. The *Marriage Act* makes provision for the formalities to conclude a valid marriage. See s2-6, 24-26, 29-30 of the *Marriage Act*.

223 Kruuse 2017 *The International Survey of Family Law* 344; Heaton and Roos *Family and Succession Law in South Africa* 73; Osman-Hyder 2022 *Stell LR* 262; Smith 2016 *SALJ* 290.

spouse, and, like the *ISA*, it relies on the above-mentioned common law definition of marriage. To conclude a valid marriage, the formalities and requirements demanded by the *Marriage Act* must be met.[224] Only two persons of the opposite sex who are of majority age, or where one or both is a minor with the appropriate consent, and are not related within the prohibited degrees of relation, can conclude a valid common law marriage.[225] Common law emphasises that marriages are strictly monogamous and prohibits the conclusion of another common law marriage, customary marriage or civil union once a valid marriage has been entered into.[226]

Once a valid marriage between a man and a woman in terms of the *Marriage Act* is concluded, the man and the woman become "spouses" and establish a "family unit". The common law attributed various entitlements and duties exclusively to "spouses" in valid marriages.[227] For instance, spouses owe a reciprocal duty of support to each other; they may institute an action for the negligent death of a spouse upon the death of a spouse; they may claim for maintenance against a deceased estate in terms of the *Maintenance of Surviving Spouses Act*;[228] and, importantly for this study, spouses acquire automatic rights of intestate inheritance from each other.[229]

It is worth noting that the *Marriage Bill* is currently under consideration by Parliament.[230] The *Marriage Bill* aims to consolidate all marriage laws into one act. If enacted, the *Marriage Bill* will repeal the *Marriage Act*. The *Marriage Bill* has not been

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224 *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) paras 3, 64; Clark and Van Heerden 2024 *SALJ* 468; De Vos 1996 *SAPL* 360; De Vos 2004 *SAJHR* 189; De Vos 2007 *SAJHR* 457; Heaton 2008 *Stell LR* 452; Mosikatsana 1996 *CILSA* 155; 360.

225 Du Toit 2021 *Journal of Civil Law Studies* 370; Heaton "The Legal Requirements for a Civil Marriage" 31-38; Heaton and Roos *Family and Succession Law in South Africa* 86; Moosa and Abduroaf 2022 *Ahkam* 8; Osman and Baase 2022 *SAJHR* 8; Peart 1984 *THRHR* 163; Sachs 1990 *Agenda* 46; Smith 2011 *SALJ* 562.

226 Du Toit 2021 *Journal of Civil Law Studies* 370; Heaton "The Legal Requirements for a Civil Marriage" 30; Peart 1984 *THRHR* 163; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 153; Smith 2011 *SALJ* 262; Van Schalkwyk 2003 *De Jure* 291. See para 5.3 of this study.

227 *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 3; Bonthuys 2007 *SAJHR* 527; De Vos 1996 *SAPL* 360, 364; De Vos 2004 *SAJHR* 181; Meyerson 2010 *Constitutional Court Review* 295; Mosikatsana 1996 *SAJHR* 556; Reddy 2006 *Agenda* 151; Schäfer 2006 *SALJ* 629; Williams 2004 *SAJHR* 36, 55.

228 27 of 1990.

229 Bonthuys 2007 *SAJHR* 527; De Vos 1996 *SAPL* 360, 364; De Vos 2004 *SAJHR* 181; Meyerson 2010 *Constitutional Court Review* 295; Mosikatsana 1996 *SAJHR* 556; Reddy 2006 *Agenda* 151; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 373; Williams 2004 *SAJHR* 36, 55.

230 See paras 1.1 and 6.4 of this study.

enacted and consequently has no legally enforceable influence over the definition of the term "spouse". Possible further developments of the term "spouse" to be brought about by the *Marriage Bill* are discussed in Chapter 6[231] of this study.

As stated above, the common law initially only recognised a married husband and wife as "spouses" for intestate succession. Same-sex couples, spouses in customary and religious marriages and unmarried persons were not recognised as "spouses" in terms of the provisions of intestate succession law.[232] This chapter considers the development of the common law intestate succession term "spouse" to include same-sex partners.[233] The inclusion of persons in customary, Muslim and Hindu marriages and life partnerships in the term "spouse" is discussed in Chapters 3-5 of this study.

Before the development of the term "spouse" is analysed, the development of the right of a "spouse" to be a beneficiary in terms of intestate succession from their spouse is considered. Although spouses in a marriage concluded in terms of the *Marriage Act* were recognised as part of the "family unit", they initially had no right to intestate succession to inherit from each other. In paragraph 2.2.1, the development of the right of intestate succession of spouses to inherit from each other is discussed.

2.2.1 Intestate succession rights of spouses in terms of the common law

Common law intestate succession was adopted from Roman-Dutch common law.[234] Two systems of Roman-Dutch intestate succession law were adopted in South Africa namely *Schependomsrecht* and *Aasdomsrecht*.[235] In terms of the *Schependomsrecht,* spouses had no right of intestate inheritance from each other.[236] In terms of the *Aasdomsrecht*, spouses were allowed to inherit from each other only where there were no other living blood relatives.[237] Under South African law, it is unclear whether

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231 See para 6.4 of this study.
232 Du Toit 2021 *Journal of Civil Law Studies* 370.
233 See paras 2.2.2-2.2.3 of this study.
234 See para 1.1 of this study.
235 Botha 1917 *SALJ* 173-174; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 22.
236 *Flynn v Farr* 2009 1 SA 584 (C) para 13; Du Plessis 1990 *De Jure* 239; Hofmeyr and Paleker *The Law of Succession in South Africa* 835; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 67.
237 De Groot *Inleidinge tot de Hollandsche Rechts-Geleerdheid* 2 28 3; Du Plessis 1990 *De Jure* 239; Hofmeyr and Paleker *The Law of Succession in South Africa* 835; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 67.

spouses had the right to intestate inheritance from each other.[238] The prevailing opinion supports that the *Schependomrecht* was followed, however this remained subject to debate.[239]

Spouses' rights to inherit intestate from each other were formally recognised by the *Succession Act*[240] that amended the common law system of intestate succession.[241] The *ISA* repealed the *Succession Act*,[242] reforming and simplifying the law of intestate succession, granting greater inheritance rights to spouses.[243] As indicated in Chapter 1,[244] the *ISA* currently governs South African law of intestate succession. Briefly explained, married couples are automatically entitled to inherit from each other in terms of the *ISA*.[245] A spouse inherits the entire estate where there are no descendants.[246] Where there are descendants and a spouse, the spouse shares the inheritance with the descendants.[247]

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238 Du Plessis 1990 *De Jure* 239.

239 Du Plessis 1990 *De Jure* 239.

240 13 of 1934; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 21; Hofmeyr and Paleker *The Law of Succession in South Africa* 837; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 68.

241 13 of 1934; *Flynn v Farr* 2009 1 SA 584 (C) para 13; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 21; Hofmeyr and Paleker *The Law of Succession in South Africa* 837; Smith 2016 *SAJHR* 141; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 68. In terms of the *Succession Act* 13 of 1934, a spouse inherited the greater amount between a child's share or R50 000. Where the spouses were married in community of property, the R50 000 was inclusive of the spouse's share in the joint estate, and where the spouses were married out of community of property with the accrual system, the R50 000 included the accrual share. If there were no descendants, the surviving spouse inherited the entire estate. S1(1) of the *Succession Act* 13 of 1934.

242 13 of 1934.

243 Du Toit 2014 *Ars Aequi* 282; Hofmeyr and Paleker *The Law of Succession in South Africa* 835; Rautenbach 2008 *Journal of Comparative Law* 124; Schoeman-Malan 2007 *PELJ* 109.

244 See para 1.1 of this study.

245 Section 1(1)(a), (c) of the *ISA*; Amien 2014 *Acta Juridica* 203; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 28; Du Toit 2009 *SALJ* 464; Kult 2001 *Indiana International and Comparative Law Review* 711; Monareng and Zounmenou 2007 *Agenda* 126.

246 Section 1(1)(a) of the *ISA*; *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 117; *Flynn v Farr* 2009 1 SA 584 (C) paras 15, 29; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 28; De Waal and Schoeman-Malan *Erfreg* 18, 291; Du Toit 2009 *SALJ* 465; Du Toit 2021 *Journal of Civil Law Studies* 369; Gildenhuys "Wills and Succession" para 263; Heaton and Roos *Family and Succession Law in South Africa* 205; Hofmeyr and Paleker *The Law of Succession in South Africa* 846; Mochela and Smith 2020 *TSAR* 483; Monareng and Zounmenou 2007 *Agenda* 126; Wood-Bodley 2018 *Obiter* 276.

247 Where there is both a spouse and a descendant(s), the spouse inherits the greater amount between a child's share and the amount determined by the Minister of Justice. A child's portion is calculated by "dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived him or have died before him but are survived by their descendants, plus one". Currently the amount is fixed at R250 000. Section 1(4)(f) of the *ISA*; GN R921 in GG 38238 of 24 November 2014; *Flynn v Farr* 2009 1 SA 584 (C) para 15; Amien 2014

As stated above, a "spouse" in terms of intestate succession law was limited to a husband and wife married in terms of the *Marriage Act*.[248] As indicated above,[249] in paragraphs 2.2.2 and 2.2.3 the development of the term "spouse" in the common law to include same-sex partners of a civil union and persons who underwent a sex-change operation and their rights to intestate succession is discussed.

2.2.2 The inclusion of same-sex partners in a civil union in the intestate succession term "spouse" in terms of the common law[250]

As stated previously, same-sex partners were excluded from the "family unit".[251] Same-sex partners could not enter into a valid marriage since marriage was reserved for opposite-sex partners.[252] Consequently, same-sex partners could not claim benefits which flow from a valid marriage, such as intestate succession rights.[253] The reason for excluding same-sex partners from marriage and its attached benefits was due to the perception that same-sex relationships were immoral and contrary to public policy.[254]

Same-sex relationships are no longer contrary to public policy, evidenced by the prohibition of discrimination on the grounds of sexual orientation by the *Constitution*.[255] Despite the protection against discrimination based on sexual orientation promised to persons in same-sex relationships, no legislative recognition was provided to same-sex couples prior to the intervention by the courts.[256] On the

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Acta Juridica 204; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 27-28, 32; De Waal and Schoeman-Malan *Erfreg* 18, 22-25, 25; Du Toit 2009 *SALJ* 465; Du Toit 2021 *Journal of Civil Law Studies* 369; Heaton and Roos *Family and Succession Law in South Africa* 206-207; Hofmeyr and Paleker *The Law of Succession in South Africa* 856; Kult 2001 *Indiana International and Comparative Law Review* 711; Mochela and Smith 2020 *TSAR* 483; Monareng and Zounmenou 2007 *Agenda* 126; Wood-Bodley 2018 *Obiter* 276.

248 See para 2.2 of this study.

249 See para 2.2 of this study.

250 The development of same-sex partners' rights to inherit who have not formalised their relationship in terms of the *Civil Union Act* 17 of 2006 is discussed in Chapter 5.

251 See paras 1.1-2.2 of the is study.

252 See para 2.2 of this study.

253 De Vos 1996 *SAPL* 361; Mosikatsana 1996 *SAJHR* 553.

254 *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 4; Ziehl 1997 *African Sociological Review* 49.

255 See para 1.1.3 of this study.

256 See the discussion of *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC) and *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) below. See also the discussion of same-sex partners in life partnerships in Chapter 5.

contrary, legislation criminalising certain behaviour associated with same-sex relationships, such as sexual acts between men, was not repealed.[257] For example, the *Sexual Offences Act*[258] criminalised specific sexual acts between male persons.[259]

Same-sex relationships were eventually decriminalised by the court in *National Coalition of Gay and Lesbian Equality v Minister of Justice*[260] (hereafter referred to as *National Coalition v Minister of Justice*), creating the opportunity for further development of rights of same-sex couples.[261] The court had to decide on the constitutional validity of legislative and the common law crimes which prohibited sexual conduct between gay men.[262] The High Court declared the common law crime of sodomy along with the inclusion of sodomy in the schedules of the *Criminal Procedure Act*,[263] the *Security Officers Act*,[264] and section 20A of the *Sexual Offences Act*[265] unconstitutional.[266]

The common law and the above-mentioned acts criminalised sexual conduct between gay men, while the same conduct between heterosexual couples was not criminalised.[267] The differential treatment was clearly based on sexual orientation.[268] To determine whether the differential treatment amounted to an infringement of the right to equality, the court applied the *Harksen* test.[269] Since the differential treatment

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257 De Ru 2013 *Fundamina* 221; Mochela and Smith 2020 *TSAR* 481; Wolhuter 1997 *SALJ* 394.

258 23 of 1957.

259 Section 20A of the *Sexual Offences Act* 23 of 1957; Cameron 1993 *SALJ* 455; De Ru 2013 *Fundamina* 226; De Vos 1996 *SAJHR* 279; Louw 2005 *Journal of Homosexuality* 144-145.

260 1998 2 SACR 556 (CC).

261 Bonthuys 2007 *SAJHR* 528.

262 *National Coalition v Minister of Justice* case para 1; Bonthuys 2002 *SALJ* 752; De Ru 2013 *Fundamina* 234; De Vos 2000 *SALJ* 18; Louw 2005 *Journal of Homosexuality* 145; Mochela and Smith 2020 *TSAR* 486; Reddy 2006 *Agenda* 148.

263 51 of 1977.

264 92 of 1987.

265 23 of 1957.

266 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 102 (W) 131A-E; *National Coalition v Minister of Justice* case paras 1-2; De Vos 2000 *SALJ* 18; Louw 2005 *Journal of Homosexuality* 145; Reddy 2006 *Agenda* 148.

267 *National Coalition v Minister of Justice* case para 28.

268 *National Coalition v Minister of Justice* case para 75-76.

269 *National Coalition v Minister of Justice* case paras 15, 18-19. See para 1.1.3.1 of this study for a discussion of the *Harksen* test.

was on the grounds of sexual orientation, which is one of the prohibited grounds in section 9(3), unfair discrimination was presumed.[270]

In analysing the impact of the discrimination, the court determined that criminalising sexual conduct between men fuelled the negative stereotypes associated with same-sex relationships prevalent in society prior to the introduction of the *Constitution*.[271] Gay men form part of a vulnerable minority who suffered from past patterns of disadvantage which increases the impact of the discrimination of gay and lesbian persons.[272] The discrimination had a serious impact on the rights of gay men, which affected their dignity.[273] For these reasons, the discrimination was determined to be unfair and an infringement of the right to equality of gay men.[274]

In addition to being discriminatory based on the right of equality, the common law and the above-mentioned acts also infringed the right to dignity.[275] Criminalising sexual conduct between gay men supported the stereotype that all gay men are criminals.[276] In terms of the limitation clause, the criminalisation of sexual conduct between gay men violated the rights of gay men.[277] There was no valid purpose or justification in limiting the rights to justify the harm caused by the criminalisation of sexual conduct between men.[278] The moral reasoning of a segment of society based on prejudice cannot serve as justification for the infringement of the rights to equality and dignity.[279]

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270 *National Coalition v Minister of Justice* case paras 18, 76; Louw 2005 *Journal of Homosexuality* 145. See para 1.1.3.1 of this study.

271 *National Coalition v Minister of Justice* case para 23.

272 *National Coalition v Minister of Justice* case paras 25-26; De Ru 2013 *Fundamina* 235; De Vos 2000 *SALJ* 23-24; Louw 2005 *Journal of Homosexuality* 146.

273 *National Coalition v Minister of Justice* case para 26; Bonthuys 2002 *SALJ* 752; De Vos 2000 *SALJ* 25.

274 *National Coalition v Minister of Justice* case para 27; De Ru 2013 *Fundamina* 235; De Vos 2000 *SALJ* 23-24; Louw 2005 *Journal of Homosexuality* 147. See para 1.1.3.1 of this study for a discussion of the right to equality.

275 *National Coalition v Minister of Justice* case para 28; De Ru 2013 *Fundamina* 235; De Vos 2000 *SALJ* 23-24; Louw 2005 *Journal of Homosexuality* 147. The court also considered infringement of the right to privacy. The right to privacy is not considered in this study. See *National Coalition v Minister of Justice* case paras 31-32; Louw 2005 *Journal of Homosexuality* 147 for a discussion of the infringement of the right to privacy in *National Coalition v Minister of Justice* case.

276 *National Coalition v Minister of Justice* case para 28.

277 *National Coalition v Minister of Justice* case paras 36, 76; Bonthuys 2002 *SALJ* 752. See para 1.1.3.4 of this study for a discussion of the limitation clause.

278 *National Coalition v Minister of Justice* case para 37; De Ru 2013 *Fundamina* 235; De Vos 2000 *SALJ* 25; Louw 2005 *Journal of Homosexuality* 145-146.

279 *National Coalition v Minister of Justice* case para 37; De Ru 2013 *Fundamina* 235.

Therefore, the crime of sodomy, section 20A of the *Sexual Offences Act*[280] as well as the schedules to the *Criminal Procedure Act*[281] and the *Security Officers Act*[282] were inconsistent with the values of the *Constitution* and were declared unconstitutional and invalid.[283] Following the decision of *National Coalition v Minister of Justice*, various rights were extended for the benefit of same-sex life partners in permanent life partnerships, including the right to inherit intestate from each other.[284] However, marriage remained unavailable to same-sex partners.

The right of same-sex partners to marry was first considered in *Minister of Home Affairs v Fourie*[285] (hereafter referred to as the *Fourie* case). The *Fourie* case dealt with two persons in a same-sex relationship who wished to be married.[286] The partners in the *Fourie* case lived together in a relationship similar to a marriage and were publicly acknowledged by friends as a couple.[287]

As indicated above,[288] same-sex partners could not conclude a valid marriage since the common law, specifically the *Marriage Act* did not provide for same-sex marriage.[289] Section 30(1) of the *Marriage Act* specifically refers to a husband and wife, thereby excluding same-sex partners from marriage.[290] The exclusion meant that same-sex couples could not automatically access certain benefits that only become available by entering into a marriage.[291] Additionally, same-sex couples were unable

280 23 of 1957.
281 51 of 1977.
282 92 of 1987.
283 *National Coalition v Minister of Justice* case paras 73, 76, 90, 106, 138; Bilchitz and Judge 2007 *SAJHR* 469; Bonthuys 2002 *SALJ* 752-753; De Ru 2013 *Fundamina* 235; De Vos 2007 *SAJHR* 447-448.
284 See para 5.2 of this study.
285 2006 1 SA 524 (CC).
286 *Fourie* case para 1.
287 *Fourie* case para 1.
288 See para 2.2 of this study.
289 *Fourie* case paras 1-2, 74; De Vos and Barnard 2007 *SALJ* 823; Robinson 2005 *Obiter* 499. See para 2.2 for the common law definition of marriage.
290 *Fourie* case paras 3, 64, 77; De Ru 2013 *Fundamina* 240; De Vos 2007 *SAJHR* 453; Goldblatt 2006 *Feminist Legal Studies* 261-262; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 102. See para 2.2 of this study.
291 De Vos and Barnard 2007 *SALJ* 804. Except for benefits already specifically extended to same-sex couples by the courts. See para 5.2 of this study.

to rely on legal protection[292] if the relationship ends.[293] The exclusion was based in historical prejudice directed at same-sex couples and not simply due to an oversight.[294]

The effect of the exclusion of same-sex couples from marriage has been a denial of the dignity, status, benefits and responsibilities attributed to marriage that is afforded to opposite-sex couples.[295] Despite the fact that the *Constitution* does not explicitly protect the right to marriage, it does protect the right to human dignity and the right to be treated equally.[296] Therefore, denial of equal protection and benefits to same-sex couples amounts to unfair discrimination of the right to equality on the grounds of sexual orientation.[297] Additionally, the right to human dignity was also unfairly infringed.[298] The denial of the right to marry portrayed same-sex partners as unworthy of marriage which devalues their inherent dignity.[299]

In considering whether the discrimination could be justified, the court considered the argument that marriage is a religious institution and granting same-sex couples the right to marry will infringe the right to religion.[300] Allowing same-sex couples to marry would not prohibit opposite-sex couples from marrying.[301] On the contrary, it was argued that the right of same-sex couples to marry does not infringe the right to religion of opposite-sex couples.[302] Consequently, the discrimination against same-sex couples could not be justified.[303]

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292 For instance, claims for maintenance in terms of the *Divorce Act* 70 of 1979.

293 *Fourie* case para 73.

294 *Fourie* case paras 49, 76-77.

295 *Fourie* case para 78.

296 Sections 9(1), 10 of the *Constitution*; *Fourie* case paras 4, 7, 14, 75-76; De Vos and Barnard 2007 *SALJ* 800; Robinson 2005 *Obiter* 498-499. See para 1.1.3.2 of this study

297 *Fourie* case paras 72, 78, 82, 114; Boniface 2015 *Scientific Cooperations International Journal of Law and Politics* 9; De Ru 2013 *Fundamina* 240; De Vos and Barnard 2007 *SALJ* 800; Meyerson 2010 *Constitutional Court Review* 305; Schäfer 2006 *SALJ* 635; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 101-102.

298 *Fourie* case para 50; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 44; De Ru 2013 *Fundamina* 240; Schäfer 2006 *SALJ* 635.

299 *Fourie* case para 50; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 44.

300 *Fourie* case paras 88-98. See para 1.1.3 for a complete discussion of the *Harksen* test.

301 *Fourie* case paras 111, 114; De Vos and Barnard 2007 *SALJ* 802; Goldblatt 2006 *Feminist Legal Studies* 264; Kruuse 2014 *International Journal of Law, Policy and the Family* 153.

302 De Vos and Barnard 2007 *SALJ* 802.

303 *Fourie* case paras 113-114; Robinson 2005 *Obiter* 499. See para 1.1.4 of this study for the grounds on which a right may be limited.

Section 30(1) of the *Marriage Act* and the common law were therefore declared unconstitutional and invalid to the extent that it did not provide same-sex couples with the same entitlements that opposite-sex couples enjoyed.[304] The court suspended the declaration of invalidity for a year to allow Parliament to enact suitable legislation.[305] If Parliament failed to correct the defect, the words "or spouse" must be read in after the words "or husband" in section 30(1) of the *Marriage Act*.[306] In the event that Parliament enacted legislation, the common law definition of "marriage" would also be amended to the effect that same-sex couples are recognised as "spouses".[307]

Following the decision in the *Fourie* case, Parliament enacted the *Civil Union Act*[308] (hereafter referred to as the *Civil Union Act*). The *Civil Union Act* extended the term "spouse" and the concept "family unit" to include partners or spouses in a legally concluded civil union.[309] A civil union in terms of the *Civil Union Act*

> means the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership,

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304 *Fourie* case paras 82, 132, 162; Bilchitz and Judge 2007 *SAJHR* 477; De Ru 2013 *Fundamina* 240; De Vos and Barnard 2007 *SALJ* 803; Goldblatt 2006 *Feminist Legal Studies* 262; Heaton "Civil Unions" 249; Heaton 2008 *Stell LR* 460-461; Kruuse 2014 *International Journal of Law, Policy and the Family* 153; Kruuse 2017 *The International Survey of Family Law* 351; Meyerson 2010 *Constitutional Court Review* 305; Mochela and Smith 2020 *TSAR* 485; Osman and Baase 2022 *SAJHR* 17; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 357; Wood-Bodley 2018 *Obiter* 277. See para 1.1.2 of this study for a discussion of the available remedies for curing unconstitutionality of acts.

305 *Fourie* case paras 154, 162; Bilchitz and Judge 2007 *SAJHR* 477; Bonthuys 2007 *SAJHR* 529; De Ru 2013 *Fundamina* 222, 240-241; De Vos and Barnard 2007 *SALJ* 823; Goldblatt 2006 *Feminist Legal Studies* 262, 268; Heaton "Civil Unions" 249; Kruuse 2014 *International Journal of Law, Policy and the Family* 153; Kruuse 2017 *The International Survey of Family Law* 351; Mochela and Smith 2020 *TSAR* 285; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 154; Schäfer 2006 *SALJ* 635; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 102; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 357; Wood-Bodley 2018 *Obiter* 277. The minority judgment held that the declaration of invalidity should not have been suspended. See *Fourie* case paras 169-170, 173; Goldblatt 2006 *Feminist Legal Studies* 262, 269.

306 *Fourie* case para 162; De Vos 2007 *SAJHR* 433, 457; De Vos and Barnard 2007 *SALJ* 798, 803, 806; Goldblatt 2006 *Feminist Legal Studies* 262; Kruuse 2017 *The International Survey of Family Law* 351; Mochela and Smith 2020 *TSAR* 485; Wood-Bodley 2018 *Obiter* 277.

307 *Fourie* case para 122; Goldblatt 2006 *Feminist Legal Studies* 262.

308 17 of 2006; Bilchitz and Judge 2007 *SAJHR* 482; Clark and Van Heerden 2024 *SALJ* 468; De Ru 2013 *Fundamina* 222; De Vos and Barnard 2007 *SALJ* 798; Domingo "Civil Union" 326; Heaton "Introduction" 4; Heaton "Civil Unions" 249; Kruuse 2017 *The International Survey of Family Law* 351; Osman and Baase 2022 *SAJHR* 17; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 154; Wood-Bodley 2018 *Obiter* 277; Zitzke 2018 *TSAR* 187.

309 Amien and Rajwani 2020 *The Journal of Legal Pluralism and Unofficial Law* 330; Amien, Moosa and Rautenbach "Religious, Personal, and Family Law Systems in South Africa" 68; Bonthuys 2007 *SAJHR* 530; De Ru 2013 *Fundamina* 245; Domingo "Civil Union" 326; Smith 2016 *SALJ* 288, 290.

in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others.[310]

The *Civil Union Act* allows for both same- and opposite-sex couples to enter into either a civil marriage or partnership, collectively referred to as a civil union.[311] Like the *Marriage Act*, the *Civil Union Act* sets out certain requirements for the conclusion of a valid civil union.[312] The legal consequences of a marriage contemplated in the *Marriage Act* apply to validly concluded civil unions.[313] Specifically, the *Civil Union Act* determines that partners or spouses in a civil union are regarded as spouses for any legislation referring to spouses or marriage.[314] Therefore, where the *ISA* refers to "spouse" it also refers to partners or spouses in a civil union.[315]

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310 Section 1 of the *Civil Union Act*; Bilchitz and Judge 2007 *SAJHR* 482, 484; De Ru 2013 *Fundamina* 245; Domingo "Civil Union" 327; Heaton 2008 *Stell LR* 452; Heaton "Civil Unions" 249; Heaton and Roos *Family and Succession Law in South Africa* 73; Jamneck 2014 *PELJ* 975; Rautenbach "Families and Legal Pluralism in South Africa" 66, 73; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 154; Smith and Heaton 2012 *THRHR* 481; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 359.

311 Barratt "Requirements for Civil Marriages" 184; Bilchitz and Judge 2007 *SAJHR* 482-483; Boniface 2015 *Scientific Cooperations International Journal of Law and Politics* 9; Bonthuys 2007 *SAJHR* 530; Clark and Van Heerden 2023 *SALJ* 622; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 4; De Vos 2007 *SAJHR* 461; De Vos and Barnard 2007 *SALJ* 821; Du Toit 2021 J*ournal of Civil Law Studies* 375; Heaton 2008 *Stell LR* 452; Heaton "Civil Unions" 249; Heaton "The Legal Requirements for a Civil Marriage" 30; Heaton and Roos *Family and Succession Law in South Africa* 73; Kruuse 2017 *The International Survey of Family Law* 351; Madzika 2020 *De Jure* 394; Mochela and Smith 2020 *TSAR* 485; Osman 2021 *SALJ* 524; Osman and Baase 2022 *SAJHR* 8; Osman-Hyder 2022 *Stell LR* 263; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 161; Rautenbach "Families and Legal Pluralism in South Africa" 73; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 102; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 358-359. Where a civil union has been concluded, a marriage in terms of any other law may not be concluded, including a marriage in terms of the *Marriage Act* or the *RCMA*. Bilchitz and Judge 2007 *SAJHR* 495; Bonthuys 2007 *SAJHR* 532; De Ru 2013 *Fundamina* 245, 247; Jamneck 2014 *PELJ* 976; Müller-Van der Westhuizen "Family Law" 118. See para 3.2 of this study for a discussion of the *RCMA*.

312 Heaton 2008 *Stell LR* 452.

313 De Ru 2013 *Fundamina* 245, 247; De Vos 2007 *SAJHR* 461, 463; Domingo "Civil Union" 329; Heaton 2008 *Stell LR* 452; Heaton "Civil Unions" 249; Mochela and Smith 2020 *TSAR* 485; Heaton and Roos *Family and Succession Law in South Africa* 73; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 102; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 368.

314 Section 13(1) of the *Civil Union Act*; Bonthuys 2007 *SAJHR* 530; De Vos 2007 *SAJHR* 461; Du Toit 2009 *SALJ* 474; Hofmeyr and Paleker *The Law of Succession in South Africa* 841; Jamneck 2014 *PELJ* 976; Smith 2016 *SAJHR* 132; Smith and Heaton 2012 *THRHR* 481; Wood-Bodley 2018 *Obiter* 276; Wood-Bodley 2020 *Obiter* 478-479.

315 De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 28; De Waal and Schoeman-Malan *Erfreg* 21; Smith 2016 *SALJ* 290.

Since the *Civil Union Act* was enacted within the time frame determined in the *Fourie* case, the *Marriage Act* remains unavailable to same-sex partners.[316] Since a civil union has essentially the same consequences as a marriage concluded in terms of the *Marriage Act*, the inability of same-sex partners to conclude a marriage in terms of the *Marriage Act* is of little legal consequence.[317] However, the separate systems of marriage available to opposite-sex and same-sex partners leave the *Marriage Act* open for further constitutional attack on the grounds of equality.[318]

What is important to note from the discussion of the *Fourie* case and the *Civil Union Act* is that the common law definition of the "family unit" and "marriage" was amended to include same-sex spouses.[319] Since same-sex partners are allowed to conclude civil unions and inherit intestate, it follows that a sex-change operation should not prohibit the ability of persons who have undergone a sex-change operation to inherit intestate. In paragraph 2.2.3 the ability of a person in a valid marriage or civil union who underwent a sex-change operation to inherit intestate from their spouse or partner is analysed.

2.2.3 The effect of sex-change operation on the common law term "spouse" in terms of the intestate succession law

Prior to the introduction of the *Constitution* and the legalisation of same-sex marriages, where a person underwent a sex-change operation before entering into a common law marriage, such a marriage was invalid due to it being regarded as a same-sex marriage.[320] In *W v W*[321] the court held that the sex of a person could not be changed by means of surgery.[322] Sexual classification was fixed at birth.[323] The marriage concluded in *W v W*[324] was invalid since both parties were deemed to be of the same

316 Bilchitz and Judge 2007 *SAJHR* 487; De Vos and Barnard 2007 *SALJ* 821; Heaton "The Legal Requirements for a Civil Marriage" 30; Mochela and Smith 2020 *TSAR* 485.
317 Bilchitz and Judge 2007 *SAJHR* 488; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 161; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 366.
318 Heaton "Civil Unions" 256.
319 Barratt "Requirements for Civil Marriages" 184.
320 *W v W* 1976 2 SA 308 (W); *Simms v Simms* 1981 2 All SA 322 (D).
321 1976 2 SA 308 (W).
322 *W v W* 1976 2 SA 308 (W) 312.
323 Ziehl 1997 *African Sociological Review* 49.
324 1976 2 SA 308 (W).

sex at the time of the conclusion of the marriage, despite the sex-change operation and the subsequent alteration of the sex description of one of the parties.[325] Based on the marriage being deemed between persons of the same sex, the court refused to grant a divorce action.[326] This position was confirmed in *Simms v Simms*.[327]

Although *W v W*[328] and *Simms v Simms*[329] dealt with divorce actions, the same principle would have been attributed to an intestate succession claim. If a deceased person had married a person who had undergone a sex change, the marriage would have been void on the same grounds. Since there would have been no marriage, no claim for intestate succession could succeed. For the purposes of law, a person was therefore regarded by the existing legislation as the sex they were born.

With the declaration of invalidity of the definition of marriage to the extent that same-sex couples are excluded, "spouse" is no longer limited to persons of the opposite-sex. Consequently, the question whether a sex-change operation influences the validity of a marriage, as held in *W v W*[330] and *Simms v Simms*,[331] needed to be reconsidered.

The *Alteration of Sex Description and Sex Status Act*[332] invalidated the decisions in *W v W*[333] and *Simms v Simms*.[334] The aforementioned act provides that a person may apply to have their sex description changed on the birth register if their sexual characteristics have been changed by means of surgery or medical treatments.[335] A person whose sex description has been changed is considered to have the sex corresponding to the new description.[336] The change of sex description does not affect the rights and obligations a person obtained before the change of sex description.[337]

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325 *W v W* 1976 2 SA 308 (W) 310; Oomen 2000 *THRHR* 278.
326 Lind 1995 *SALJ* 486.
327 1981 2 All SA 322 (D); Ziehl 1997 *African Sociological Review* 49.
328 1976 2 SA 308 (W).
329 1981 2 All SA 322 (D).
330 *W v W* 1976 2 SA 308 (W).
331 1981 2 All SA 322 (D).
332 49 of 2003.
333 *W v W* 1976 2 SA 308 (W).
334 1981 2 All SA 322 (D).
335 Section 2(1) of the *Alteration of Sex Description and Sex Status Act* 49 of 2003; *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 3.
336 Section 3(2) of the *Alteration of Sex Description and Sex Status Act* 49 of 2003.
337 Section 3(3) of the *Alteration of Sex Description and Sex Status Act* 49 of 2003; *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) paras 3-4.

In *KOS v Minister of Home Affairs*,[338] the court was called upon to adjudicate the status of marriages of transgender persons who were married in terms of the *Marriage Act* and who applied to have their sex description changed in accordance with the *Alteration of Sex Description Act*.[339] The case concerned several individuals who concluded valid marriages in terms of the *Marriage Act* and who were born biologically male and registered at birth as male.[340] After the marriages were concluded, the individuals had their sex surgically altered to female.[341] The individuals concerned applied for the alteration of their sex description with the support of their spouses.[342] If the applications were granted, it would result in their marriages being changed to same-sex marriages.[343] The Department of Home Affairs maintained that the alteration of the individuals' sex description is not possible while they are married in terms of the *Marriage Act*, since the *Marriage Act* did not permit same-sex marriages.[344]

The applications for the alteration of sex description of the individuals concerned were subsequently either denied or not processed.[345] One of the applications was granted and the marriage was removed from the records without the consent of the individuals concerned.[346] The Department of Home Affairs advised the applicants to obtain a divorce and conclude a civil union, that permits same-sex unions, after which the applications could be considered.[347]

The court determined that the marriages of the applicants' marriages were validly concluded in terms of the *Marriage Act*.[348] The marriages were stable, and the spouses had no desire to end them.[349] A marriage may only be ended through death or divorce.[350] A divorce may only be obtained on the grounds of an irretrievable

338 2017 6 SA 588 (WCC).
339 *Alteration of Sex Description and Sex Status Act* 49 of 2003; *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 1.
340 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 2.
341 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 2.
342 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 11.
343 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 13.
344 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 13.
345 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 14.
346 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) paras 15, 54.
347 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 40.
348 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 89.
349 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 11.
350 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 12.

breakdown or where one of the spouses suffers from a mental illness or continued unconsciousness.[351] Therefore, the applicants had no legal basis for dissolving their marriages.[352]

The court further held that marriage is neither defined in the *Marriage Act* nor the *Civil Union Act*.[353] The common law definition of marriage was extended in the *Fourie* case to include same-sex partners.[354] The common law definition of marriage, therefore, no longer excludes couples in same-sex marriages.[355]

The court also recognised that a change of a person's sex description in terms of the *Alteration of Sex Description Act*[356] has important legal and practical significance to transgender people.[357] A person who fails to obtain a replacement identity document card, that may only be obtained once the alteration in terms of the *Alteration of Sex Description Act*[358] is granted, is guilty of a criminal offence in terms of the *Identification Act.*[359] Persons who have undergone a sex change are therefore obliged to ensure that the change is recorded by the Department of Home Affairs, which is prohibited by their status as married persons in terms of the *Marriage Act*.

Lastly, the court confirmed that rights and duties that flow from a marriage exist for as long as the marriage does.[360] The *Alteration of Sex Description Act*[361] does not provide that an applicant's marriage precludes the granting of an application for the alteration of sex description.[362] Furthermore, section 7(2) of the *Constitution* obligates the state to promote the values enshrined in the Bill of Rights.[363] To interpret the *Marriage Act* in a manner that would undermine rather than promote the rights

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351 Section 5 of the *Divorce Act* 70 of 1979; *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 12.

352 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) paras 11, 41, 46; Heaton "The Legal Requirements for a Civil Marriage" 31.

353 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 22.

354 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) paras 18-19. See para 2.2.2 of this study.

355 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) paras 19-20.

356 *Alteration of Sex Description and Sex Status Act* 49 of 2003.

357 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 10.

358 *Alteration of Sex Description and Sex Status Act* 49 of 2003.

359 68 of 1997; *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 74.

360 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 4.

361 *Alteration of Sex Description and Sex Status Act* 49 of 2003.

362 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) paras 62, 73, 82; Heaton "The Legal Requirements for a Civil Marriage" 31.

363 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 70.

contained in the Bill of Rights would be contrary to the constitutional duties of the state.[364]

The failure of the state to process and grant the applications in terms of the *Alteration of Sex Description Act*[365] was deemed unconstitutional and unfair and infringed upon the rights to equality and dignity of the individuals concerned.[366] The court therefore ordered the registration of the change of the sex description of all the applicants and that the deleted marriage be restored in the Department of Home Affairs' record system.[367]

Therefore, marriages concluded in terms of the *Marriage Act* before or after a sex-change operation are not affected by a sex-change operation once validly concluded. Partners may thus be of the same-sex in a common law marriage where one of the parties has undergone a sex-change operation after the conclusion of a valid civil marriage. Accordingly, a person who underwent a sex-change operation after the conclusion of a valid marriage or civil union remains eligible to inherit intestate from their spouse or partner in terms of the *ISA*.

In summary, a "spouse" in terms of the common law is a person who concluded a valid marriage in terms of the *Marriage Act*, or a valid civil union in terms of the *Civil Union Act*. Where a valid marriage or civil union has been concluded, a sex-change operation does not change the ability of a person to inherit intestate from their partner or spouse. The discussion now turns to an examination of the terms "descendant" and "parent" in the context of common law.

2.3 The development of the terms "descendant" and "parent" in terms of the common law

As with the term "spouse", the terms "descendant" and "parent" are not defined by the *ISA* and the common law meaning was attributed to "descendant" and "parent".[368] At common law, initially only the biological children of married spouses were regarded

364 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 82.
365 *Alteration of Sex Description and Sex Status Act* 49 of 2003.
366 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 90.
367 *KOS v Minister of Home Affairs* 2017 6 SA 588 (WCC) para 90.
368 See para 1.1 of this study.

as "descendants", and married spouses were regarded as "parents" of their biological children.[369] Additionally, unmarried mothers were recognised as parents of their biological children to the exclusion of unmarried fathers.[370]

For the purpose of the *ISA*, the terms "descendant" and "parent" were extended to include adopted children and adoptive parents,[371] unmarried fathers,[372] commissioning parents,[373] same-sex parents[374] and persons who have accepted or acquired parental rights and responsibilities pertaining to a child.[375] The recognition of parental rights and responsibilities of persons involved in artificial insemination is regulated by the *Children's Act*.[376]

Notably, the *Constitution* as well as the *Children's Act* reflect a change in the emphasis of the legal relationship between children and parents.[377] The emphasis of the legal relationship between parents and children has shifted from considering who has authority and control over children to who has rights and responsibilities towards a child.[378] The principle of the best interest of the child takes primary consideration in matters pertaining to the child.[379] In contrast, the *ISA*'s focus on determining intestate succession rights between a "parent" and a "descendant" remains centred on a biological link.

The development of the terms "parent" and "descendant" is discussed below in relation to unmarried parents,[380] adoption,[381] surrogacy agreements,[382] same-sex parents,[383] artificial insemination[384] and the recognition of persons with parental rights as

369 See paras 1.1 and 2.1 of this study.
370 See paras 2.1 and 2.3.2 of this study.
371 See paras 2.1 and 2.3.3 of this study.
372 See paras 2.1 and 2.3.2 of this study.
373 See paras 2.1 and 2.3.4 of this study.
374 See paras 2.1 and 2.3.6 of this study.
375 See paras 2.1 and 2.3.7 of this study.
376 See paras 2.1 and 2.3.5 of this study.
377 Church and Church "Children" para 185.
378 *Wilsnach v TM* 2021 3 SA 568 (GP); Church and Church "Children" para 185.
379 Sections 7, 9 of the *Children's Act*; Church and Church "Children" para 185, 193; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 109.
380 See para 2.3.2 of this study.
381 See para 2.3.3 of this study.
382 See para 2.3.4 of this study.
383 See para 2.3.6 of this study.
384 See para 2.3.5 of this study.

parents.[385] Before the development of the terms "descendant" and "parent" are analysed, the intestate rights of "descendants" and "parents" are discussed in paragraph 2.3.1.

2.3.1 Inheritance rights of "descendants" and "parents" in terms of the common law

As indicated above, intestate succession rights developed from Roman-Dutch law.[386] As mentioned above, Roman-Dutch law incorporated two systems of intestate inheritance, namely *Aasdom's* law and *Schependomsreg*.[387] In terms of the *Aasdom's* law, the basic principle is that the nearest blood relation or relations inherit the entire estate in equal shares.[388] If there were descendants alive at the time of the deceased's death, they would inherit the entire estate in equal shares.[389] Only if there were no living children at the time of the deceased's death, descendants removed from the deceased to the second degree were entitled to inherit.[390]

According to old *Schependom's* law, descendants inherited before other possible heirs.[391] Representation of descendants was allowed if a descendant predeceased the deceased.[392] No limit was placed on the degree to which the descendants were removed from the deceased; therefore, any descendant was allowed to inherit by representation.[393] If there were no descendants alive at the time of the deceased's death, the deceased's parents inherited in equal shares.[394]

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385 See para 2.3.7 of this study.
386 See para 2.1 of this study.
387 Van der Westhuizen 1948 *THRHR* 246.
388 Botha 1917 *SALJ* 175, 179; De Groot *Inleidinge tot de Hollandsche Rechts-Geleerdheid* 2 28 3; Du Plessis 1990 *De Jure* 238; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 30; Van der Westhuizen 1948 *THRHR* 250.
389 Botha 1917 *SALJ* 175, 179; Du Plessis 1990 *De Jure* 242; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 31; Van der Westhuizen 1948 *THRHR* 250.
390 Botha 1917 *SALJ* 175; Du Plessis 1990 *De Jure* 242; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 31; Van der Westhuizen 1948 *THRHR* 250.
391 Botha 1917 *SALJ* 174; Du Plessis 1990 *De Jure* 238, 242; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 33*;* Van der Westhuizen 1948 *THRHR* 249.
392 Botha 1917 *SALJ* 174; Du Plessis 1990 *De Jure* 242; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 34; Wood-Bodley 2020 *Obiter* 463.
393 Botha 1917 *SALJ* 174, 179; Du Plessis 1990 *De Jure* 242; Van der Westhuizen 1948 *THRHR* 249.
394 Du Plessis 1990 *De Jure* 242; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 48; Van der Westhuizen 1948 *THRHR* 247.

Where there was no descendant alive at the time of the death of the deceased, the basic principle in old *Schependom's* law was that property returned to where it came from.[395] The principle was based on the reasoning that the deceased's estate benefited equally from both the parents.[396] If no parents, or only one parent, survived the deceased, such parents' descendants inherited, in other words, the brothers and/or sisters of the deceased.[397] The assumption is that if one parent outlived and one predeceased the deceased, the living parent contributed nothing to the estate of the deceased and therefore inherits nothing.[398] Half brothers and sisters could only inherit from one parent and, as a result, only inherited half a share of a deceased's estate compared to full-blood brothers and sisters.[399]

The *ISA* codified and simplified the intestate succession rights of "descendants" and "parents".[400] In terms of the *ISA*, "descendant(s)" are entitled to inherit from their "parent(s)". A "descendant" inherits the entire estate from a "parent" (and in equal shares where there is more than one descendant) where that "parent" had no "spouse" at the time of their death.[401] If both a "spouse" and a "descendant" survive the deceased, the "spouse" and the "descendant" inherit the estate as explained above.[402] A "parent", however, only inherit where a deceased leaves no "spouse" or "descendants".[403]

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395 Botha 1917 *SALJ* 174; De Groot *Inleidinge tot the Hollandsche Rechts-Geleerdheid* 2 28 6; Du Plessis 1990 *De Jure* 242; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 48; Van der Westhuizen 1948 *THRHR* 247.

396 Botha 1917 *SALJ* 174; Du Plessis 1990 *De Jure* 242; Van der Westhuizen 1948 *THRHR* 247.

397 Botha 1917 *SALJ* 174-175; Du Plessis 1990 *De Jure* 242; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 49; Van der Westhuizen 1948 *THRHR* 247, 249.

398 Botha 1917 *SALJ* 174; Du Plessis 1990 *De Jure* 242; Van der Westhuizen 1948 *THRHR* 248.

399 Du Plessis 1990 *De Jure* 242; Van der Westhuizen 1948 *THRHR* 248.

400 See para 2.2.1 of this study.

401 Section 1(b) of the *ISA*; *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 117; *Flynn v Farr* 2009 1 SA 584 (C) para 15; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 29-30; De Waal and Schoeman-Malan *Erfreg* 22; Gildenhuys "Wills and Succession" para 263; Heaton and Roos *Family and Succession Law in South Africa* 207; Hofmeyr and Paleker *The Law of Succession in South Africa* 847.

402 See para 2.2.1 of this study.

403 Section 1(d) of the *ISA*; *Wilsnach v TM* 2021 3 SA 568 (GP) para 47. The parents inherit in equal shares. If one of the parents is predeceased, the deceased parent's descendant inherits. Section 1(d)-(e) of the *ISA*; *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 117; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 35-37; De Waal and Schoeman-Malan *Erfreg* 25-28; Du Toit 2009 *SALJ* 465; Gildenhuys "Wills and Succession" para 263; Heaton and Roos *Family and Succession Law in South Africa* 208; Hofmeyr and Paleker *The Law of Succession in South Africa* 859; Wood-Bodley 2022 *SALJ* 768.

A "descendant" and "parent" only qualified for inheritance rights in terms of the *ISA* if they were included in the common law concept of the "family unit". In paragraph 2.3.2 the development of the terms "descendant" and "parent" to include unmarried fathers as a "parent" for the purpose of the *ISA* is discussed.

2.3.2 The influence of the marital status of parents on the development of the intestate succession terms "descendant" and "parent" in terms of the common law

As stated above, only biological children born from a legally valid marriage were regarded as part of the "family unit" in terms of the common law.[404] A child born to unmarried parents was regarded as the child of the mother only.[405] Consequently, a child born to unmarried parents could only inherit intestate from their biological mother and *vice versa*.[406] If an unmarried father married the mother of his biological child, the child became legally his child and gained the right to inherit intestate from his biological child and *vice versa*.[407]

Where a father remained unmarried, he remained outside the common law definition of the "family unit" and his legal rights to his children were severely limited.[408] Aside from a maintenance duty, an unmarried father did not have any parental rights over his biological child.[409] For instance, an unmarried father had no guardianship over his biological child and he could not refuse adoption of his biological child.[410] Additionally, an unmarried father was not a "parent" of his biological child, and a child was not a

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404 Peart 1984 *THRHR* 176. See para 2.2 of this study.

405 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 57; *Green v Fitzgerald* 1914 AD 88 99; Barratt and Domingo "Parent and Child" 155; Boniface 2015 *Scientific Cooperations International Journal of Law and Politics* 8; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 23-24; Mosikatsana 1996 *CILSA* 153-154; Ziehl 1997 *African Sociological Review* 46.

406 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 57; Gildenhuys "Wills and Succession" para 257; Hofmeyr and Paleker *The Law of Succession in South Africa* 848.

407 *Children's Status Act* 82 of 1987; Burman and Naude 1991 *Journal of Southern African Studies* 404, 407; Heaton and Roos *Family and Succession Law in South Africa* 129; Mosikatsana 1996 *CILSA* 154; Ziehl 1997 *African Sociological Review* 46-47.

408 Mosikatsana 1996 *CILSA* 152.

409 Barratt and Domingo "Parent and Child" 155; Lind 1995 *SALJ* 483.

410 Section 18(4)(d) of the *Child Care Act* 74 of 1983; Mosikatsana 1996 *CILSA* 159.

"descendant" of their biological father in terms of the *ISA*.[411] As such, neither were entitled to inherit in terms of intestate succession law from each other.

The law developed to include the legal recognition of a familial relationship between an unmarried father and his biological children. Under the *Child Care Act*,[412] *Guardianship Act*[413] and the *Natural Fathers of Children Born Out of Wedlock Act*,[414] an unmarried father could obtain guardianship over his biological child through a court order.[415] However, the right to intestate succession for unmarried biological fathers from their biological children and *vice versa* was recognised prior to unmarried fathers gaining full parental rights to their biological children. The *ISA* provided for children to inherit from their biological parents and *vice versa*.[416] Therefore, once the *ISA* was enacted, marital status no longer prohibited the ability of unmarried fathers and their biological children to inherit intestate from each other.

Despite the recognition of intestate succession rights for unmarried fathers, the lack of authority of an unmarried father over his child could cause a father to lose intestate succession rights from his child and *vice versa*. For instance, an unmarried father could not object to the adoption of his biological child. If such a child was adopted, an unmarried father and his biological child would no longer be able to inherit intestate from each other.[417]

In the case of *Fraser v Children's Court*,[418] the court dealt with the lack of authority of an unmarried father to prevent the adoption of his biological child. The parties were involved in a relationship not formalised by marriage, from which a child was born.[419]

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411 Gildenhuys "Wills and Succession" para 257.

412 74 of 1983.

413 192 of 1993.

414 86 of 1997.

415 Section 1 of the *Guardianship Act* 192 of 1993; Section 8 of the *Natural Fathers of Children Born Out of Wedlock Act* 86 of 1997.

416 Section 1(2) of the *ISA*; *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 117; *Wilsnach v TM* 2021 3 SA 568 (GP) para 47; Amien 2014 *Acta Juridica* 203; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 23; De Waal and Schoeman-Malan *Erfreg* 32, 118; Gildenhuys "Wills and Succession" para 257; Hofmeyr and Paleker *The Law of Succession in South Africa* 151, 848.

417 See para 2.3.3 of this study for a discussion of intestate succession rights of an adopted child and adoptive parents.

418 1997 2 SA 261 (CC).

419 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) paras 1-2.

The mother unilaterally decided that it would be in the best interests of the child to give the child up for adoption.[420] The court had to decide on the constitutionality of the *Child Care Act*[421] in failing to require the authority of unmarried fathers to consent to adoptions.[422]

The court found that the *Child Care Act*[423] unfairly discriminated against fathers in different unions.[424] The court determined that fathers in Muslim marriages were in the same position as unmarried fathers since Muslim marriages were not recognised in terms of the law at the time the case was heard.[425] Fathers in Muslim marriages, therefore, also did not need to consent to adoption.[426]

In contrast, in terms of the provisions of customary law, a father was required to consent to the adoption of his child.[427] The court found no justifiable reason why the same recognition should not be afforded to marriages in accordance with the rights of systems that allows polygyny.[428] Since both are potentially polygynous, the distinction was unfair.[429] Additionally, it is also unjustifiably unfair to treat unmarried fathers and mothers differently.[430] The *Child Care Act*[431] was therefore held unconstitutional since it distinguishes between fathers in different unions and between married and unmarried fathers.[432] The differential treatment was on the grounds of marital status and gender.[433]

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420 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para 2.
421 74 of 1983. The *Child Care Act* was repealed by the *Children's Act* 74 of 1983.
422 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para 18.
423 74 of 1983.
424 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para 21.
425 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para 21; Bonthuys 2002 *SALJ* 764. See para 4.3 of this study.
426 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para 21; Bonthuys 2002 *SALJ* 764.
427 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para 21, 23; Bonthuys 2002 *SALJ* 764. See para 3.3.2 of this study.
428 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para 23; Williams 2004 *SAJHR* 36.
429 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para 21-23; Bonthuys 2002 *SALJ* 764.
430 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para 25.
431 74 of 1983.
432 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) paras 24, 26, 52; Bonthuys 2002 *SALJ* 764-765.
433 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para 24; Wolhuter 1997 *SALJ* 396. See para 1.1.3.1 of this study.

After the declaration of unconstitutionality of the *Child Care Act*,[434] the *Children's Act* was enacted, fully recognising the rights of unmarried fathers alongside those of unmarried mothers.[435] In terms of the *Children's Act*, unmarried fathers acquire full and automatic rights to their biological children if the father is living with the biological mother at the time of the child's birth, acknowledged that he is the father of the child, applied to court for parental rights and responsibilities of the child, paid damages in terms of customary law or if he made and attempted to contribute to the upbringing and maintenance of the child.[436] Where an unmarried father marries the mother of the child after birth or conception, he too acquires full rights and responsibilities of the child.[437]

Where a father does not meet the requirements of the *Children's Act*, he does not acquire rights to the child. However, for the purpose of the *ISA*, the biological link between a parent and a child remains of paramount importance in determining who qualifies as a "parent", irrespective of rights acquired or lost in terms of the *Children's Act*.[438] This position was challenged in *Wilsnach v TM* (hereafter referred to as the *Wilsnach* case).[439]

The High Court in the *Wilsnach* case dealt with the legal position of the estate of a deceased child of an unmarried mother and father.[440] The deceased suffered a debilitating condition during childbirth and was awarded damages.[441] Upon the death

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434 74 of 1983.

435 Sections 19-20 of the *Children's Act*; Barratt and Domingo "Parent and Child" 151-152, 155; Heaton and Roos *Family and Succession Law in South Africa* 133; Kruger "Parental Responsibilities and Rights" 371.

436 Section 21 of the *Children's Act*; *Wilsnach v TM* 2021 3 SA 568 (GP) para 51; Barratt and Domingo "Parent and Child" 150, 155; Boniface 2015 *Scientific Cooperations International Journal of Law and Politics* 8; Heaton and Roos *Family and Succession Law in South Africa* 133, 158; Kruger "Parental Responsibilities and Rights" 374-376; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 165; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 113; Smith 2011 *SALJ* 583-584.

437 Section 38(1) of the *Children's Act*; De Waal and Schoeman-Malan *Erfreg* 34; Domingo "Adoption, Artificial Fertilisation and Surrogate Motherhood" 173; Kruger "Parental Responsibilities and Rights" 374.

438 Section 1(2) of the *ISA*; *Wilsnach v TM* 2021 3 SA 568 (GP) para 56-57; De Waal and Mills 2021 *TSAR* 564-565.

439 2021 3 SA 568 (GP).

440 *Wilsnach* case paras 2, 12, 33; Hofmeyr and Paleker *The Law of Succession in South Africa* 853; Muneer 2023 *Journal of Comparative Law in Africa* 207.

441 *Wilsnach* case paras 10, 17; De Waal and Mills 2021 *TSAR* 563; Du Toit 2021 *Journal of Civil Studies* 382; Muneer 2023 *Journal of Comparative Law in Africa* 207; Wood-Bodley 2022 *SALJ* 769.

of the child, his estate amounted to approximately R15 000 000.[442] As per the *ISA*, the estate was to be divided between the biological parents.[443] The *Wilsnach* case revolved around two issues, namely, whether a biological father may be disqualified as a "parent" and whether a grandmother who acted as the primary caregiver could be recognised as a "parent".[444] The grandmother's position is discussed in paragraph 2.3.6 of this study.

The father of the child played no role in the upbringing, financial support or the care of his biological child.[445] The court determined that the lack of involvement of the father in his child's life is contrary to the best interest principle contained in the *Constitution* and the *Children's Act*.[446] Due to the lack of involvement of the father in his child's life, an order for the termination of the parental rights and responsibilities of the biological father was issued in terms of the *Children's Act*.[447] For the court, the loss of parental rights of the father was a decisive factor in excluding the father from the term "parent" in the *ISA*.[448]

The court held that the father was the biological father of the deceased child, but not a father in terms of the law.[449] The father argued that losing rights under the *Children's Act* does not automatically mean that intestate succession rights are also lost.[450] By recognising that the principle of the best interest of the child applied to the estate of a deceased child, the court argued that the father was an unworthy heir who should

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442 *Wilsnach* case para 19; De Waal and Mills 2021 *TSAR* 563; Du Toit 2021 *Journal of Civil Law Studies* 382; Wood-Bodley 2022 *SALJ* 769.

443 Du Toit 2021 *Journal of Civil Law Studies* 382; Muneer 2023 *Journal of Comparative Law in Africa* 208; Wood-Bodley 2022 *SALJ* 769.

444 *Wilsnach* case paras 8, 34; Du Toit 2021 *Journal of Civil Law Studies* 382; Hofmeyr and Paleker *The Law of Succession in South Africa* 283; Wood-Bodley 2022 *SALJ* 771.

445 *Wilsnach* case para 12; Hofmeyr and Paleker *The Law of Succession in South Africa* 852; Muneer 2023 *Journal of Comparative Law in Africa* 207; Wood-Bodley 2022 *SALJ* 769-770.

446 *Wilsnach* case para 63; Hofmeyr and Paleker *The Law of Succession in South Africa* 853.

447 Section 21 of the *Children's Act*; *Wilsnach* case paras 55, 62; De Waal and Mills 2021 *TSAR* 563; Kruger "Parental Responsibilities and Rights" 398-400; Muneer 2023 *Journal of Comparative Law in Africa* 208; Wood-Bodley 2022 *SALJ* 770.

448 *Wilsnach* case paras 62, 64; De Waal and Mills 2021 *TSAR* 563; Hofmeyr and Paleker *The Law of Succession in South Africa* 854; Muneer 2023 *Journal of Comparative Law in Africa* 205, 208-209.

449 *Wilsnach* case paras 65-66; Du Toit 2021 *Journal of Civil Law Studies* 383; Hofmeyr and Paleker *The Law of Succession in South Africa* 854.

450 *Wilsnach* case para 57.

not qualify for intestate succession.[451] The father was therefore not an heir in terms of the provisions of the *ISA*.[452]

Despite the outcome of the case being satisfying, the court's reasoning was questionable in its reliance on the *Children's Act*, since the *Children's Act* and the *ISA* serve very different purposes.[453] The *Children's Act* does not terminate intestate succession rights.[454] The *Children's Act* is only applicable to children who have not yet obtained the age of majority.[455] The *ISA* is applicable to all "descendants" and "parents" who qualify as such, irrespective of age. Therefore, the best interest argument made by the court would have failed had the deceased been, for example, 26 years old at the time of death. Had the father taken care of the child up to the age of 18 years, then chose to abandon the child, the mother and grandmother would not have been able to apply for termination of the parental rights of the father in terms of the *Children's Act*, since the *Children's Act* is only applicable to children who are of minority age.[456]

Instead, the father could have been declared an unworthy heir based on his neglect of the child.[457] The current classes of unworthiness may be extended to recognise new classes in accordance with public policy.[458] Public policy, informed by the best interest principle, and a common law requirement that a biological parent is obliged to care for and maintain his/her child, irrespective of the age of the child, could have been used

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451 *Wilsnach* case para 65; De Waal and Mills 2021 *TSAR* 565; Hofmeyr and Paleker *The Law of Succession in South Africa* 854.

452 *Wilsnach* case paras 68, 90, 93; De Waal and Mills 2021 *TSAR* 565.

453 De Waal and Mills 2021 *TSAR* 566, 570-571; Du Toit 2021 *Journal of Civil Law Studies* 384.

454 De Waal and Mills 2021 *TSAR* 569.

455 See also De Waal and Mills 2021 *TSAR* 569.

456 Also see De Waal and Mills 2021 *TSAR* 568 who confirms that the *Children's Act* is only applicable to persons below the age of 18 years.

457 See for example De Waal and Mills 2021 *TSAR* 570; Du Toit 2021 *Journal of Civil Law Studies* 385.

458 De Waal and Mills 2021 *TSAR* 570-571. See *Caldwell v Erasmus* 1952 4 SA 43 (T); *Casey v The Master* 1992 4 SA 505 (N); *Danielz v De Wet* 2009 6 SA 42 (C); *Ex Parte Hauptfleish* 1925 1 PH All (C); *Ex Parte Steenkamp and Steenkamp* 1952 1 SA 744 (T); *Leeb v Leeb* 1999 JDR 0302 (N); *Makhanya v Minister of Finance* 2001 2 SA 1251 (D); *Marais v Botha* 2009 JDR 0020 (C); *Pillay v Ngan* 2001 1 SA 410 (D); *Smit v The Master of the High Court, Western Cape* 2022 JDR 1085 (WCC); *Taylor v Pim* 1903 24 NLR; *Yassen v Yassen* 1965 1 SA 438 (N); Hofmeyr and Paleker *The Law of Succession in South Africa* 140-150 for a discussion of persons who are deemed unworthy the law of succession.

to determine that the father is unworthy.[459] If in the example above, the child had been 26 years of age at the time of his death, an argument can be made that public policy in this case would have demanded that the father continue care of his child and could have been declared unworthy for his failure in care of his child.

Additionally, the court's argument that it would not be in the child's best interest to allow the father to inherit is incorrect in law. A deceased person does not have legal personality.[460] Therefore, upon the death of the child in the *Wilsnach* case, legal personality of the child ceased.[461] There was thus no child whose interests' needed protection.[462] It is therefore submitted that the *Wilsnach* case was incorrect in its reliance on the principle of the best interest of the child to disqualify the father to inherit intestate. Instead, the court should have considered the father an unworthy heir.

In *Jacobs v Adams*[463] (hereafter the *Adams* case), the court refused to follow the *Wilsnach* case in as far as it relied on constitutional considerations.[464] The court was, however, prepared to consider the unworthiness of the father as an intestate heir.[465] As in the *Wilsnach* case, the father in the *Adams* case played a negligible role in the child's life.[466] At the age of 29, the child passed away, amassing an estate valued at more than R700 000 without being survived by a spouse or a descendant.[467] The estate was therefore to devolve on the two surviving parents in accordance with the *ISA*.[468]

In the *Wilsnach* case, an application was made to the court to declare a person a "parent" who was not a biological parent. In the *Adams* case, however, an application was made to remove a person from the term "parent."[469] Additionally, unlike in the *Wilsnach* case, the court in the *Adams* case was of the opinion that the *Children's Act*

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459 Sections 1, 18 of the *Children's Act*; De Waal and Mills 2021 *TSAR* 562. See the discussion of *Jacobs v Adams* (GJ) (unreported) case number 2024-127653 of 24 August 2025 below.
460 De Waal and Mills 2021 *TSAR* 568.
461 De Waal and Mills 2021 *TSAR* 568; Mahler-Coetzee "The End of Legal Personality" 102.
462 De Waal and Mills 2021 *TSAR* 568.
463 (GJ) (unreported) case number 2024-127653 of 24 August 2025.
464 *Adams* case para 3.
465 *Adams* case para 3.
466 *Adams* case paras 4-6.
467 *Adams* case para 9.
468 *Adams* case para 10. See para 2.3.1 of this study
469 *Adams* case para 32. See para 2.3.7 of this study.

should not be applied to intestate matters.[470] The court determined that intestate succession is concerned with the devolution of a deceased estate, while the *Children's Act* is concerned with parental rights.[471] Therefore, the term "parent" in the *ISA* cannot be defined with reference to the term "parent" in the *Children's Act*.[472]

In considering the unworthiness principle, the court determined that parents who show extreme neglect of a child, are unworthy of being recognised as "parents" in terms of the *ISA*.[473] The court was hesitant to extend the unworthiness principle,[474] but due to the denial of the father as an intestate succession heir in the *Wilsnach* case, the court in the *Adams* case considered itself bound to find a father who showed no interest in a child's life, as unworthy.[475] However, the court limited the unworthiness of a parent only to those instances where the facts show complete abandonment of the child by the parent.[476] Apart from complete abandonment, the court called on the legislature to determine the extent of the lack of involvement that would lead to a parent being deemed unworthy of custody.[477] Unlike the *Wilsnach* case, the court opted not to remove the father from the term "parent" but instead to declare him unworthy to inherit.[478]

Despite the finding of unworthiness in the *Adams* case, the court's decision in the *Wilsnach* case leaves room for legislative regulation of the intestate inheritance rights of "parents" and "descendants" where unmarried fathers have lost parental rights

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470 *Adams* case paras 35-36.
471 *Adams* case paras 35-36.
472 *Adams* case para 51.
473 *Adams* case para 56.
474 Heirs are unworthy if they were involved in the deceased's murder, involved in a conspiracy to the murder of the deceased, caused the deceased to live an immoral life, involved in fraudulent conduct in hiding the deceased's will or forgery of the deceased's will. See *Caldwell v Erasmus* 1952 4 SA 43 (T); *Casey v The Master* 1992 4 SA 505 (N); *Danielz v De Wet* 2009 6 SA 42 (C); *Ex Parte Hauptfleish* 1925 1 PH All (C); *Ex Parte Steenkamp and Steenkamp* 1952 1 SA 744 (T); *Leeb v Leeb* 1999 JDR 0302 (N); *Makhanya v Minister of Finance* 2001 2 SA 1251 (D); *Marais v Botha* 2009 JDR 0020 (C); *Pillay v Ngan* 2001 1 SA 410 (D); *Smit v The Master of the High Court, Western Cape* 2022 JDR 1085 (WCC); *Taylor v Pim* 1903 24 NLR; *Yassen v Yassen* 1965 1 SA 438 (N); See Hofmeyr and Paleker *The Law of Succession in South Africa* 140-150 for a discussion of persons who are deemed unworthy the law of succession.
475 *Adams* case para 60.
476 *Adams* case para 60.
477 *Adams* case para 61. See para 6.2 for a discussion supporting the declaration of unworthiness in appropriate circumstances.
478 *Adams* case para 64-65.

under the *Children's Act*. In paragraph 2.4, suggestions on how the intestate succession rights of persons who acquired and lost or never acquired rights in terms of the *Children's Act* could be regulated are considered.[479]

To summarise, where a biological relationship exists between a child and their parent, such a child and parent automatically become a "descendant" and a "parent" in the context of the *ISA*, irrespective of the parents' marital status. If a parent has lost parental rights and responsibilities and played no part in a child's life, following the *Wilsnach* case, they are not "parents" in terms of the *ISA*. The court in the *Adams* case, rather than excluding a parent who lost parental rights and responsibilities from the term "parent", demonstrated that a parent who shows no interest in the child is an unworthy heir. Such an unworthy heir is disqualified from inheriting in terms of the *ISA*. In paragraph 2.3.3 the development of the terms "descendant" and "parent" in relation to adoption is discussed.

2.3.3 The inclusion of adopted children and adoptive parents in the intestate succession terms "descendant" and "parent" in terms of common law

Roman-Dutch law, and therefore South African common law, did not recognise adoption.[480] Adoption was first legally recognised by the *Adoption of Children Act*.[481] Despite creating a legal relationship between an adopted child and an adoptive parent, no intestate succession rights were recognised between an adopted child and an adoptive parent or their relations.[482] The repeal of the *Adoption of Children Act* [483] and subsequent enactment of the *Children's Act*[484] of 1923 that in turn was repealed by the *Children's Act*[485] of 1937 also provided that the legal relationship between an

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479 See also para 2.3.7 of this study.

480 Ferreira 2010 *Fundamina* 4; Louw 2017 *Obiter* 457, 460; Monye 2018 *Journal of Law, Society and Development* 5; Van der Walt 2014 *Obiter* 431.

481 25 of 1923; *Kewana v Santam* 1993 4 SA 771 (TkA) 776B; Ferreira 2010 *Fundamina* 4.

482 Section 8(2) of the *Adoption of Children Act* 25 of 1923; Louw 2017 *Obiter* 460, 462-463; Mosikatsana 1996 *Acta Juridica* 117; Monye 2018 *Journal of Law, Society and Development* 5; Van der Walt 2014 *Obiter* 422, 430-431.

483 25 of 1923.

484 25 of 1923.

485 31 of 1937.

adopted child and their natural parents was terminated, except for the right to intestate succession.[486]

The *Succession Act*[487] finally recognised the right of adopted children to inherit intestate from their adoptive parent. The *Succession Act*[488] specifically provided that children adopted in terms of the *Children's Act*,[489] may inherit intestate from their adoptive parents and *vice versa*.[490] Additionally, once enacted, the *Child Care Act*[491] also recognised the right of intestate succession between adopted children and adoptive parents.[492] The *Child Care Act*[493] repealed the *Children's Act*[494] and terminated the link between the natural parents of an adopted child for all purposes.[495] Upon its enactment, the *ISA* also reaffirmed the right of adopted children to inherit from their adoptive parents instead of their natural parents and *vice versa*.[496]

Currently, the *Children's Act* regulates adoption procedures, demanding a court order for an adoption to have legal effect.[497] The *Children's Act* specifically includes an adoptive parent in the definition of parent.[498] A child may be adopted by a husband and wife jointly, partners in a life partnership, persons forming a permanent family unit, a widower, widow, divorced or unmarried person, a married person whose spouse

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486 Section 71(2) of the *Children's Act* 31 of 1937; S 71(2)(b) of the *Children's Act* 33 of 1960; *Flynn v Farr* 2009 1 SA 584 (C) paras 14-15; Kruger "Children's Rights" 354; Louw 2017 *Obiter* 462, 466-467.

487 13 of 1934.

488 13 of 1934.

489 Section (2) of the *Succession Act* 13 of 1934.

490 Section (2) of the *Succession Act* 13 of 1934.

491 74 of 1983.

492 74 of 1983; Louw 2017 *Obiter* 462, 467; Van der Walt 2014 *Obiter* 442.

493 74 of 1983.

494 31 of 1937.

495 Louw 2017 *Obiter* 462, 467; Mosikatsana 1996 *Acta Juridica* 117; Van der Walt 2014 *Obiter* 442.

496 Section 1(4)(e), 1(5) of the *ISA*; *Flynn v Farr* 2009 1 SA 584 (C) paras 15-16; *Wilsnach* case para 47; Amien 2014 *Acta Juridica* 204; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 23, 43; De Waal and Mills 2021 *TSAR* 566; De Waal and Schoeman-Malan *Erfreg* 29, 118; Gildenhuys "Wills and Succession" para 258; Hofmeyr and Paleker *The Law of Succession in South Africa* 151, 848-849; Louw 2017 *Obiter* 467.

497 Sections 228-253 of the *Children's Act*; *RS v JS* 2024 6 SA 609 (WCC) para 24; Church and Church "Children" para 399; Domingo "Adoption, Artificial Fertilisation and Surrogate Motherhood" 162; Heaton and Roos *Family and Succession Law in South Africa* 137; Kruger "Parental Responsibilities and Rights" 381; Louw 2017 *Obiter* 459; Monye 2018 *Journal of Law, Society and Development* 6; Van der Walt 2014 *Obiter* 445.

498 Section 1 of the *Children's Act*; *Wilsnach* case para 49.

is the parent of the child or life partner of the biological unmarried father.[499] Additionally, a person must be a fit and proper person.[500]

Therefore, customary and religious law spouses, partners in a civil union and life partners are included as persons who may adopt.[501] As with the *Child Care Act*,[502] all parental rights and responsibilities are terminated through adoption.[503] An adopted child legally becomes the child of the adoptive parent and *vice versa*.[504] For the *ISA*, a child legally adopted in terms of the *Children's Act* is therefore a "descendant" and an adoptive parent is a "parent".[505]

Without a formal adoption, a person cannot be regarded as a "parent" of a child in terms of the *ISA*.[506] In *Flynn v Farr*[507] (hereafter referred to as the *Flynn* case), under consideration was whether the concept "adopted child" in the *ISA* could be interpreted to include informally adopted children.[508] If it could not be so interpreted, it was argued that the *ISA* should be declared unconstitutional due to the exclusion of informally adopted children.[509]

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499 Section 231(1) of the *Children's Act;* Domingo "Adoption, Artificial Fertilisation and Surrogate Motherhood" 163; Ferreira 2025 *THRHR* 204; Heaton and Roos *Family and Succession Law in South Africa* 137; Kruger "Parental Responsibilities and Rights" 382; Monye 2018 *Journal of Law, Society and Development* 6; Smith 2016 *SALJ* 296.

500 Section 231(2) of the *Children's Act*; Domingo "Adoption, Artificial Fertilisation and Surrogate Motherhood" 163; Van der Walt 2014 *Obiter* 445.

501 Barratt and Domingo "Parent and Child" 163-164. See paras 3.3 and 4.3 of this study.

502 74 of 1983.

503 *Wilsnach* case para 40; Barratt and Domingo "Parent and Child" 167; Church and Church "Children" para 399; Ferreira 2025 *THRHR* 209, 211; Hofmeyr and Paleker *The Law of Succession in South Africa* 850; Kruger "Parental Responsibilities and Rights" 387; Louw 2017 *Obiter* 458; Monye 2018 *Journal of Law, Society and Development* 4, 7; Heaton and Roos *Family and Succession Law in South Africa* 142, 210; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 165; Van der Walt 2014 *Obiter* 449.

504 Section 242(3) of the *Children's Act*; Barratt and Domingo "Parent and Child" 167; Ferreira 2025 *THRHR* 209; Heaton and Roos *Family and Succession Law in South Africa* 142, 158, 210; Kruger "Parental Responsibilities and Rights" 381, 388; Louw 2017 *Obiter* 458; Monye 2018 *Journal of Law, Society and Development* 4, 7; Van Schalkwyk 2012 *TSAR* 206.

505 Section 1(4)(e), 1(5) of the *ISA*.

506 Hofmeyr and Paleker *The Law of Succession in South Africa* 854; Ziehl 1997 *African Sociological Review* 48.

507 2009 1 SA 584 (C).

508 *Flynn* case paras 2, 18.

509 *Flynn* case paras 2, 18.

In the *Flynn* case, the stepfather of a child treated the child as his own son.[510] However, no formal adoption was pursued.[511] Since the child was not formally adopted, the child could not be regarded as the "descendant" of the deceased in terms of the *ISA*.[512] The question was whether it is unconstitutional to discriminate between children formally and informally adopted.[513]

The court considered the *Harksen* test and found that differentiation between formally and informally adopted children was clearly evident.[514] Unjustified discrimination was argued on the grounds of birth and dignity.[515] However, the court found that there was a rational connection between the discrimination that served a legitimate purpose.[516] The court referred to *Volks v Robinson*, [517] which held that the parties had a choice to marry or not.[518] Similarly, in the *Flynn* case, there was a choice to adopt or not.[519]

The court pointed out that there would be various difficulties in determining when an informal adoption was made, such as what would be an appropriate duration of time acting as a parent, how it would be regulated if there were multiple stepparents and whether the child would retain inheritance rights from both stepparents and natural parents.[520] Additionally, the stringent requirements of the adoption process was aimed at the protection of a child, particularly to avoid exploitation and abduction of children.[521] The stringent requirements constituted a fair limitation of the right to equality.[522] Based on these considerations, a stepson informally adopted cannot be

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510 *Flynn* case paras 17, 46, 49; De Waal and Schoeman-Malan *Erfreg* 30; Louw 2017 *Obiter* 459, 467.
511 *Flynn* case para 6.
512 *Flynn* case para 21; Louw 2017 *Obiter* 467.
513 *Flynn* case paras 19, 22; Hofmeyr and Paleker *The Law of Succession in South Africa* 854; Louw 2017 *Obiter* 467.
514 *Flynn* case para 23-24, 26-27. See para 1.1.3.1 of this study.
515 *Flynn* case para 49; De Waal and Schoeman-Malan *Erfreg* 30; Louw 2017 *Obiter* 459, 467. See paras 1.1.3.1-1.3.2.
516 *Flynn* case para 49; Hofmeyr and Paleker *The Law of Succession in South Africa* 854-855; Louw 2017 *Obiter* 468, 470.
517 2009 JDR 1018 (CC). See para 5.3 for a comprehensive discussion of *Volks v Robinson* 2009 JDR 1018 (CC).
518 *Flynn* case para 41; Hofmeyr and Paleker *The Law of Succession in South Africa* 855. See para 5.3 of this study for a discussion of *Volks v Robinson* 2009 JDR 1018 (CC).
519 *Flynn* case 43; Hofmeyr and Paleker *The Law of Succession in South Africa* 855.
520 *Flynn* case para 36; Hofmeyr and Paleker *The Law of Succession in South Africa* 855.
521 *Flynn* case para 49; Louw 2017 *Obiter* 470.
522 See para 1.1.4 of this study for the limitation of rights.

regarded as a "descendant" of his stepfather in terms of the *ISA*, despite the son being treated as the child of the stepfather.[523]

The court's decision may be criticised on the basis that the choice to adopt might have been illusionary, since the biological father refused to allow adoption.[524] Where consent for adoption from a biological parent was lacking, a child could still be adopted, but it involves further court involvement, which does not guarantee successful adoption.[525] Additionally, compared to court decisions extending the intestate succession term "spouse,"[526] which held that formal marriage is not a requirement to extend intestate succession rights to worthy heirs, it may be argued that formal adoption is not necessary to establish a parent-child relationship worthy of protection. The facts in the *Flynn* case demonstrate that the father supported the child emotionally and financially, which constitutes a relationship worthy of protection in terms of public policy.[527]

The court's concerns regarding identifying when an informal adoption came into existence cannot be regarded as a justifiable obstacle to deny intestate inheritance rights. Circumstances will indicate whether a parent-child relationship worthy of legal protection has been established.[528] Additionally, the court's concerns regarding the regulation of multiple parent-child relationships also do not pose a problem for intestate succession. Where multiple parent-child relationships have been proven, all parents should be allowed to inherit equally from their child. Another concern raised by the court is that informal adoptions will facilitate child exploitation and abduction. However, it is difficult to see how child exploitation and abduction will be encouraged by granting intestate succession rights to persons involved in informal adoption. It is difficult to imagine that a person will abduct a child with the sole purpose to claim from the child's deceased estate.

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523 *Flynn* case para 49; De Waal and Schoeman-Malan *Erfreg* 30; Louw 2017 *Obiter* 459, 467-468.

524 *Flynn* case para 6; Domingo "Adoption, Artificial Fertilisation and Surrogate Motherhood" 165; Louw 2017 *Obiter* 483. See similar criticism of *Volks v Robinson* 2009 JDR 1018 (CC). See s236(1)(a)-(f) of the *Children's Act* for when consent may be dispensed with.

525 Domingo "Adoption, Artificial Fertilisation and Surrogate Motherhood" 165.

526 See chapters 4-5 of this study.

527 See paras 2.4 and 7.5.1 of this study for recommendations for the recognition of informal adoptions for intestate succession.

528 See para 5.4 of this study.

Despite the lack of legal recognition of informal adoption, the courts have, in certain circumstances, recognised parental rights of persons who have not formally adopted children. For instance, in *Heystek v Heystek*[529] maintenance was claimed in favour of children from a previous marriage who were not formally adopted by their stepfather.[530] Despite there being no duty in terms of common law to maintain stepchildren, the court held that during the subsistence of a marriage in community of property, the stepfather had a duty to contribute to the common household, including a contribution toward the maintenance of his stepchildren.[531] On that basis a claim for maintenance of the stepchildren may be enforced against the stepfather.[532]

In *MB v NB*[533] the stepfather acted as a father to his stepchild by meeting the maintenance needs of the child.[534] Additionally, the stepfather expressed a wish to adopt the child, but had not done so.[535] The court recognised a liability for school expenses on the part of the stepfather, as he had acted as a parent to the child.[536] The court distinguished the *Flynn* case on the basis that it dealt with intestate succession rights and not maintenance.[537] The recognition of the stepfather's duty to pay school fees as part of maintenance did not amount to the recognition of informal adoption.[538]

Similarly, in *JT v Road Accident Fund*,[539] the court recognised a maintenance duty of a biological father who had no parental rights pertaining to the child.[540] The biological

529 2002 2 SA 754 (T).
530 *Heystek v Heystek* 2002 2 SA 754 (T) 756B-C; Van Schalkwyk 2012 *TSAR* 216.
531 *Heystek v Heystek* 2002 2 SA 754 (T) 757B; Bonthuys 2002 *SALJ* 770; Van Schalkwyk 2012 *TSAR* 217-218.
532 *Heystek v Heystek* 2002 2 SA 754 (T) 757B-C; Bonthuys 2002 *SALJ* 770.
533 2010 3 SA 220 (GSJ).
534 *MB v NB* 2010 3 SA 220 (GSJ) paras 3, 20; Kruger "Parental Responsibilities and Rights" 367; Louw 2017 *Obiter* 471; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 110.
535 *MB v NB* 2010 3 SA 220 (GSJ) para 3; Louw 2017 *Obiter* 471; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 110; Van Schalkwyk 2012 *TSAR* 219.
536 *MB v NB* 2010 3 SA 220 (GSJ) paras 21, 36, 61; Kruger "Parental Responsibilities and Rights" 367; Louw 2017 *Obiter* 459, 571; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 110; Van Schalkwyk 2012 *TSAR* 223.
537 *MB v NB* 2010 3 SA 220 (GSJ) para 24-25; Louw 2017 *Obiter* 472; Van Schalkwyk 2012 *TSAR* 222.
538 *MB v NB* 2010 3 SA 220 (GSJ) para 22; Louw 2017 *Obiter* 471-472.
539 2015 1 SA 609 (GSJ).
540 *JT v Road Accident Fund* 2015 1 SA 609 (GJ) para 31.

grandmother formally adopted the child of unmarried parents.[541] The father contributed to the upkeep of the child until he was killed in a motor vehicle accident.[542] The *Children's Act* provides that adoption terminates the rights and duties between natural parents and their children who have been adopted.[543] However, a court could vary the effects of an adoption order.[544] The contribution to the maintenance of the child of the father created a legal duty that could be recognised in terms of the law.[545] The common law must accordingly be extended to recognise the duty of support where a father without parental rights contributed to the maintenance of his child.[546]

In *RS v JS*[547] adoption proceedings were initiated by a married couple, but prior to completion, the marriage was dissolved by divorce.[548] The court recognised that ordinarily there is no duty of support between a person and a child not biologically related or formally adopted.[549] Both parents undertook to support the child.[550] The fact that the adoption proceedings were not concluded did not negate the maintenance obligation promised and owed to the child concerned.[551] After the divorce, the father continued to maintain the child.[552] He regarded the child as his own.[553] The court therefore concluded that it is in the best interest of the child to recognise the maintenance duty of the father.[554]

It is evident from the above discussion that there is no recognition of informal adoption in South Africa. However, the court's willingness to extend maintenance obligations to stepparents who acted as parents and accepted stepchildren as their own indicates that stepparents could form part of the "family unit".[555] Additionally, the court in *RS v*

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541 *JT v Road Accident Fund* 2015 1 SA 609 (GJ) paras 1, 4-5; Louw 2017 *Obiter* 472.
542 *JT v Road Accident Fund* 2015 1 SA 609 (GJ) para 6; Louw 2017 *Obiter* 472.
543 *JT v Road Accident Fund* 2015 1 SA 609 (GJ) para 11; Louw 2017 *Obiter* 472.
544 *JT v Road Accident Fund* 2015 1 SA 609 (GJ) para 11; Louw 2017 *Obiter* 472.
545 *JT v Road Accident Fund* 2015 1 SA 609 (GJ) para 29; Louw 2017 *Obiter* 472.
546 *JT v Road Accident Fund* 2015 1 SA 609 (GJ) para 30; Louw 2017 *Obiter* 474.
547 2024 6 SA 609 (WCC).
548 *RS v JS* 2024 6 SA 609 (WCC) paras 7-8.
549 *RS v JS* 2024 6 SA 609 (WCC) para 29.
550 *RS v JS* 2024 6 SA 609 (WCC) para 32.
551 *RS v JS* 2024 6 SA 609 (WCC) para 33.
552 *RS v JS* 2024 6 SA 609 (WCC) para 34.
553 *RS v JS* 2024 6 SA 609 (WCC) paras 34-35, 37.
554 *RS v JS* 2024 6 SA 609 (WCC) paras 43, 54; Kruger "Parental Responsibilities and Rights" 381.
555 *MB v NB* 2010 3 SA 220 (GSJ); Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 110.

JS[556] recognised a maintenance right on the part of a man who informally adopted a child.[557] Due to the *Flynn* case, intestate succession rights for children and parents involved in informal adoption cannot be recognised without either the *Flynn* case being overturned or by legislative intervention.[558] In paragraph 2.4 of this study it is argued that the intestate succession rights of informally adopted children from persons who provided care for them, should be reconsidered.

As it stands, in terms of the common law, only formally adopted children are included in the term "descendant" and only adoptive parents who formally adopted a child are included in the term "parent". Apart from adoption, surrogacy agreements may also transfer parental rights and responsibilities and intestate succession rights to persons other than the biological parents of a child. In paragraph 2.3.4 the development of parental rights in the context of surrogacy agreements is discussed.

2.3.4 The recognition of commissioning parents of surrogacy agreements under the terms "descendant" and "parent" in intestate succession in terms of the common law

A surrogate mother is a woman who undergoes artificial insemination to beget a child for another couple or person.[559] Under common law, surrogacy agreements were considered invalid, and parental rights could not be legally transferred by means of a surrogacy agreement.[560] Where a surrogacy agreement was nevertheless concluded, the commissioning parents did not become the legal parents of the child.[561] The surrogate mother and, if she was married, her spouse were regarded as the parents of the child.[562] Accordingly, for intestate inheritance rights, the surrogate mother and her husband qualified as "parents" of a child born to an invalid surrogacy agreement. Commissioning parents of purported surrogacy agreements gained no intestate

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556 2024 6 SA 609 (WCC).
557 *RS v JS* 2024 6 SA 609 (WCC) paras 43, 54.
558 The *Flynn* case was however decided in a high court, which means a high court in a different jurisdiction might come to a different conclusion and the *Flynn* case would not be a bar to recognising intestate succession rights to informally adopted children and their purported parents.
559 Domingo "Adoption, Artificial Fertilisation and Surrogate Motherhood" 171.
560 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 34; Wolhuter 1997 *SALJ* 394-395.
561 Lind 1995 *SALJ* 490.
562 Lind 1995 *SALJ* 490.

inheritance rights from children born as a result of surrogacy agreements and *vice versa*.

Presently, the *Children's Act* regulates surrogacy agreements.[563] A surrogacy agreement is only valid once a validly signed, written agreement has been entered into and confirmed by a High Court.[564] For the conclusion of a valid surrogacy agreement, the commissioning parents must both donate gametes.[565] Only where it is impossible for both parents to donate gametes, may one parent be the donor.[566] Additionally, a surrogate agreement is only allowed in circumstances where a couple is unable to have children.[567] However, a single prospective parent may be a sole donor.[568]

In *AB v Minister of Social Development*[569] a single woman was unable to provide her own gamete for the conclusion of a valid surrogacy agreement.[570] A valid surrogacy agreement can, however, only be concluded if the woman donates gametes herself.[571] It was submitted that the purpose of the *Children's Act* by requiring that at least one commission parent provide gametes, was to ensure that there was a biological link between at least one of the commissioning parents and the child born from a surrogate agreement, to enable the child to know his own genetic origin.[572] The question was whether the *Children's Act* unfairly discriminated against infertile women.[573] The court found no unfair differentiation between individuals capable of providing gametes and

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563 Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and The Family* 114.

564 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 41; Church and Church "Children" para 442; Domingo "Adoption, Artificial Fertilisation and Surrogate Motherhood" 171; Kruger "Parental Responsibilities and Rights" 372; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 114.

565 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 45; Church and Church "Children" para 442; Domingo "Adoption, Artificial Fertilisation and Surrogate Motherhood" 171; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 114.

566 Church and Church "Children" para 442; Domingo "Adoption, Artificial Fertilisation and Surrogate Motherhood" 171; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 114.

567 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 45; Domingo "Adoption, Artificial Fertilisation and Surrogate Motherhood" 171; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 114.

568 Church and Church "Children" para 442; Domingo "Adoption, Artificial Fertilisation and Surrogate Motherhood" 171; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 114.

569 2017 3 SA 570 (CC).

570 *AB v Minister of Social Development* 2017 3 SA 570 (CC) paras 8, 10, 19.

571 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 10.

572 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 18.

573 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 26.

those who are not.[574] The differentiation was not arbitrary and served to protect the best interests of the child.[575]

Additionally, the differentiation was not on specified grounds.[576] The majority judgment found that the differentiation did not infringe the right to equality, since it was not based on the characteristics of certain persons and did not "create or compound infertility".[577] If a single person is unable to provide a gamete, the person has the option of entering into a relationship with a fertile person to conclude a valid surrogacy agreement.[578] Therefore, there was no discrimination and the right of equality was not infringed.[579]

The minority judgment, however, found that the differentiation amounted to discrimination against infertile persons that impaired the dignity of infertile persons.[580] The *Children's Act* infringed the right of equality, since it denied a particular class of people, namely, infertile women, the right to form a family by means of surrogacy agreements that were available to fertile women.[581] The impact of the discrimination was psychological, since it prohibited certain women from entering into surrogacy agreements.[582]

In considering whether there was a legitimate limitation to the right of equality of infertile women, the court considered the need of a child to "know his origin".[583] Section 42(2) of the *Children's Act*, which allows for anonymous sperm donations, explicitly excludes certain children from knowing their genetic origin.[584] There was no justifiable argument to exclude one group of children from knowing their origin yet

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574 *AB v Minister of Social Development* 2017 3 SA 570 (CC) paras 98-99, 258. See para 1.1.3.2 of this study for a discussion of the *Harksen* test.
575 *AB v Minister of Social Development* 2017 3 SA 570 (CC) paras 104, 287.
576 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 105.
577 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 301.
578 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 302.
579 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 304.
580 *AB v Minister of Social Development* 2017 3 SA 570 (CC) paras 106, 109. See para 1.1.3.2 for a discussion of discrimination not based on the listed grounds in section 9.3 of the *Constitution*.
581 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 110.
582 *AB v Minister of Social Development* 2017 3 SA 570 (CC) paras 91-2.
583 *AB v Minister of Social Development* 2017 3 SA 570 (CC) paras 153, 155.
584 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 158.

denying it to another group.[585] Therefore, no justifiable reason for limiting infertile women's rights to conclude a surrogacy agreement existed.[586]

It is submitted that the finding of the minority court that there is discrimination, and the right of equality is infringed, is more satisfying than the majority decision.[587] Especially disconcerting is the majority court's assertion that an infertile woman has the choice to enter a relationship with a fertile person. By stating that infertile persons may enter a permanent relationship with a fertile person limits their choice to form a family and achieve parenthood. As it stands, infertile persons are unable to conclude valid surrogacy agreements.

Where a valid surrogacy agreement has been concluded, the commissioning parents become the legal parents of the child born as a result of a surrogacy agreement.[588] A surrogacy agreement ends all legal obligations between the surrogate mother and the child.[589] Consequently, a child born from a surrogacy agreement has no claim of succession from the surrogate mother or her husband or partner or any of her relatives.[590] If an invalid surrogacy agreement has been concluded, the child will be the child of the surrogate mother and will inherit from her, her spouse if she is married and her relations only.[591]

Additionally, once a valid surrogacy agreement is concluded, the commissioning parents are considered to be "parents" in terms of the provisions of the *ISA*.[592] A child

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585 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 161.

586 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 210.

587 See also the discussion of *VJV v Minister of Social Development* 2023 6 SA 87 (CC) in para 2.3.5 of this study.

588 Section 297 of the *Children's Act*; *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 42; *Wilsnach* case para 40; Dominga "Adoption, Artificial Fertilisation and Surrogate Motherhood" 173; Kruger "Parental Responsibilities and Rights" 373; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and The Family* 114.

589 Section 297(1)(a) of the *Children's Act*; *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 42; *Wilsnach* case para 40; Dominga "Adoption, Artificial Fertilisation and Surrogate Motherhood" 173; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 114.

590 Section 297(1)(f) of the *Children's Act*; De Waal and Schoeman-Malan *Erfreg* 33; Dominga "Adoption, Artificial Fertilisation and Surrogate Motherhood" 173.

591 Section 297(2) of the *Children's Act*; De Waal and Schoeman-Malan *Erfreg* 34; Dominga "Adoption, Artificial Fertilisation and Surrogate Motherhood" 173; Kruger "Parental Responsibilities and Rights" 373.

592 Heaton and Roos *Family and Succession Law in South Africa* 212.

born from a surrogacy agreement is considered a "descendant" of the commissioning parents in terms of the *ISA*.[593] Apart from artificial insemination to give effect to a surrogacy agreement, the *Children's Act* determines who gains parental rights and responsibilities in other instances of artificial insemination. This is discussed in paragraph 2.3.5.

2.3.5 The recognition of "descendant" and "parent" in instances of artificial insemination in intestate succession law in terms of common law

In terms of the common law, artificial insemination was initially regarded as contrary to public policy.[594] The *Children's Status Act*[595] regulated who was regarded as the parent of a child born from artificial insemination. Children born from artificial insemination were regarded as the child of the mother only, or, where she was married, of her and her husband.[596] The biological father, therefore, acquired no rights to his biological child, and the biological father and child could not inherit intestate from each other.[597]

In *J v Director General, Department of Home Affairs*[598] (hereafter referred to as the *J v Director General* case), the court held that children born as a result of artificial insemination are the children of the partners in a same-sex life partnership.[599] One of the partners in the same-sex partners gave birth to children conceived by means of artificial insemination.[600] The same-sex life partners wanted to register jointly as the parents of the children.[601]

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593 Heaton and Roos *Family and Succession Law in South Africa* 212.
594 Lind 1995 *SALJ* 490; Wolhuter 1997 *SALJ* 394-395.
595 82 of 1987.
596 Section 5(1)(a) of the *Children's Status Act* 82 of 1987; Wolhuter 1997 *SALJ* 395.
597 Section 5(2) of the *Children's Status Act* 82 of 1987.
598 2003 5 SA 621 (CC).
599 *J v Director General* case paras 2, 28; Bonthuys 2007 *SAJHR* 528; Boniface 2015 *Scientific Cooperations International Journal of Law and Politics* 8-9; Robinson 2005 *Obiter* 498. See also para 2.3.6 of this study for the recognition of same-sex parents in terms of the common law.
600 *J v Director General* case para 2; De Ru 2013 *Fundamina* 238.
601 *J v Director General* case para 3; De Ru 2013 *Fundamina* 238-239.

The *Children's Status Act*[602] determined that only married parents or the birth mother could register as a parent.[603] The inability of same-sex partners to register jointly as parents constituted unfair discrimination between married persons and same-sex life partners.[604] The discrimination unfairly infringed the right to equality on the grounds of sexual orientation and marital status since there was no justification for the discrimination.[605] Therefore, same-sex life partners were held to be the parents of a child born as a result of artificial insemination. Such a child was therefore a "descendant", and the same-sex partners were "parents" in terms of the *ISA*.

After the judgment in the *J v General Director* case, the *Children's Act* was enacted, repealing the *Children's Status Act.*[606] The *Children's Act* re-enacted the limitations of the *Children's Status Act*[607] on parentage in the case of artificial insemination, thereby again excluding permanent life partners, both of the opposite- and same-sex, from being recognised as joint parents in the case of artificial insemination.[608]

The *Children's Act* determines that where a gamete for artificial insemination has been used, any child born to married spouses shall be regarded as the child of the spouses only.[609] Therefore, only the woman who gives birth to a child conceived by means of artificial insemination and her spouse in a valid marriage qualify under the intestate succession term "parents" of a child born as a result of artificial insemination and *vice versa*.[610] However, since same-sex partners are currently able to conclude a civil union in terms of the *Civil Union Act*, same-sex life partners are in the same position as

602 82 of 1987.
603 Section 5 of the *Children's Status Act*; *J v Director General* case paras 5, 13; De Ru 2013 *Fundamina* 239.
604 *J v Director General* case para 13; Boniface 2023 *THRHR* 517; De Ru 2013 *Fundamina* 238-239. See para 1.1.3.1 of this study
605 *J v Director General* case paras 14-15; De Ru 2013 *Fundamina* 238-239.
606 82 of 1987.
607 82 of 1987.
608 Section 40(3) of the *Children's Act*; De Ru 2013 *Fundamina* 239; Du Toit 2009 *SALJ* 477.
609 Section 40(1)(a) of the *Children's Act*; De Waal and Schoeman-Malan *Erfreg* 33; Domingo "Parent and Child" 170; Heaton and Roos *Family and Succession Law in South Africa* 157; Kruger "Parental Responsibilities and Rights" 371; Kruuse 2017 *The International Survey of Family Law* 352-352; Smith 2016 *SALJ* 296.
610 Heaton and Roos *Family and Succession Law in South Africa* 211.

opposite-sex life partners in respect of parental and intestate succession rights pertaining to a child born due to artificial insemination.[611]

In *CM v NG*[612] an order for parental rights and responsibilities pertaining to a child who had been conceived by means of artificial insemination was sought by a partner in a same-sex life partnership.[613] The partner in the same-sex relationship had no biological link with the child and therefore no automatic parental rights and responsibilities to the child.[614] The court determined that if she were an unmarried father, she would have qualified for parental rights and responsibilities in terms of the *Children's Act*.[615] Additionally, the parties presented themselves as the parents of the child and were portrayed as a "family unit".[616]

The court ruled in favour of granting parental rights and responsibilities to the partner not biologically linked to the child.[617] Therefore, despite the inability of same-sex life partners to register as joint parents of a child born as a result of artificial insemination, the unregistered parent has the option of acquiring parental rights and responsibilities in terms of the *Children's Act*.[618] However, persons with parental rights and responsibilities do not automatically acquire intestate succession rights from that child.[619]

In *VJV v Minister of Social Development*[620] the parties were in a permanent same-sex relationship, and one partner gave birth to a child due to artificial insemination.[621] As

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611 See para 5.2.2 of this study.

612 2012 4 SA 452 (WCC).

613 *CM v NG* 2012 4 SA 452 (WCC) paras 1-2; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 115.

614 *CM v NG* 2012 4 SA 452 (WCC) paras 59-60; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 115.

615 *CM v NG* 2012 4 SA 452 (WCC) para 53; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 115.

616 *CM v NG* 2012 4 SA 452 (WCC) para 68; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 115.

617 *CM v NG* 2012 4 SA 452 (WCC) paras 72, 76; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 115.

618 See para 2.3.7 of this study for a discussion of the intestate succession rights of persons with parental rights and responsibilities.

619 See also para 5.4 and 7.5.1 of this study for recommendations for the extension of intestate succession rights to persons with parental rights and responsibilities.

620 2023 6 SA 87 (CC).

621 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) para 6; Kruger "Parental Responsibilities and Rights" 372.

in *CM v NG*,[622] only the woman who gave birth may be registered as a parent.[623] The limitation prevents both opposite- and same-sex couples from jointly registering as the parents of a child born from artificial insemination.[624] Marriage is singled out as the only relationship that allows for jointly acquiring parental rights and responsibilities in instances of artificial insemination.[625] The emphasis of the *Children's Act* is therefore on the substance of a relationship rather than the form.[626] Despite the partners being able to conclude a civil union, the choice to do so might be illusionary.[627]

In applying the *Harksen* test to determine infringement of the right to equality, the court found that differentiation between married and unmarried parents on the grounds of marital status and sexual orientation was not justified.[628] The court indicated that there was discrimination on the grounds of sexual orientation, since same-sex couples are unable to reproduce without the assistance of artificial insemination, while opposite-sex couples can.[629] The discrimination was based on specified grounds and is therefore presumed to be unfair.[630]

Additionally, the right to human dignity was infringed since they were unable to make choices on parenthood.[631] The right to the best interest of the child was also infringed since children born from artificial insemination to unmarried person and married

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622 2012 4 SA 452 (WCC).

623 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) para 6; Heaton "Life Partnerships" 314; Kruger "Parental Responsibilities and Rights" 372.

624 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) para 29; Kruger "Parental Responsibilities and Rights" 372.

625 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) para 31; Kruger "Parental Responsibilities and Rights" 372.

626 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) para 33; Kruger "Parental Responsibilities and Rights" 372.

627 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) para 39; Kruger "Parental Responsibilities and Rights" 372. See para 5.3 for a comprehensive discussion of the so-called "choice argument".

628 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) para 44; Heaton "Life Partnerships" 314; Kruger "Parental Responsibilities and Rights" 372. See para 1.1.3.1 of this study.

629 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) paras 51-52, 59; Heaton "Life Partnerships" 314; Kruger "Parental Responsibilities and Rights" 372.

630 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) para 47; Kruger "Parental Responsibilities and Rights" 372.

631 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) para 60; Heaton "Life Partnerships" 314; Kruger "Parental Responsibilities and Rights" 372.

persons are treated differently.[632] There was no justifiable limitation of the rights.[633] Section 40 of the *Children's Act* is therefore unconstitutional insofar as it denies partners in life partnerships from jointly acquiring parental rights where a child is born from artificial insemination.[634] The court ordered that the words "or permanent life partner" must be read in after the words "spouse" and "husband" wherever it appears in section 40 of the *Children's Act*.[635]

Therefore, any couple in a validly concluded marriage[636] or permanent life partnership[637] may jointly register as the parents of a child born as a result of artificial insemination. Children born from artificial insemination are therefore the "descendants" of "parents" either in a marriage or a permanent life partnership. Where a child is born to a woman not married or in a permanent life partnership as a result of artificial insemination, such a child only acquires intestate inheritance rights from the woman and her family, and *vice versa*.

With regards to the position of the gamete donor, no rights or responsibilities have been recognised between the donor and a child born of artificial insemination.[638] In *QG v CS*[639] the beneficiaries of a donor for artificial insemination were in a same-sex marriage.[640] The beneficiaries concluded a written agreement with the donor for the provision of gametes for artificial insemination, excluding the donor from parenthood.[641] One of the partners in the same-sex relationship fell pregnant after artificial insemination and gave birth to a child.[642]

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632 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) para 63; Kruger "Parental Responsibilities and Rights" 372.

633 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) paras 46, 76; Kruger "Parental Responsibilities and Rights" 372.

634 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) paras 82, 97; Heaton "Life Partnerships" 314; Kruger "Parental Responsibilities and Rights" 372.

635 *VJV v Minister of Social Development* 2023 6 SA 87 (CC) paras 82, 97; Heaton "Life Partnerships" 314; Kruger "Parental Responsibilities and Rights" 372. See para 1.1.2 of this study for an explanation of a reading-in order.

636 See para 2.2 and Chapters 3-4 of this study.

637 See Chapter 5 of this study.

638 Sections 1, 40(3) of the *Children's Act*; *Wilsnach* case para 49; De Waal and Schoeman-Malan *Erfreg* 33.

639 2021 JDR 1212 (GP).

640 *QG v CS* 2021 JDR 1212 (GP) para 5.

641 *QG v CS* 2021 JDR 1212 (GP) paras 12-13.

642 *QG v CS* 2021 JDR 1212 (GP) para 16.

The donor was allowed to visit the child after his birth.[643] However, the court determined that visitations did not create a familial bond between the donor and the child.[644] The court also concluded that it would not be advisable to grant parental rights and responsibilities to a person who is merely a donor.[645] Excluding donors from parenthood provides legal certainty regarding parentage to both donors and beneficiaries.[646] The court emphasised the importance of recipients of gamete donations establishing a family free from the influence of donors.[647]

Therefore, donors for the purpose of artificial insemination are not "parents" in terms of the *ISA* and do not acquire intestate succession rights from their biological children born as a result of artificial insemination, and *vice versa*. It is submitted that the court's reasoning in *QG v CS* was sound, since biology is no longer the sole consideration to establish a parent-child relationship worthy of intestate succession rights.[648] Donors should not have intestate succession rights from their children simply for the reason that they share a biological link to the child.

The court cases discussed above dealing with artificial insemination involved same-sex parents. The discussion above focused on the position of same-sex parents in relation to children born as a result of artificial insemination and not their position in common law as same-sex parents. Since same-sex parents were initially excluded from the concept of the "family unit" at common law, a full discussion of their subsequent inclusion is presented in paragraph 2.3.6 of this study.

2.3.6 The recognition of same-sex partners as "parents" in intestate succession in terms of the common law

Initially, same-sex relationships were regarded as "immoral" and contrary to public policy.[649] Same-sex parents could not jointly adopt children, nor could they register

643 *QG v CS* 2021 JDR 1212 (GP) paras 20-22, 47, 51.
644 *QG v CS* 2021 JDR 1212 (GP) para 43.
645 *QG v CS* 2021 JDR 1212 (GP) para 81.
646 *QG v CS* 2021 JDR 1212 (GP) para 81.
647 *QG v CS* 2021 JDR 1212 (GP) paras 87-88, 95.
648 See paras 2.3.3-2.3.4 of this study for a discussion of the recognition of non-biological adoptive and commissioning parents as "parents" in terms of the *ISA*.
649 De Vos 2004 *SAJHR* 182; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 115.

jointly as parents to a child born as a result of artificial insemination, nor could they conclude a surrogacy agreement.[650] Same-sex partners were therefore not included in the term "parent" for the *ISA*.

As indicated above,[651] prior to repeal by the *Children's Act*, the *Child Care Act*[652] governed adoptions. The *Children's Act* allowed for only one unmarried person to adopt a child.[653] At best, only the mother of the child in a same-sex relationship (where both partners were women) or a partner who adopted a child could be regarded as a parent. Therefore, even where same-sex partners raised an adopted child jointly, only one parent at a time could hold parental rights and responsibilities to the child.[654] As a result, the child would only be able to claim intestate succession from the person registered as a parent and *vice versa*.

Additionally, the *Child Care Act*[655] required that a prospective adoptive parent be a fit and proper person.[656] Because of public policy concerns, as illustrated by *Van Rooyen v Van Rooyen*,[657] if persons made known that they were in a same-sex relationship, an application for adoption would most likely have been rejected.[658] In *Van Rooyen v Van Rooyen*[659] the court limited access rights to a mother when she was with her same-sex partner, since lesbianism was considered abnormal.[660] The court held that it was in the best interest of the children that the mother's lifestyle had to be taken into account when making a custody order.[661] A lesbian mother sent the "wrong signals to the children" by engaging in a same-sex relationship.[662] As part of the order for contact

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650 Louw 2005 *Journal of Homosexuality* 152; Wolhuter 1997 *SALJ* 394-395; Ziehl 1997 *African Sociological Review* 49. See paras 2.3.4-2.3.5 of this study.

651 See para 2.3.2 of this study.

652 74 of 1983.

653 De Vos 1996 *SAPL* 362; Lind 1995 *SALJ* 489-491.

654 Mosikatsana 1996 *Acta Juridica* 117; Van der Walt 2014 *Obiter* 445.

655 74 of 1983.

656 Section 18 (4)(b) of the *Child Care Act* 1994 2 SA 325 (W); Mosikatsana 1996 *Acta Juridica* 118; Van der Walt 2014 *Obiter* 432, 442.

657 1994 2 SA 325 (W).

658 Lind 1995 *SALJ* 489; Wolhuter 1997 *SALJ* 385.

659 1994 2 SA 325 (W).

660 *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) 329I; De Vos 1996 *SAJHR* 280; Lind 1995 *SALJ* 488; Reddy 2006 *Agenda* 148.

661 De Vos 1996 *SAJHR* 280; Reddy 2006 *Agenda* 148.

662 *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) 330A-C; *V v V* 1998 4 SA 169 (C) 188D; Lind 1995 *SALJ* 488; Louw 2005 *Journal of Homosexuality* 144; Mosikatsana 1996 *Acta Juridica* 118, 124; Reddy 2006 *Agenda* 148.

with her children, the mother was prohibited from sharing a bed with her partner while her children were with her to protect children from exposure to homosexuality.[663]

In *V v V*[664] the question whether full custody rights ought to be granted to a lesbian mother resurfaced.[665] The court refused to follow *Van Rooyen v Van Rooyen*[666] and recognised the right to custody.[667] Not to recognise the right to custody would be an infringement of the right to equality on the grounds of sexual orientation of the mother.[668] The court's decision is an indication of the change in public policy fuelled by the *Constitution*. Therefore, the sexual orientation of a person in adoption proceedings should not be a consideration.[669] The court could not perpetuate discrimination against sexual orientation in the guise of protecting children.[670]

In *Du Toit v Minister of Welfare and Population Development* (hereafter the *Du Toit* case)[671] the court granted adoption rights to same-sex life partners.[672] The *Child Care Act*[673] was applicable at the time the *Du Toit* case was heard. Additionally, the *Civil Union Act* had not yet been enacted.[674] The case involved same-sex partners who lived together in a committed relationship similar to that of a marriage.[675] In finding that a life partnership existed, the court determined that the partners formalised their relationship through a commitment ceremony registered jointly in both names, shared financial resources, executed a joint will, and were beneficiaries in each other's

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663 *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) 331F; De Vos 1996 *SAPL* 362; De Vos 1996 *SAJHR* 280; Lind 1995 *SALJ* 488-489; Louw 2005 *Journal of Homosexuality* 150; Reddy 2006 *Agenda* 148; Wolhuter 1997 *SALJ* 394.

664 1998 4 SA 169 (C).

665 Bonthuys 2002 *SALJ* 754.

666 1994 2 SA 325 (W).

667 Bonthuys 2002 *SALJ* 754; Reddy 2006 *Agenda* 148.

668 *V v V* 1998 4 SA 169 (C) 189A-B; Bonthuys 2002 *SALJ* 754. See para 1.1.3.1 of this study.

669 Louw 2005 *Journal of Homosexuality* 150.

670 *V v V* 1998 4 SA 169 (C) 189B-C; Bonthuys 2002 *SALJ* 754.

671 2003 2 SA 198 (CC).

672 *Du Toit* case para 44; Bilchitz and Judge 2007 *SAJHR* 470; De Ru 2013 *Fundamina* 238; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 163; Robinson 2005 *Obiter* 498.

673 74 of 1983.

674 See para 2.2.2 of this study.

675 *Du Toit* case para 4; Goldblatt 2006 *Feminist Legal Studies* 266; Louw 2005 *Journal of Homosexuality* 152-153; Reddy 2006 *Agenda* 149.

insurance policies.[676] Same-sex life partners were unable to jointly adopt children since the *Child Care Act*[677] only allowed for married persons or single persons to adopt.[678]

In analysing the constitutionality of the *Child Care Act*,[679] the court held that not allowing same-sex life partners to adopt children jointly was contrary to the best interest of the children.[680] In terms of the right to equality, the court found that the *Child Care Act*[681] unfairly discriminated on the grounds of marital status and sexual orientation.[682] The inability of same-sex parents to adopt also infringed their right to dignity.[683] The limitation of the right to equality, dignity and the best interest of the child was not justified.[684]

The court therefore held the *Child Care Act*[685] in this respect unconstitutional and invalid.[686] The court corrected the defect by reading in the words "or by the two members of a permanent same-sex life partnership jointly" in the relevant parts of the *Child Care Act*.[687] Criticism that may be levelled against the case is that there was no detailed analysis of the impact of the discrimination on same-sex partners.[688] Discrimination was simply assumed.[689] However, if the court embarked on an equality analysis, infringement of equality would have been proven on the basis that same-sex

676 *Du Toit* case para 4.
677 74 of 1983.
678 *Du Toit* case paras 8, 13-47; Bonthuys 2002 *SALJ* 755; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 370.
679 74 of 1983.
680 *Du Toit* case para 22; De Ru 2013 *Fundamina* 238; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 370.
681 74 of 1983.
682 *Du Toit* case paras 24-26; De Ru 2013 *Fundamina* 238; Louw 2005 *Journal of Homosexuality* 153; Reddy 2006 *Agenda* 149; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 370. See para 1.1.3.1 of this study.
683 *Du Toit* case paras 27-29; De Ru 2013 *Fundamina* 238; Louw 2005 *Journal of Homosexuality* 153; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 370. See para 1.1.3.2 of this study.
684 *Du Toit* case para 37; Boniface 2023 *THRHR* 517; De Ru 2013 *Fundamina* 238.
685 74 of 1983.
686 *Du Toit* case para 38; Reddy 2006 *Agenda* 149.
687 74 of 1983. *Du Toit* case para 44; Reddy 2006 *Agenda* 149; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 370. See para 1.1.2 of this study.
688 Bonthuys 2002 *SALJ* 755-756.
689 Bonthuys 2002 *SALJ* 756.

couples were not able to marry and the inability to adopt children jointly impacted same-sex couples' rights to establish familial relationships of their choice.[690]

The *Children's Act* currently governs adoption and allows for same-sex (and opposite-sex) parents in life partnerships to adopt jointly.[691] Additionally, the *Civil Union Act* grants marital rights to same-sex partners, which allows same-sex partners in a civil union to adopt children. This is in line with the provisions of the *Marriage Act*.[692]

What is clear from the discussion of the cases above is that same-sex partners are part of the "family unit". Therefore, they fall under the intestate succession term "parent". Same-sex parents may inherit in terms of the *ISA* from their children, legally adopted or born due to artificial insemination during a civil union concluded between two same-sex partners, and *vice versa*. Same-sex partners, as well as certain other persons, may acquire parental rights and responsibilities in respect of a child in terms of the *Children's Act*. In paragraph 2.3.7 the impact of the acquisition of rights and responsibilities on the right to intestate inheritance is discussed.

2.3.7 The extension of the intestate succession term "parent" to include persons who acquired parental rights and responsibilities in terms of the Children's Act

In terms of the *Children's Act*, a family member includes

> any other person with whom the child has developed a significant relationship based on a psychological or emotional attachment, which resembles a family relationship.[693]

A person may acquire parental rights and responsibilities if they have an interest in the care, well-being or development of a child.[694] However, for the *ISA*, the terms "descendant" and "parent" are based on a biological link, not on an emotional attachment or rights and responsibilities acquired under the *Children's Act*.[695]

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690 See para 5.1 of this study for a discussion of the recognition of same-sex couples for other legislative and common law actions on the same arguments.

691 Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 370. See paras 2.3.3 and 5.2.2 of this study. The *Children's Act* repealed the *Child Care Act* 74 of 1983.

692 See para 2.2.1 of this study.

693 Section 1 of the *Children's Act*; Boniface 2015 *Scientific Cooperations International Journal of Law and Politics* 4.

694 Section 23 of the *Children's Act*; Barratt and Domingo "Parent and Child" 150.

695 See para 2.3.1 of this study.

As indicated in paragraph 2.3.1, in the *Wilsnach* case the court was asked to decide whether a grandmother who acted as a primary caregiver to a child could qualify as a "parent" for the *ISA*.[696] The maternal grandmother acquired parental rights and responsibilities alongside the biological mother in terms of the *Children's Act*.[697] The grandmother was the primary caregiver and acted in the capacity of a parent to the child.[698] The court borrowed from the principles established in the *Children's Act* to accord a wider meaning to the term "parent." "Parent" was extended to include a person who fulfilled the role of a parent in the child's life, but who was neither biologically the child's parent nor the adoptive parent of the child.[699] Since the biological mother and the grandmother were involved in the child's life, both qualified as "parents" for the *ISA*.[700]

It should be borne in mind that the *Children's Act* defines a child as a "person under the age of 18 years".[701] Although it is useful for the interpretation of "descendant" and "parent" in terms of the *ISA* to refer to the *Children's Act*, it should be kept in mind that a "descendant" in intestate succession law may be older than 18 years, and consequently they do not fall within the ambit of the *Children's Act*.[702]

As argued above,[703] the court's reliance on the *Children's Act* to extend the term "parent" is problematic.[704] The grandmother had other legal means to secure a claim against the deceased child's estate, for instance, she could have instituted a claim for expenses incurred in caring for the deceased in terms of section 29 of the *Administration of Estates Act*.[705] The claim would have been based on compensation for expenses incurred for the child's care and loss of income due to the inability to

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696 *Wilsnach* case para 8; Du Toit 2021 *Journal of Civil Law Studies* 382.

697 *Wilsnach* case paras 69, 77-78; De Waal and Mills 2021 *TSAR* 563-564; Hofmeyr and Paleker *The Law of Succession in South Africa* 852.

698 *Wilsnach* case paras 14, 77; De Vos 2004 *SAJHR* 182; Hofmeyr and Paleker *The Law of Succession in South Africa* 852.

699 *Wilsnach* case para 42, 58; Wood-Bodley 2022 *SALJ* 769-770.

700 *Wilsnach* case para 70, 75-77; De Waal and Mills 2021 *TSAR* 563-564; Du Toit 2021 *Journal of Civil Law Studies* 383-384; Hofmeyr and Paleker *The Law of Succession in South Africa* 854; Osman 2021 *SALJ* 534; Wood-Bodley 2022 *SALJ* 770.

701 See para 2.3.2 and 2.3.4-2.3.5 of this study.

702 De Waal and Mills 2021 *TSAR* 568. See para 2.3 for the use of the *Children's Act* in the interpretation of "descendant" and "parent" in terms of the *ISA*.

703 See para 2.3.1 of this study.

704 De Waal and Mills 2021 *TSAR* 570-571; Du Toit 2022 *J Civ Law Stud* 384.

705 66 of 1965; Du Toit 2022 *J Civ Law Stud* 384-385.

work.[706] Reform in this area of the law is clearly needed.[707] It is undesirable to place the obligation on courts to determine when a parent-child relationship came into existence.[708]

In the interests of public policy and in consideration of the criticism outlined above, it is clear that the term "parent" in *ISA* should be extended to persons who act as a parent. The development of the term "parent" should preferably be provided for by legislation. Recommendations for reform are provided in paragraph 2.4 of this study. Public policy considerations would dictate that where a parent, either the mother or the father, or both, fail to contribute to a child's life, such parents should be excluded from the terms "descendant" and "parent". The exclusion of biological parents creates the possibility for other persons to be recognised as "parents".[709] It is therefore submitted that legislation should be amended to recognise only persons who acted as parents to be deemed "parents" in terms of the *ISA*. Where a child fails to be involved in their parents' life, such children should be removed from the ambit of "descendant".

Certain persons in certain relationships remain unrecognised by intestate succession law under the common law. In paragraph 2.4, persons who fall outside the ambit of the terms "spouse", "descendant" and "parent" are highlighted.

2.4 Persons outside the scope of the terms "spouse", "descendant" and "parent" in ISA in terms of the common law

As indicated previously, a marriage concluded in terms of the *Marriage Act* and a civil union concluded in terms of the *Civil Union Act* is strictly monogamous.[710] Where a person is in a common law marriage, they will only be able to inherit from their spouse or partner with whom they entered into a common law marriage.[711] If a person is also in a life partnership while in a valid common law marriage, the partners in the life partnership do not have the right to inherit intestate from each other. Life partnerships

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706 De Waal and Mills 2021 *TSAR* 571.
707 See also De Waal and Mills 2021 *TSAR* 571.
708 Hofmeyr and Paleker *The Law of Succession in South Africa* 855.
709 See para 2.3.6 of this study.
710 See para 2.2 of this study.
711 See also Goldblatt 2003 *SALJ* 613.

and the position of partners in a life partnership who are also involved in a valid marriage are comprehensively discussed in Chapter 5.[712]

As previously discussed,[713] the terms "descendant" and "parent" in the context of the common law do not include persons who have adopted a child informally. It is submitted that, specifically for the purposes of the *ISA*, recognition of informal adoptions needs to be reconsidered. Whether informal adoptions should be recognised for other areas of the law, is beyond the scope of this study.

Informal adoptions should be recognised where a parent-child relationship was created between a child and a parent for the law of intestate succession. As is the case with the recognition of unformalised life partnerships,[714] certain factors may be taken into consideration to identify whether a parent-child relationship worthy of legal recognition was established. Suggested factors may include the length of the relationship between the parent and the child; the respective age of the child and the parent; whether the parent was the step-parent of the child; whether there was a duty of support fulfilled by the parent in favour of the child or by the child in favour of the parent; whether family and friends regarded the child as the child of the parent; whether the child was living with the parent; medical aid benefits acquired in favour of the child by the parent; and whether the parent has obtained any parental rights and responsibilities in terms of the *Children's Act*.

It is suggested that the *ISA* should be amended to recognise as "descendants" and as "parents" persons in parent-child relationships where one or more of the suggested factors can be proven. A parent-child relationship may be established between a child any person acting as a parent of the child. Consequently, the possibility exists that multiple persons may be recognised as "parents", contrary to the two-parent model common law traditionally preferred.[715]

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712 See para 5.3 of this study.
713 See para 2.3.3 of this study.
714 See para 5.2 of this study for a discussion of the factors identified by the courts that was considered to recognised unformalised life partnerships.
715 See paras 1.1 and 2.2 of this study.

As indicated above,[716] parents not involved in a parent-child relationship with a child should be excluded from the term "parent" as an unworthy heir. Similarly, children who were not involved in a parent-child relationship with their biological parent should also be excluded from the term "descendant".[717] To ensure legal certainty, the *ISA* should be amended to specifically exclude biological parents and biological children who failed to establish a parent-child relationship from the terms "parent" and "descendant". The factors suggested above to recognise a parent-child relationship to include persons in the terms "descendant" and "parent" should also be used to determine when biological children and parents should be excluded.

2.5 Conclusion

As indicated above, the concept of the "family unit" in the context of the common law traditionally only included a married biological couple and their children.[718] This chapter discussed the development of the term "spouse" in the context of the common law. [719] The term "spouse" was accordingly limited to a married man or woman.[720] Initially, spouses were unable to inherit from each other.[721] This chapter discussed the development of spouses' rights to inherit intestate from each other.[722] Specifically, the legislation regulating the common law intestate inheritance was discussed.[723]

With regards to the development of the term "spouse", this chapter analysed the inclusion of same-sex partners[724] and persons who had undergone sex-change operations.[725] Specifically, the court case decriminalising same-sex relationships,[726] the

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716 See para 2.3.6 of this study.

717 The argument may be made that denying a child to claim from their biological parents, regardless of the nature of their relationship, may be contrary to the best interest principle, especially since a biological parent owes a duty of maintenance, regardless of whether they fulfil that duty. However, as argued in paragraph 2.3.1 of this study, "descendants" are not always younger than 18 years. It is suggested that other areas of law should allow a claim for maintenance to be lodged against the deceased estate of a biological in favour of children who are unable to maintain themselves. Such claims are outside the ambit of this study.

718 See para 2.1 of this study.

719 See para 2.2 of this study.

720 See para 2.2 of this study.

721 See para 2.2 of this study.

722 See para 2.2 of this study.

723 See para 2.2.1 of this study.

724 See para 2.2.2 of this study.

725 See para 2.2.3 of this study.

726 See para 2.2.2 of this study.

court case and legislation recognising the right of same-sex partners to enter into a valid marriage,[727] and the recognition of same-sex partners as "spouses" in intestate succession[728] were comprehensively discussed. The ability of same-sex partners in a valid common law marriage or civil union to inherit intestate from each other was also discussed.[729]

Court cases and legislation that initially excluded and eventually included persons who had undergone a sex-change operation in the term "spouse" are also discussed.[730] Specifically, the ability of persons who had undergone a sex-change operation to inherit under the *ISA* was discussed.[731]

In paragraph 2.3, the development of the terms "descendant" and "parent" was analysed. Specifically, the rights of "descendants and "parents" to inherit intestate were discussed.[732] The discussion of the development of the term "parent" to include unmarried fathers revolved around specific legislation and court decisions that dealt with unmarried fathers.[733] When unmarried fathers are to be recognised as "parents" for the purposes of the *ISA* was specifically discussed.[734] Also discussed was the development of the term "descendant" to recognise biological children of unmarried fathers as the "descendants" of their unmarried biological fathers.[735]

The inclusion of adoptive children and adoptive parents in the terms "descendant" and "parent" was also discussed, with specific reference to legislation and court decisions dealing with adoption.[736] Specifically, the development of the rights of adopted children and adoptive parents to inherit intestate was analysed.[737]

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727 See para 2.2.2 of this study.
728 See para 2.2.2 of this study.
729 See para 2.2.2 of this study.
730 See para 2.2.3 of this study.
731 See para 2.2.3 of this study.
732 See para 2.3.1 of this study.
733 See para 2.3.2 of this study.
734 See para 2.3.2 of this study.
735 See para 2.3.2 of this study.
736 See para 2.3.3 of this study.
737 See para 2.3.3 of this study.

Additionally, the recognition of commissioning parents in surrogacy agreements as "parents" was examined, with specific reference to relevant legislation and case law.[738] Specifically, whether and when commissioning parents have the right to inherit as "parents" was examined.[739] The right of a surrogate mother to inherit as a "parent" was also discussed.[740] Also examined was the right of a child born from a surrogate agreement to inherit from commissioning parents and/or surrogate mothers.[741] Who qualifies as a "parent" where a child is born as a result of artificial insemination was also examined.[742] Specifically, the position of the donor was explained, as well as the position in relation to intestate succession rights of the beneficiary and the beneficiary's partner or spouse.[743] Legislation and court cases focussing on artificial insemination were analysed.[744]

The development of the term "parent" to include same-sex partners was also examined.[745] Specifically, court cases arguing for the exclusion of same-sex partners as well as for the inclusion of same-sex partners as "parents" were analysed.[746] Also, the right of persons to inherit intestate from children over whom they acquired parental rights and responsibilities was examined, with specific reference to court cases.[747] Suggestions for further development of the terms "spouse", "descendant" and "parent" are also provided.[748]

It is evident from the discussion presented in this chapter that the concept of the "family unit" in the context of the common law has evolved due to constitutional considerations.[749] Specifically, the term "spouse" developed from being limited to a man and a woman in a valid marriage concluded in terms of the *Marriage Act*, to also include same-sex partners in a civil union concluded in terms of the *Civil Union Act*, as

738 See para 2.3.4 of this study.
739 See para 2.3.4 of this study.
740 See para 2.3.4 of this study.
741 See para 2.3.4 of this study.
742 See para 2.3.5 of this study.
743 See para 2.3.5 of this study.
744 See para 2.3.5 of this study.
745 See para 2.3.6 of this study.
746 See para 2.3.6 of this study.
747 See para 2.3.7 of this study.
748 See para 2.4 of this study.
749 See paras 2.2-2.3 of this study.

well as persons who had undergone sex-change operations.[750] The terms "descendant" and "parent" were developed to not only include the biological children born to parents in a valid marriage, but also adopted children and adoptive parents, commissioning parents of surrogacy agreements, beneficiaries from artificial insemination, same-sex parents and persons who acquired parental rights and responsibilities in terms of the *Children's Act*.[751]

However, certain persons remain outside the definition of "spouse", "descendant" and "parent".[752] Excluded from the term "spouse" are persons in life partnerships with persons who are also in a marriage validly concluded in terms of the common law.[753] A full discussion of the possible inclusion of such persons is presented in paragraph 7.5.1 of this study.

Excluded from the terms "descendant" and "parent" are parents and children involved in informal adoptions and where a parent-child relationship was established between a person and a child.[754] It is recommended that intestate succession in terms of the common law be amended to accommodate all persons in worthy parent-child relationships.[755] Detailed suggestions in this regard are presented in paragraph 7.5.1 of this study.

Apart from "family units" established in terms of common law, a "family unit" may also be formed in terms of customary law. Chapter 3 discusses a "family unit" established in terms of customary law.

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750 See para 2.2 of this study.
751 See para 2.3 of this study.
752 See para 2.4 of this study.
753 See para 2.4 of this study.
754 See para 2.4 of this study.
755 See para 2.4 of this study.

Chapter 3: The development of the concept of the "family unit" in the law of intestate succession in terms of customary law

3.1 Introduction

As indicated in Chapter 1,[1] customary law received little recognition prior to the enactment of the *Constitution*.[2] Certain aspects of customary law were recognised by legislation, for instance, and important to this study, the rule of male primogeniture.[3] Traditionally, customary law was designed to preserve and continue the family line.[4] Customary law did not necessarily protect the individual rights of "spouses," "descendants" and "parents", but rather protected the individuals as part of the "family unit".[5]

Once the *Constitution* was enacted, customary law received full recognition.[6] The importance of the to the law of intestate succession in the context of customary law, lies in the development of the rule of male primogeniture in response to the *Constitution*. Accordingly, this chapter evaluates the abolishment of the rule of male primogeniture by discussing relevant court decisions and legislation.[7] This chapter also discusses the recognition of female spouses under the term "spouse" and children other than the eldest male son under the term "descendant" under customary law of intestate succession.[8]

The development of the term "spouse" to include spouses married in terms of customary law is also discussed, with reference to legislation dealing with customary law marriages.[9] Specifically, court cases dealing with the recognition of customary law

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1 See para 1.1 of this study.
2 Burman 1991 *Acta Juridica* 37; Heaton "Customary Marriages" 261; Heaton and Roos *Family and Succession Law in South Africa* 25; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 149; Rautenbach and Tshivhase "The Phenomenon of Legal Pluralism" 5.
3 See paras 3.2.1 and 3.3.1 of this study.
4 Himonga and Nhlapo *African Customary Law* 246; Mbatha 2002 *SAJHR* 260.
5 Chikaonda 2020 *Journal of Comparative Law in Africa* 76.
6 Section 211(3) of the *Constitution*; Rautenbach and Tshivhase "The Phenomenon of Legal Pluralism" 9, 13, 19.
7 See paras 3.2.1 and 3.3.1 of this study.
8 See paras 3.2.1 and 3.3.1 of this study.
9 See paras 1.1 and 3.2.2 of this study.

marriages are analysed.[10] Also discussed is the development of the term "spouse" to include women in seed-raiser agreements and woman-to-woman marriages.[11] Specifically, legislation recognising the right of women in seed-raiser agreements and woman-to-woman marriages is examined.[12]

Important for the terms "descendant" and "parent" in the customary law of intestate succession is the recognition of adoption in terms of customary law.[13] This chapter, therefore, also examines the development of intestate succession rights of adopted children and adoptive parents involved in customary law adoptions, with specific court cases dealing with adoptions in terms of customary law.[14] As in common law, customary law treated children born to unmarried parents differently from those born to married parents.[15] The position of children of unmarried parents under customary law is also discussed in this chapter.[16]

In this chapter persons who fall outside the ambit of the terms "spouse", "descendant" and "parent" are considered.[17] Suggestions for the further development of the terms "spouse", "descendant" and "parent" in customary law of succession are also presented.[18] In paragraph 3.2, the term "spouse" in terms of customary law is comprehensively analysed.

3.2 The intestate succession law term "spouse" in terms of customary law

As stated above, customary law received only partial recognition prior to the introduction of the *Constitution*.[19] Although not fully recognised as part of South African Law, customary law systems continued to be applied within traditional communities.[20] The resistance to recognise customary law was largely due to

10 See para 3.2.2 of this study.
11 See paras 3.2.3 -3.2.4 of this study.
12 See paras 3.2.3 -3.2.4 of this study.
13 See para 3.3.3 of this study.
14 See para 3.3.3 of this study.
15 See para 2.3.1 of this study.
16 See para 3.3.2 of this study.
17 See para 3.4 of this study.
18 See para 3.4 of this study.
19 See paras 1.1 and 3.1 of this study.
20 Rautenbach and Tshivhase "The Phenomenon of Legal Pluralism" 9.

customary law marriages being potentially polygynous.[21] Polygyny was regarded as contrary to public policy.[22]

Legislation such as the *BAA* partially recognised customary law for limited purposes.[23] For instance, the *BAA* directed that customary law could only be applied if it was not contrary to principles of public policy.[24] Capturing customary law in legislation created an official, stagnant version of customary law without the input of the persons it purported to regulate.[25] Customary law, as practised, is, however, continuously changing to keep pace with the changing living circumstances of communities.[26] Additionally, customary law is not uniform since it is practised differently by different communities.[27] Consequently, official customary law did not accurately reflect the reality of practised living customary law.[28]

Despite the variances between different communities' practises, certain overarching principles amongst communities may be identified, specifically in terms of the law of intestate succession in the context of customary law.[29] For instance, the goal of intestate succession was the continuation of the family rather than the distribution of the estate's assets.[30] To ensure the continuation of the family line, customary law incorporated the rule of male primogeniture to regulate succession.[31] The rule of male

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21 Bennett 2009 *The American Journal of Comparative Law* 5; Pienaar 2006 *Stell LR* 314.

22 Amien, Moosa, and Rautenbach "Muslim Personal Law" 67; Pienaar 2006 *Stell LR* 314.

23 See para 1.1 of this study.

24 Section 11(1) of the *BAA*; Bekker 1994 *THRHR* 440, 443; Bekker and Maithufi 1992 *Tydskrif vir Regswetenskap* 52; Church 1995 *CILSA* 294; Rautenbach, Himonga and Ntlama-Makhanya "Recognition, Application, and Ascertainment of Customary Law" 39; Rautenbach and Tshivhase "The Phenomenon of Legal Pluralism" 8.

25 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 43.

26 *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 460 (CC) paras 52-54; *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 45; Rautenbach "Nature and Sphere of African Customary Law" 21, 28.

27 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 87; Heaton "Customary Marriages" 262; Himonga and Nhlapo *African Customary Law* 52; Osman "Customary Marriages" 297; Osman and Baase 2022 *SAJHR* 5; Rautenbach 2008 *CILSA* 106; Rautenbach, Himonga and Ntlama-Makhanya "Recognition, Application, and Ascertainment of Customary Law" 42; Schoeman-Malan 2007 *PELJ* 115.

28 Osman "Customary Marriages" 298; Rautenbach and Tshivhase "The Phenomenon of Legal Pluralism" 5.

29 Himonga and Nhlapo *African Customary Law* 52; Rautenbach "State Intervention in the Customary law of Succession in South Africa" 37-38; Rautenbach, Himonga and Ntlama-Makhanya "Recognition, Application, and Ascertainment of Customary Law" 42.

30 De Waal 1997 *Stell LR* 164. See para 3.1 of this study.

31 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) paras 3, 77; Kult 2001 *Indiana International and Comparative Law Review* 707; Osman "The Communal Nature of South African Customary Law of

primogeniture was captured in the *BAA*.[32] The rule of male primogeniture is fully discussed below.[33]

With the recognition of customary law by the *Constitution*, customary law had to be protected and implemented. Contrary to customary law, the *Constitution* focuses on the protection of individuals' rights.[34] The *Constitution* requires that customary law must comply with the *Constitution* to be valid.[35] Therefore, certain aspects of customary law were developed to ensure compliance with the *Constitution*.[36] The *RCMA* defines customary law as the

> customs and usages traditionally observed among the indigenous African peoples of South Africa which form part of the culture of those peoples.[37]

Despite the recognition of customary law by the *Constitution* and the courts' increased mindfulness[38] of living customary law, newer legislation, such as the *RCMA* and *RCLSA* creates new official customary law, which might not reflect actual practices.[39] The creation of new legislation governing customary law is to essentially ensure compliance with the *Constitution*.[40]

In paragraphs 3.2.1-3.2.4 the declaration of invalidity of the rule of male primogeniture and the consequential inclusion of women in the term "spouse" in terms of intestate succession, the inclusion of spouses married in terms of customary law in the term

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Succession" 64; Rautenbach 2014 *Acta Juridica* 135-136. See paras 1.1, 3.1, 3.2.1 and 3.3.1 of this study.

32 Section 23 of the *BAA*; Himonga and Nhlapo *African Customary Law* 249, 256-257; Mbatha 2002 *SAJHR* 264; Osman "The Communal Nature of South African Customary Law of Succession" 67; Rautenbach 2014 *Acta Juridica* 134; Rautenbach, Himonga and Ntlama-Makhanya "Recognition, Application, and Ascertainment of Customary Law" 30. See para 1.1 of this study.

33 See paras 3.2.1 and 3.3.1 of this study.

34 See para 1.1.3 of this study.

35 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 44. See para 1.1.3 of this study.

36 See paras 3.2-3.3 of this study.

37 Section 1 of the *RCMA*; Heaton "Customary Marriages" 261; Kult 2001 *Indiana International and Comparative Law Review* 718; Osman "Customary Marriages" 297; Rautenbach "Families and Legal Pluralism in South Africa 67; Rautenbach "Nature and Sphere of African Customary Law" 20, 40-41.

38 See para 3.2-3.3 of this study for a discussion of court cases attempting to incorporate living customary law.

39 Osman 2019 *PELJ* 2; Rautenbach "Nature and Sphere of African Customary Law" 20; Rautenbach and Tshivhase "The Phenomenon of Legal Pluralism" 5, 10.

40 Osman 2019 *PELJ* 2.

"spouse" in intestate succession and the development of the term "spouse" by the *RCLSA* are discussed.

3.2.1 The declaration of invalidity of the principle of male primogeniture and inclusion of women in the intestate succession term "spouse" in customary marriages

As stated above, the traditional customary law of succession followed the rule of male primogeniture, which excluded female spouses and descendants other than the first-born male child from inheriting from a deceased.[41] As mentioned above, the goal of customary law, specifically, the customary law of intestate succession, was to protect the family and ensure that the deceased's dependants were provided for upon the death of the deceased.[42] To that end, the focus of customary law of intestate succession was succession to the status of the deceased rather than the distribution of the estate's assets.[43]

The rule of male primogeniture furthered the above-mentioned goals of continuation of the deceased's family and the protection of their dependants.[44] In terms of the rule of male primogeniture, a single male heir was identified to accept the rights and responsibilities of the deceased.[45] As explained below,[46] customary law marriages may be polygynous or monogamous. In a monogamous marriage, the rule of male primogeniture dictated that the firstborn son was to succeed to the deceased's position as head of the family and his estate.[47] Should he have predeceased the deceased, his

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41 See paras 3.2 and 3.3.1 of this study.

42 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 75; Himonga and Nhlapo *African Customary Law* 246; Mbatha 2002 *SAJHR* 260.

43 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) paras 76, 158-160; Himonga 2017 *Southern African Public Law* 11; Himonga and Nhlapo *African Customary Law* 249; Kult 2001 *Indiana International and Comparative Law Review* 707; Mbatha 2002 *SAJHR* 272; Osman and Rautenbach "Law of Succession and Inheritance" 193; Rautenbach "State Intervention in the Customary law of Succession in South Africa" 35; Schoeman-Malan 2007 *PELJ* 116.

44 Himonga and Nhlapo *African Customary Law* 249; Maunatlala and Maimela 2020 *De Jure* 40.

45 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 76; *Mthembu v Letsela* 2000 3 SA 867 (SCA) para 8; Himonga and Nhlapo *African Customary Law* 255-256; Mbatha 2002 *SAJHR* 260; Osman and Rautenbach "Law of Succession and Inheritance" 193; Osman "The Communal Nature of South African Customary Law of Succession" 64; Rautenbach 2014 *Acta Juridica* 136.

46 See para 3.2.2 of this study.

47 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 77; *Mthembu v Letsela* 2000 3 SA 867 (SCA) para 8; Himonga and Nhlapo *African Customary Law* 249; Mbatha 2002 *SAJHR* 261; Osman and Rautenbach "Law of Succession and Inheritance" 194.

eldest son was the successor, and so forth.[48] Where there was a male descendant of the first-born son living, the second eldest son and his sons were considered, and so forth.[49]

If no male descendant was living at the time of the deceased's death, the deceased's father inherited.[50] If the father was predeceased, the oldest brother inherited, or his son, or oldest surviving male descendant.[51] In polygynous households, each house additionally identified one successor to the head of the house in terms of the principle of male primogeniture, subject to the general successor.[52]

Apart from taking control of the family assets, the identified heir was responsible for providing for the deceased's dependants.[53] As stated above, the *BAA* incorporated the rule of male primogeniture.[54] However, the duty on the heir to maintain the deceased's dependants was not included in the *BAA*.[55] The failure of the *BAA* to include the duty of maintenance rendered it unenforceable by law. Since surviving female spouses, younger sons and daughters were not considered for succession, and should the identified male heir not fulfil his maintenance obligation, the deceased's dependants might be left without legal recourse upon the death of the head of the family.[56]

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48 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 77; *Mthembu v Letsela* 2000 3 SA 867 (SCA) para 8; Himonga and Nhlapo *African Customary Law* 249; Kult 2001 *Indiana International and Comparative Law Review* 707; Osman and Rautenbach "Law of Succession and Inheritance" 195.

49 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 77; *Mthembu v Letsela* 2000 3 SA 867 (SCA) para 8; Himonga and Nhlapo *African Customary Law* 249; Kult 2001 *Indiana International and Comparative Law Review* 707; Osman and Rautenbach "Law of Succession and Inheritance" 195-196.

50 *Mthembu v Letsela* 2000 3 SA 867 (SCA) para 8; Osman and Rautenbach "Law of Succession and Inheritance" 195.

51 Kult 2001 *Indiana International and Comparative Law Review* 707; Osman and Rautenbach "Law of Succession and Inheritance" 195.

52 Himonga and Nhlapo *African Customary Law* 249; Mbatha 2002 *SAJHR* 261; Osman and Rautenbach "Law of Succession and Inheritance" 194, 196.

53 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 76; Bekker and Boonzaaier 2007 *De Jure* 288; De Waal and Schoeman-Malan *Erfreg* 2; Himonga and Nhlapo *African Customary Law* 246; Mbatha 2002 *SAJHR* 261; Osman 2019 *PELJ* 4, 8; Osman "The Communal Nature of South African Customary Law of Succession" 65; Osman and Rautenbach "Law of Succession and Inheritance" 193.

54 See paras 1.1 and 3.2 of this study.

55 Bekker and Boonzaaier 2007 *De Jure* 288; Himonga 2005 *Acta Juridica* 92; Mbatha 2002 *SAJHR* 264, 267; Osman 2019 *PELJ* 8.

56 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) paras 77, 174; Himonga 2005 *Acta Juridica* 92; Himonga and Nhlapo *African Customary Law* 262, 268; Maunatlala and Maimela 2020 *De Jure* 487;

The question whether the rule of male primogeniture was constitutional was first raised in *Mthembu v Letsela*.[57] It was determined that the rule of male primogeniture infringed the right to equality of women.[58] The right to equality was violated on the grounds of sex and gender.[59] However, the rule of male primogeniture did not unfairly discriminate against female spouses and descendants due to the heir's obligation of support.[60] The court therefore declined to declare the rule of male primogeniture unconstitutional.[61] Any development was best left to the legislature.[62] Criticism levelled against this decision includes that the court failed to consider whether the duty of maintenance was practised.[63] By failing to ensure that the maintenance obligation of the heir was enforced, the court endorsed the discriminatory impact of the rule of male primogeniture.[64]

The court declared the rule of male primogeniture unconstitutional in *Bhe v The Magistrate, Kayelitsha*[65] (hereafter the *Bhe* case), along with section 23 of the *BAA*.[66]

Mbatha 2002 *SAJHR* 261; Osman 2019 *PELJ* 4; Osman and Rautenbach "Law of Succession and Inheritance" 194, 196; Pienaar 2006 *SAJHR* 107; Schoeman-Malan 2007 *PELJ* 126.

57 1998 2 SA 675 (T) 945A-B; *Mthembu v Letsela* 2000 3 SA 867 (SCA); Bonthuys 2002 *SALJ* 757; Himonga and Bosch 2000 *SALJ* 331.

58 *Mthembu v Letsela* 1998 2 SA 675 (T) 945A-B; Kult 2001 *Indiana International and Comparative Law Review* 721.

59 *Mthembu v Letsela* 1998 2 SA 675 (T) 945C; Kult 2001 *Indiana International and Comparative Law Review* 721. See para 1.1.3.1 of this study.

60 *Mthembu v Letsela* 1998 2 SA 675 (T) 945G; Bonthuys 2002 *SALJ* 757; Himonga 2017 *Southern African Public Law* 7; Himonga and Bosch 2000 *SALJ* 332; Himonga and Nhlapo *African Customary Law* 266; Kult 2001 *Indiana International and Comparative Law Review* 721; Mbatha 2002 *SAJHR* 275; Rautenbach 2008 *Journal of Comparative Law* 125; Rautenbach "State Intervention in the Customary law of Succession in South Africa" 42. See para 1.1.3.1 of this study.

61 *Mthembu v Letsela* 1998 2 SA 675 (T) 688E; *Mthembu v Letsela* 2000 3 SA 867 (SCA) para 47; Nhlapo 2017 *SAJHR* 5; Pienaar 2006 *SAJHR* 99. See para 1.1.3.1 of this study.

62 *Mthembu v Letsela* 2000 3 SA 867 (SCA) para 40; Bonthuys 2002 *SALJ* 757; Rautenbach "State Intervention in the Customary law of Succession in South Africa" 42; Schoeman-Malan 2007 *PELJ* 121.

63 Ntlama 2009 *Stell LR* 344.

64 See also Ntlama 2009 *Stell LR* 344.

65 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC).

66 *Bhe* case paras 73, 107, 136; Du Toit 2009 *SALJ* 467, 477; De Waal and Schoeman-Malan *Erfreg* 20; Heaton and Roos *Family and Succession Law in South Africa* 197; Himonga 2005 *Acta Juridica* 84, 93, 127; Himonga and Nhlapo *African Customary Law* 62, 261; Hofmeyr and Paleker *The Law of Succession in South Africa* 838-839; Mochela and Smith 2020 *TSAR* 483-484; Nhlapo 2017 *SAJHR* 7-8; Osman "The Communal Nature of South African Customary Law of Succession" 69; Osman and Baase 2022 *SAJHR* 19; Osman and Rautenbach "Law of Succession and Inheritance" 200; Pienaar 2006 *SAJHR* 110; Rautenbach 2008 *CILSA* 107; Rautenbach "State Intervention in the Customary law of Succession in South Africa" 31, 39; Rautenbach 2008 *Journal of Comparative Law* 124; Rautenbach 2014 *Acta Juridica* 132, 136; Rautenbach and Meyer 2012 *TSAR* 150; Schoeman-Malan 2007 *PELJ* 125; Sloth-Nielsen and Van Heerden 2014 *International Journal of*

Section 23 of the *BAA* prescribed that estates of deceased persons who lived in accordance with customary law must devolve in terms of customary law, in other words, the rule of male primogeniture.[67] The question before the court was whether the rule of male primogeniture discriminated against women and other children of the deceased.[68] Unlike the court in *Mthembu v Letsela*,[69] the court in the *Bhe* case undertook an equality analysis.[70] In analysing the impact of the provisions on the community, the court recognised that women and children are vulnerable persons in society.[71]

The exclusion of women from customary law inheritance violated their right to equality.[72] Additionally, section 23 of the *BAA* discriminated on the grounds of race and colour.[73] The exclusion also infringed the right to human dignity, as it implied that women could not own and administer property.[74] Women were placed under the mercy of male heirs solely based on their sex and gender.[75]

The court further determined that, due to changing circumstances, the heir identified in terms of the rule of male primogeniture did not necessarily assume the required duty of maintenance towards the dependents of the deceased.[76] Contrary to the decision in *Mthembu v Letsela*[77] the court in the *Bhe* case held that the duty of support cannot be used to justify discrimination against women and extra-marital children.[78]

Law, Policy and the Family 104; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 373.

67 *Bhe* case para 2; Schoeman-Malan 2007 *PELJ* 116, 119.

68 *Bhe* case para 138; Smith 2016 *SAJHR* 136. See para 3.3.1 below for a discussion of the development of the rule of male primogeniture for descendants other than the first-born son.

69 2000 3 SA 867 (SCA).

70 *Bhe* case para 32.

71 *Bhe* case para 32.

72 *Bhe* case paras 31, 48, 52, 52 91; Himonga 2005 *Acta Juridica* 93; Himonga 2017 *Southern African Public Law* 5, 11, 15; Himonga and Nhlapo *African Customary Law* 261; Hofmeyr and Paleker *The Law of Succession in South Africa* 839; Maunatlala and Maimela 2020 *De Jure* 45; Muneer 2023 *Journal of Comparative Law in Africa* 212; Osman and Rautenbach "Law of Succession and Inheritance" 206-207; Pienaar 2006 *SAJHR* 107-108, 110; Rautenbach 2008 *Journal of Comparative Law* 125; Smith 2016 *SAJHR* 137.

73 *Bhe* case para 66-67. See para 1.1.3.1 of this study.

74 *Bhe* case para 92; Pienaar 2006 *SAJHR* 107. See para 1.1.3.1 of this study.

75 *Bhe* case paras 54, 92.

76 *Bhe* case paras 80, 96; Himonga 2017 *Southern African Public Law* 11.

77 2000 3 SA 867 (SCA).

78 *Bhe* case para 96; Osman and Rautenbach "Law of Succession and inheritance" 207; Pienaar 2006 *SAJHR* 108; Rautenbach 2008 *Journal of Comparative Law* 126. See para 1.1.3.1 of this study.

Capturing the rule of male primogeniture in legislation stripped customary law of the ability to adapt.[79] As a result, the rule of male primogeniture failed to adapt to changing gender roles and higher level of economic participation by women.[80] The discrimination could therefore not be justified, since it excluded women and infringed upon their rights to dignity and equality.[81]

In deciding on the appropriate remedy, the court held that it did not have enough information argued before it to develop customary law, and the rule of primogeniture was accordingly struck down.[82] The *ISA* was made applicable to all deceased estates, with some adjustments to accommodate polygynous marriages.[83] The result of the judgment in the *Bhe* case was that the term "spouse" in terms of the *ISA* was extended to recognise spouses in a customary law marriage, followed by the enactment of the *RCLSA*.[84]

Critique against this decision include that it simply replaced customary law rules of intestate succession with common law rules of intestate succession.[85] The *Constitution* guarantees the survival of customary law and courts should preferably develop rather than strike down a rule of customary law.[86] The concurrent responsibility of maintenance on the heir was abolished, as women and children could now inherit in their own names.[87] Instead of abolishing the customary law rule of male primogeniture, it could have developed.

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79 *Bhe* case paras 72, 82.

80 *Bhe* case para 90.

81 *Bhe* case paras 68, 72-73, 95, 97; Chikaonda 2020 *Journal of Comparative Law in Africa* 84; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 20; Himonga 2017 *Southern African Public Law* 15; Himonga and Nhlapo *African Customary Law* 261; Mochela and Smith 2020 *TSAR* 484; Pienaar 2006 *SAJHR* 107; Rautenbach 2008 *Journal of Comparative Law* 125.

82 *Bhe* case para 109, 212, 215; Rautenbach and Tshivhase "The Phenomenon of Legal Pluralism" 13-14; Smith 2016 *SAJHR* 137. See para 1.1.2 of this study

83 *Bhe* case paras 107, 125, 136. See para 1.1.3.1 of this study.

84 De Waal and Mills 2021 *TSAR* 567. See para 3.2.2 of this study for an explanation of who qualify as a "spouse" married in terms of customary law.

85 Himonga 2005 *Acta Juridica* 84; Himonga 2017 *Southern African Public Law* 8; Rautenbach "State Intervention in the Customary law of Succession in South Africa" 31; Rautenbach and Meyer 2012 *TSAR* 151.

86 Himonga 2005 *Acta Juridica* 128; Osman 2019 *PELJ* 8-9.

87 Osman "The Communal Nature of South African Customary Law of Succession" 71.

The minority judgment in the *Bhe* case advocated for the development of the principle of male primogeniture.[88] The minority judgment agreed with the main judgment that section 23 must be declared unconstitutional since it infringed human dignity and equality and discriminated between persons based on their race and colour.[89] The minority judgment disagreed with the declaration of invalidity of the rule of male primogeniture and maintained that customary law may have been developed to allow women to inherit by removing the reference to male from the rule of male primogeniture.[90] If the minority judgment had been followed, a system of intestate succession could have been implemented that reflects customary law rather than the replacement of customary law with common law as suggested by the majority decision.

As indicated above,[91] succession in terms of customary law is not only focused on the distribution of the estate of a deceased. Succession in customary law is also concerned with the succession to status. In *Shilubana v Nwamitwa*[92] the court was called upon to confirm whether a community could develop the rule of male primogeniture, which demands that a man should succeed to the position as head of the family.[93]

Unlike in the *Bhe* case, the court did not abolish the rule of male primogeniture on the basis that it discriminated against a woman's right to equality. Instead, the court confirmed the community's decision to allow a woman to succeed to the position as head of the family.[94] The court, therefore, allowed the community to develop its own law.[95] The court confirmed that communities were able to develop their own rules in line with the *Constitution*.[96]

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88 *Bhe* case para 139; Himonga 2005 *Acta Juridica* 84, 104, 128; Ntlama 2009 *Stell LR* 344; Pienaar 2006 *SAJHR* 109.

89 *Bhe* case paras 143-145.

90 *Bhe* case para 175; Himonga 2005 *Acta Juridica* 104; Himonga 2017 *Southern African Public Law* 5-6; 16; Pienaar 2006 *SAJHR* 109. See para 3.3.1 of this study for a comprehensive discussion of the minority judgment in the *Bhe* case.

91 See para 3.2 of this study.

92 2009 2 SA 66 (CC).

93 *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 1.

94 *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) paras 49, 75, 90; Himonga and Nhlapo *African Customary Law* 62; Maunatlala and Maimela 2020 *De Jure* 42; Nhlapo 2017 *SAJHR* 8; Ntlama 2009 *Stell LR* 349; Rautenbach "State Intervention in the Customary Law of Succession in South Africa" 28.

95 Rautenbach "State Intervention in the Customary Law of Succession in South Africa" 28.

96 Himonga and Nhlapo *African Customary Law* 249.

Ignoring critique against the decision in the *Bhe* case, the legislature chose to confirm the erosion of customary law of succession by enacting the *RCLSA*.[97] The introduction of the *RCLSA* recognised spouses in monogamous and polygynous customary law marriages as "spouses" for intestate succession.[98] The *RCLSA* further states that

> … any reference in section 1 of the Intestate Succession Act to a spouse who survived the deceased must be construed as including every spouse and every woman referred to in paragraphs (a), (b) and (c) of section 2(2).[99]

The *RCLSA* therefore recognises as "spouses" a man and a woman or women in a validly concluded customary law marriage,[100] a woman in a seed-raiser union,[101] or a woman in a woman-to-woman marriage.[102] The changes reflected by the *RCLSA* did not change the meaning of the term "spouse" contained in the *ISA*, but are only applicable to the definition of "spouse" in terms of customary law.[103]

The *RCLSA* determines that where a deceased is survived by more than one spouse and/or a woman referred to in section 2(2)(a)-(c) of the *RCLSA* (read with section 3(1) of the *RCLSA*), such spouses and/or women shall each inherit either a child's portion or the amount determined by the Minister.[104] Where the estate is not large enough to

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97 Section 2(1) of the *RCLSA*; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 20; De Waal and Schoeman-Malan *Erfreg* 20, 198; Du Toit 2009 *SALJ* 474; Heaton and Roos *Family and Succession Law in South Africa* 26; Himonga 2017 *South African Public Law* 75; Himonga and Nhlapo *African Customary Law* 61; Hofmeyr and Paleker *The Law of Succession in South Africa* 839; Mochela and Smith 2020 *TSAR* 484; Osman 2019 *PELJ* 5, 8; Osman "The Communal Nature of South African Customary Law of Succession" 69-70; Osman and Rautenbach "Law of Succession and Inheritance" 207; Rautenbach "State Intervention in the Customary law of Succession in South Africa" 47; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 107; Smith 2016 *SAJHR* 138.

98 Sections 1 and 2(2) of the *RCLSA*; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 28; Du Toit 2009 *SALJ* 47; Himonga and Nhlapo *African Customary Law* 268; Osman and Rautenbach "Law of Succession and Inheritance" 197. See para 3.2.2 of this study for a discussion of marriage in terms of customary law.

99 Section 2(2)(a)-(c) of the *RCLSA*; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 28; Osman and Rautenbach "Law of Succession and Inheritance" 209.

100 See para 3.2.2 of this study.

101 Hofmeyr and Paleker *The Law of Succession in South Africa* 845. See para 3.2.3 of this study.

102 Hofmeyr and Paleker *The Law of Succession in South Africa* 845; Rautenbach, Himonga and Ntlama-Makhanya "Recognition, Application and Ascertainment of Customary Law" 47. See para 3.2.4 of this study.

103 Hofmeyr and Paleker *The Law of Succession in South Africa* 856.

104 Section 1(1)(c)(iii) of the *ISA*; section 3(1), (2) of the *RCLSA*; Amien 2014 *Acta Juridica* 204; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 29; De Waal and Schoeman-Malan *Erfreg* 18; Himonga and Nhlapo *African Customary Law* 268; Hofmeyr and Paleker *The Law of Succession in South Africa* 857-859; Osman "The Communal Nature of South African Customary Law of Succession" 70. See para 2.2.1 for a discussion of the calculation of a child's portion.

allow each spouse to inherit a child's share, the spouses inherit the entire estate in equal shares.[105]

Where there are multiple spouses eligible to inherit, descendants might be excluded in favour of the spouses in instances where the estate is too small to cover the R250 000 minimum amount owed to spouses.[106] Spouses, therefore, have greater intestate succession rights compared to descendants from the time the *ISA* was enacted.[107] The question that arises is whether it is in the best interests of children to allow spouses to have stronger intestate inheritance rights than descendants. One option to ensure stronger intestate succession rights for descendants is to enact or amend legislation that would allow all spouses to share the R250 000 minimum amount where an estate is not large enough to provide all heirs with a child's share.[108] Another option would be to abolish the minimum amount and allow spouses and descendants to inherit equally.

Since the *RCLSA* specifically identifies spouses in customary law marriages as "spouses" for intestate inheritance, an explanation of customary law marriage is necessary. In paragraph 3.2.2, the development of marriage in terms of customary law is discussed.

3.2.2 The relevance of customary law marriages for the law of intestate succession term "spouse"

Traditionally, a customary law marriage was a union of two families, rather than an agreement reached between a man and a woman as in common law.[109] Upon entering into a valid customary law marriage, a woman became part of her husband's family who assumed the responsibility of ensuring her economic welfare.[110] To ensure the

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105 Section 3(2) of the *RCLSA*; De Waal and Schoeman-Malan *Erfreg* 18; Hofmeyr and Paleker *The Law of Succession in South Africa* 846.

106 Rautenbach and Meyer 2012 *TSAR* 160.

107 Rautenbach and Meyer 2012 *TSAR* 160.

108 Rautenbach and Meyer 2012 *TSAR* 160.

109 Bekker 1994 *THRHR* 347, 441; Bekker and Koyana 2014 *THRHR* 29; Chikaonda 2020 *Journal of Comparative Law in Africa* 76; Dlamini 1983 *CILSA* 384; Horn and Janse van Rensburg 2002 *Journal for Juridical Science* 172; Monareng and Zounmenou 2007 *Agenda* 123; Peart 1984 *THRHR* 137, 159; Rautenbach "Nature and Sphere of African Customary Law" 26.

110 Dlamini 1983 *CILSA* 386; Peart 1984 *THRHR* 137; Rautenbach "Nature and Sphere of African Customary Law" 27.

continuity of a family, death did not necessarily terminate the marriage.[111] The widow or widows remained entitled to support from the husband's family.[112] The rule of male primogeniture, discussed above, regulated the transfer of maintenance obligations to the heir of the deceased, ensuring the well-being of the deceased's dependants.[113] Additionally, where a man died without children, his widow could enter a union to procure children for his house, thereby ensuring the continuation of the man's family.[114]

Customary law marriages, however, were not recognised as valid marriages in terms of the common law and were designated as customary unions rather than customary marriages prior to the introduction of the *Constitution*.[115] As reflected in the provisions of the *BAA,* the legislature introduced legal provisions that regulated intestate estates of spouses from a customary law marriage differently to intestate estates of spouses from a common law marriage.[116] As indicated above, the non-recognition of customary law marriages was due to the potential polygynous nature of such marriages.[117] Polygynous marriages were criticised as being discriminatory to women since men could enter polygynous marriages, but women could not enter polyandrous marriages.[118]

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111 Dlamini 1983 *CILSA* 385; Dlamini 1991 *Acta Juridica* 80; Peart 1984 *THRHR* 162.

112 Dlamini 1983 *CILSA* 385; Dlamini 1991 *Acta Juridica* 80; Peart 1984 *THRHR* 162.

113 See para 3.2.1 of this study.

114 See para 3.2.1 of this study.

115 Bakker 2009 *THRHR* 395; Bekker and Koyana 2014 *THRHR* 23; Burman 1991 *Acta Juridica* 37; Dlamini 1983 *CILSA* 384; Monareng and Zounmenou 2007 *Agenda* 123; Müller-Van der Westhuizen "Family Law" 119; Osman 2019 *PELJ* 5; Osman "Customary Marriages" 299; Peart 1984 *THRHR* 159; Van Schalkwyk 2003 *De Jure* 292. The treatment of customary law marriages and their "spouses" as distinct from common-law marriages is evident in cases involving claims for loss of support upon the death of the breadwinner. For instance, in *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy v Fondo* 1960 2 All SA 362 (A) 367, the court denied a claim for support upon the loss of support due to the death of the breadwinner. See Kaganas and Murray 1991 *Acta Juridica* 122.

116 See paras 2.2.1 and 3.2.1 of this study.

117 *Flynn* case para 29; Bonthuys and Pieterse 2000 *THRHR* 616-617; Dlamini 1983 *CILSA* 386; Dlamini 1991 *Acta Juridica* 75, 77; Himonga 2005 *Acta Juridica* 101; Himonga and Bosch 2000 *SALJ* 309; Himonga and Nhlapo *African Customary Law* 167; Jamneck 2014 *PELJ* 978; Kaganas and Murray 1991 *Acta Juridica* 121; Monareng and Zounmenou 2007 *Agenda* 123; Mosikatsana 1996 *CILSA* 156; Osman 2019 *PELJ* 3; Osman "Customary Marriages" 298; Ozoemena, Wara and Ramarumo "Balancing Customary Practices and Human Rights in the Proposed Single Marriage Bill" 108; Robinson 2005 *Obiter* 494; Ziehl 1997 *African Sociological Review* 50. See para 3.2 of this study.

118 Dlamini 1991 *Acta Juridica* 77.

Marriages concluded in terms of customary law eventually received partial recognition.[119] The *BAA* defined a "customary union" as

> the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is party to a subsisting marriage.[120]

After a customary law marriage was concluded, it could be transformed into a common law marriage by concluding a marriage in terms of the *Marriage Act*.[121] However, any customary marriage entered into prior to or after the conclusion of the common law marriage was invalidated by the conclusion of the common law marriage.[122] Wives in marriages that became invalid were left without access to legal benefits typically associated with marriage.[123] Accordingly, where a common law marriage was concluded and dissolved by the death of a spouse, the estate would devolve according to common law to the exclusion of any spouse in an invalidated customary law marriage.[124] To protect women left destitute, the *BAA* was amended to prohibit a man in a polygynous customary law marriage from entering into a common law marriage.[125]

After the *Constitution* was enacted, customary law marriages received full recognition through the *RCMA*.[126] The *RCMA* defines a customary marriage as a "marriage concluded in accordance with customary law".[127] Both monogamous and polygynous

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119 Himonga 2005 *Acta Juridica* 101; Jamneck 2014 *PELJ* 978; Kaganas and Murray 1991 *Acta Juridica* 121; Osman 2019 *PELJ* 3.

120 Section 35 of the *BAA*; Oomen 2000 *THRHR* 278; Peart 1984 *THRHR* 161.

121 Church 1995 *CILSA* 296; Dlamini 1983 *CILSA* 386; Kaganas and Murray 1991 *Acta Juridica* 122; Peart 1984 *THRHR* 158.

122 Bonthuys and Pieterse 2000 *THRHR* 618-619; Müller-Van der Westhuizen "Family Law" 118; Osman 2019 *PELJ* 4-5; Peart 1984 *THRHR* 159; Ziehl 1997 *African Sociological Review* 50.

123 Bonthuys and Pieterse 2000 *THRHR* 619-620.

124 Bonthuys and Pieterse 2000 *THRHR* 617.

125 Section 22 of the *BAA*; Bonthuys and Pieterse 2000 *THRHR* 619; Bronstein 1998 *SAJHR* 617; Dlamini 1983 *CILSA* 386.

126 Amien, Moosa and Rautenbach "Muslim Personal Law" 68; Bakker 2009 *THRHR* 395; Bakker 2016 *THRHR* 231; Bekker and Koyana 2014 *THRHR* 23-24; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 9; Heaton 2008 *Stell LR* 452; Monareng and Zounmenou 2007 *Agenda* 122-123; Müller-Van der Westhuizen "Family Law" 90; Osman-Hyder 2022 *Stell LR* 263.

127 De Souza 2013 *Acta Juridica* 239, 241; Knoetze and Olivier 2005 *Obiter* 126; Müller-Van der Westhuizen "Family Law" 90; Osman 2019 *PELJ* 3, 6; Osman "Customary Marriages" 298; Osman and Baase 2022 *SAJHR* 8, 20.

customary law marriages are recognised.[128] As discussed above, the conclusion of a valid customary marriage means that a "spouse" qualifies for intestate succession.[129]

As with the *Marriage Act*,[130] the *RCMA* sets out certain requirements that must be met for a marriage to be considered valid. The requirements set out in terms of the *RCMA* include that the prospective spouses must be at least 18 years of age, must consent to a marriage in accordance with customary law, and the marriage must be negotiated, entered into and celebrated in accordance with customary law.[131] Should the requirements not be met, the marriage would not be valid and the "spouses" would not qualify for intestate succession.

Identifying who qualifies as a "spouse" is problematic due to the requirement that the marriage must be negotiated, entered into and celebrated in accordance with customary law.[132] The courts recognised the requirements of lobolo and integration of the bride into the family of the husband through a customary ceremony as prerequisites for the conclusion of a customary law marriage.[133] These court decisions

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128 Amien and Rajwani 2020 *The Journal of Legal Pluralism and Unofficial Law* 330; Bakker 2009 *THRHR* 395; Bronstein 1998 *SAJHR* 558; Clark and Van Heerden 2024 *SALJ* 468; De Souza 2013 *Acta Juridica* 242; Du Toit 2009 *SALJ* 473; Heaton and Roos *Family and Succession Law in South Africa* 73; Himonga 2005 *Acta Juridica* 91; Himonga and Pope 2013 *Acta Juridica* 319; Kult 2001 *Indiana International and Comparative Law Review* 718; Lind 1995 *SALJ* 483; Monareng and Zounmenou 2007 *Agenda* 123; Müller-Van der Westhuizen "Family Law" 90; Oomen 2000 *THRHR* 274, 279; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 155; Rautenbach "Families and Legal Pluralism in South Africa" 67; Vahed 2022 *Contemporary South Asia* 47; Van Schalkwyk 2003 *De Jure* 292.

129 De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 28. See para 3.2.1 of this study.

130 See para 2.2 of this study.

131 *MM v MN* 2013 4 SA 415 (CC) para 76; Bakker 2018 *PELJ* 2; Bekker and Koyana 2014 *THRHR* 28; Bonthuys and Pieterse 2000 *THRHR* 617; Bronstein 1998 *SAJHR* 559; Heaton 2008 *Stell LR* 452; Heaton "Customary Marriages" 263; Monareng and Zounmenou 2007 *Agenda* 123; Mwambene and Kruuse 2013 *Acta Juridica* 304; Oomen 2000 *THRHR* 277; Osman 2019 *PELJ* 7, 11; Osman and Baase 2022 *SAJHR* 9; Peart 1984 *THRHR* 178.

132 Bakker 2018 *PELJ* 2; Bonthuys 2018 *PELJ* 5; Himonga and Nhlapo *African Customary Law* 174; Kruuse 2017 *The International Survey of Family Law* 346; Manthwa 2021 *TSAR* 207; Müller-Van der Westhuizen "Family Law" 91; Rautenbach "Families and Legal Pluralism in South Africa" 85; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 155; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 105.

133 *Fanti v Boto* 2008 5 SA 405 (C) para 19; *Mmutle v Thinda* 2008 JDR 0904 (T) para 12; Bakker 2018 *PELJ* 2; Heaton "Customary Marriages" 264; Horn and Janse van Rensburg 2002 *Journal for Juridical Science* 172; Kruuse 2017 *The International Survey of Family Law* 346; Mwambene and Kruuse 2013 *Acta Juridica* 304; Osman 2019 *PELJ* 13; Osman "Customary Marriages" 301-302; Osman and Baase 2022 *SAJHR* 9; Ozoemena, Wara and Ramarumo "Balancing Customary Practices and Human Rights in the Proposed Single Marriage Bill" 103-105. See for example *Mabuza v Mbatha* 2003 4 SA 218 (C) paras 25, 27; *Maluleke v The Minister of Home Affairs* 2008 JDR 0426 (W) para 13; *Mbungela v Mkabi* 2020 1 SA 41 (SCA) para 30; *Moropane v Southon* (SCA) (unreported) case

established new official customary law, which is often applied to all systems of customary law, thereby disregarding the differences between different communities.[134] Due to the courts' inconsistent decisions regarding the requirements for a valid customary law marriage, uncertainty persists regarding the validity of such marriages. Partners in a customary law marriage might believe they have concluded a lawful marriage, only for it to be later invalidated. Partners in such invalidated marriages do not qualify for intestate succession.[135]

An additional requirement introduced by the courts is the consent of the first wife for the conclusion of a second or further marriage. In some communities, a woman has no say in her husband's decision to enter into further customary marriages.[136] In *MN v MM*[137] the court considered Tsonga customary law, that requires the husband to inform the first wife if he wishes to conclude a further marriage.[138] In this case, a man entered into two customary law marriages without the knowledge and consent of either of the wives.[139] The Supreme Court of Appeal held both marriages as valid.[140] The court focused on whether section 7(6) of the *RCMA* requires the consent of the

number 755/2012 of 29 May 2012 para 40; *Sengadi v Tsambo* 2019 1 All SA 569 (GJ) para 42 where the court indicated that formal integration of the bride into the husband's family was not a strict requirement; acceptance of the wife as part of the family is enough. Bakker 2018 *PELJ* 3, 5, 12; Bapela and Monyamane 2021 *Obiter* 188-189; Manthwa 2021 *TSAR* 201-202, 204. However, in *Fanti v Boto* 2008 5 SA 405 (C) para 23; *Manona v Alice Funeral Parlour* 2002 JOL 9717 (Ck) 5; *Mkabe v Minister of Home Affairs* 2016 JDR 1157 (GP) para 38; *Motsoatsoa v Roro* 2010 JDR 1392 (GSJ) para 20 the court held that handing over of the bride is an essential requirement. Bennett 2009 *The American Journal of Comparative Law* 12-13; Bekker and Van der Merwe 2011 *SAPL* 126; Mwambene and Kruuse 2013 *Acta Juridica* 309-310. In *Fanti v Boto* 2008 5 SA 405 (C) 28; *Matlala v Dlamini* 2010 JDR 0627 (GNP) 6; *Mmutle v Thinda* 2008 JDR 0904 (T) paras 17-18; *Ndlovu v Mokoena* 2009 5 SA 400 (GNP) para 12 the court held that agreement on and partial payment of *lobolo* was sufficient for the conclusion of a valid customary law marriage. See Mwambene and Kruuse 2013 *Acta Juridica* 306-307; Osman 2019 *PELJ* 12.

134 Osman 2019 *PELJ* 8, 12-13.

135 See paras 5.2 and 6.2 for the possible recognition of spouses in invalidated customary law marriages as life partners in permanent life partnerships.

136 Bekker and Koyana 2014 *THRHR* 24.

137 2012 4 SA 527 (SCA).

138 *MM* case para 57; Bakker 2016 *THRHR* 260, 263; De Souza 2013 *Acta Juridica* 258; Heaton "Customary Marriages" 266; Himonga and Nhlapo *African Customary Law* 169; Himonga and Pope 2013 *Acta Juridica* 331; Kruuse 2017 *The International Survey of Family Law* 319, 361; Kruuse and Sloth-Nielsen 2014 *PELJ* 1715-1716; Mwambene 2017 *African Human Rights Law Journal* 36; Mwambene and Kruuse 2013 *Acta Juridica* 296; Nhlapo 2017 *SAJHR* 7; Osman and Baase 2022 *SAJHR* 19; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 155.

139 *MM v MN* 2013 4 SA 415 (CC) para 4; Kruuse 2017 *The International Survey of Family Law* 347; Kruuse and Sloth-Nielsen 2014 *PELJ* 1711.

140 *MN v MM* 2012 4 SA 527 (SCA) para 23; Bakker 2016 *THRHR* 234; Himonga and Pope 2013 *Acta Juridica* 319; Kruuse and Sloth-Nielsen 2014 *PELJ* 1713.

first wife for the conclusion of a valid marriage.[141] The court held that it would be unfair to the second wife to invalidate a validly concluded customary law marriage based on the failure of the husband to comply with section 7(6) of the *RCMA*.[142] The decision had the effect that neither wife's rights received protection at the cost of the other wife.[143]

The Constitutional Court in *MM v MN*[144] (hereafter the *MM* case), however, focused on the requirement of the consent of the first wife in terms of Tsonga customary law rather than section 7(6) of the *RCMA*. The court recognised that where a further marriage is entered into without the permission of the first wife, she is unable to make informed decisions about her property.[145] Lack of consent of the first wife, therefore, infringed her right to human dignity unfairly and unjustifiably.[146] Tsonga customary law must accordingly be developed to require the consent of the first wife in consideration of the rights to human dignity and equality of the first wife.[147] The second marriage was therefore invalid.[148]

The minority judgment argued that there was no need to develop the customary law of the Tsonga community, since it already followed the requirement that the consent of the first wife is necessary to conclude a further customary law marriage.[149] Other criticisms against this decision included that the court was silent on whether other customary law systems should also be developed to include the consent of the first

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141 *MN v MM* 2012 4 SA 527 (SCA) para 17.
142 *MN v MM* 2012 4 SA 527 (SCA) paras 17, 20.
143 Bakker 2016 *THRHR* 240.
144 *MM v MN* 2013 4 SA 415 (CC) para 57.
145 *MM* case paras 72-73; Bakker 2016 *THRHR* 264; Heaton "Customary Marriages" 267; Himonga and Pope 2013 *Acta Juridica* 319.
146 *MM* case para 74.
147 *MM* case para 75; Bakker 2016 *THRHR* 264; Heaton "Customary Marriages" 267; Himonga and Pope 2013 *Acta Juridica* 319; Mwambene 2017 *African Human Rights Law Journal* 36; Nhlapo 2017 *SAJHR* 9. See para 1.1.3.1 of this study.
148 *MM* case para 89; Bakker 2016 *THRHR* 234; Bonthuys 2018 *PELJ* 5; Himonga and Pope 2013 *Acta Juridica* 319, 332; Kruuse and Sloth-Nielsen 2014 *PELJ* 1715; Mwambene and Kruuse 2013 *Acta Juridica* 296; Rautenbach "State Intervention in the Customary Law of Succession in South Africa" 30; Rautenbach "Families and Legal Pluralism in South Africa" 80; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 106.
149 *MM* case paras 152-153, 157.

wife as a requirement for the conclusion of a customary law marriage.[150] The considerations taken into account by the court to find an infringement of the rights equality and dignity meant that a court might also find consent necessary for other systems.[151]

Additionally, it is unclear whether only the first wife's consent would be necessary to conclude a third or fourth marriage, or if the consent of both the second and third wives would also be required.[152] The court also failed to establish the minimum level of consent required, for instance is merely informing the first wife sufficient or should she give permission for the marriage to be concluded.[153] See in this regard the discussion of the proposed *Marriage Bill*, that, if enacted, will require the consent of the first wife for a further marriage to be valid.[154]

The court also ignored the rights to equality and human dignity of the second wife who entered into a marriage believing it to be valid.[155] The first wife's rights are granted greater respect than those of the second wife by invalidating the rights of a second or subsequent wife.[156] The second wife's rights to equality and human dignity are unfairly infringed.[157] It is not always possible for a second wife to ascertain the marital status of the husband.[158] Both wives enter into a marriage in terms of customary law with the intention of being married to the same husband. There is no justifiable reason to distinguish between the right to equality and human dignity of the first and second wives.[159] The second wife is consequently left destitute without the

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150 Heaton "Customary Marriages" 267; Himonga and Pope 2013 *Acta Juridica* 319; Kruuse and Sloth-Nielsen 2014 *PELJ* 1725; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 106.

151 Bakker 2016 *THRHR* 266; Osman "Customary Marriages" 303.

152 Kruuse and Sloth-Nielsen 2014 *PELJ* 1725.

153 See Himonga and Pope 2013 *Acta Juridica* 329; Kruuse and Sloth-Nielsen 2014 *PELJ* 1724 for a full discussion of consent.

154 See para 6.1 of this study.

155 Bakker 2016 *THRHR* 361, 368; Kruuse and Sloth-Nielsen 2014 *PELJ* 1724.

156 Bakker 2016 *THRHR* 241; Himonga and Pope 2013 *Acta Juridica* 332.

157 Himonga and Pope 2013 *Acta Juridica* 332.

158 Bakker 2016 *THRHR* 367-368; Himonga and Pope 2013 *Acta Juridica* 333.

159 Himonga and Pope 2013 *Acta Juridica* 335.

right to claim marital benefits, such as a claim for intestate succession, should the husband die.[160]

Once a valid customary law marriage has been entered into, spouses may convert their marriage to a common law marriage if it is monogamous.[161] Such a marriage will become a common law marriage, and the *ISA* will apply to the deceased's estate in the event of the death of one of the spouses. However, as prohibited by section 10(4) of the *RCMA* and section 8(2) of the *Civil Union Act*, a person who is a party in a common law marriage or civil union may not conclude a customary law marriage.[162]

The question emerges whether a same-sex couple may conclude a marriage in terms of customary law. The *RCMA* does not explicitly prohibit same-sex marriages.[163] Osman and Baase[164] argue that there is nothing that prohibits families of same-sex partners negotiating *lobolo* and entering into a customary marriage. However, the requirement that customary marriages must be negotiated in terms of customary law means that such marriages may not be entered into if it is contrary to a community's customs.[165]

The argument may be made that denying same-sex couples from concluding customary law marriages unfairly discriminates on the grounds of sexual orientation without justification.[166] Should same-sex couples wish to conclude a marriage in terms of custom, customary law should be developed. In consideration of the rights to equality and human dignity, as well as the arguments made in the *Fourie* case, an argument may be made for the recognition of same-sex customary law marriages.[167]

For the *RCLSA* and customary law of intestate succession, partners in a validly concluded customary law marriage, therefore, qualify as a "spouse" for the purposes

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160 Bakker 2016 *THRHR* 266. See paras 3.4 and 5.3 of this study for recommendations for the development of intestate succession law to give protection to a wife so discarded.

161 Section 10(1) of the *RCMA*; Heaton "Customary Marriages" 282; Osman 2019 *PELJ* 13; Osman "Customary Marriages" 309-310.

162 Bilchitz and Judge 2007 *SAJHR* 495; Bonthuys 2018 *PELJ* 17; Heaton "Customary Marriages" 280.

163 Woman-to-woman marriages are something other than same-sex marriage. See para 3.2.4 of this study.

164 Osman and Baase 2022 *SAJHR* 14.

165 See also Bilchitz and Judge 2007 *SAJHR* 495.

166 Osman and Baase 2022 *SAJHR* 15-16. See para 1.1.3.1 of this study.

167 See para 2.2.1 of this study. For suggestions on the further development of "spouses" in customary law marriages, see para 3.4 of this study.

of intestate succession. As indicated above,[168] women who concluded a seed-raiser agreement also qualify as a "spouse" under the *RCLSA*. The intestate succession rights of women in seed-raiser agreements are discussed in paragraph 3.2.3.

3.2.3 The development of the term "spouse" to include women in seed-raiser agreements

Traditionally, customary law recognised seed-raiser unions, in terms of which a man enters into a relationship with a woman other than his wife to procure an heir for the man's house.[169] Such unions were concluded where a wife could not have children of her own.[170] Seed-raiser unions were not regarded as marriages in terms of customary law.[171] Women in seed-raiser unions occupied a lower status than spouses in customary law marriages.[172]

As stated above, the *RCLSA* recognises the right to intestate succession of a woman who entered into an agreement with a deceased man to provide children for his house as an intestate heir.[173] The *RCLSA*, however, defines a woman in a seed-raiser as both a spouse and a descendant.[174] Recognising women in seed-raiser agreements as both spouses and descendants would afford them the right to inherit twice.[175] This would amount to discrimination against other spouses.[176] The master's office follows an interpretation that treats women in seed-raiser agreements as spouses rather as descendants.[177] To interpret the *RCLSA* to recognise women in seed-raiser agreements as "spouses" affords them the best available protection.[178]

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168 See para 3.2 of this study.
169 Bekker and Koyana 2014 *THRHR* 33; Dlamini 1991 *Acta Juridica* 80; Kult 2001 *Indiana International Comparative Law Review* 709; Rautenbach "Families and Legal Pluralism in South Africa" 75.
170 Bekker and Koyana 2014 *THRHR* 33; Dlamini 1991 *Acta Juridica* 80; Kult 2001 *Indiana International Comparative Law Review* 709; Rautenbach "Families and Legal Pluralism in South Africa" 75.
171 Rautenbach and Meyer 2012 *TSAR* 158-159.
172 Rautenbach and Meyer 2012 *TSAR* 159.
173 See para 1.1of this study.
174 Sections 2(2) and 3(1) of the *RCLSA*; Osman and Rautenbach "Law of Succession and Inheritance" 209, 211; Rautenbach and Meyer 2012 *TSAR* 152.
175 Osman and Rautenbach "Law of Succession and Inheritance" 211; Rautenbach and Meyer 2012 *TSAR* 158.
176 Rautenbach and Meyer 2012 *TSAR* 158.
177 Himonga and Nhlapo *African Customary Law* 268.
178 Rautenbach and Meyer 2012 *TSAR* 159.

Also recognised by the *RCLSA* as spouses are women in woman-to-woman marriages. In paragraph 3.2.4, the development of the term "spouse" to include women in woman-to-woman marriages is discussed.

3.2.4 The development of the term "spouse" to include women in woman-to-woman marriages

Traditionally, customary law allows for a woman to marry another woman because of her powerful position in society or because she is childless.[179] A blood relative of one of the women acts as the progenitor.[180] As indicated above, women in woman-to-woman relationships are protected by the *RCLSA*.[181] As with women in seed-raiser agreements, the *RCLSA* defines women in woman-to-woman marriages as both spouses and descendants.[182] As with women in seed-raiser agreements, women in woman-to-woman marriages should be regarded as "spouses".[183]

To summarise, a "spouse" in terms of customary law is a spouse in a validly concluded customary law marriage, and a woman in a seed-raiser union or a woman-to-woman marriage. In paragraph 3.3, who qualifies as "descendant" and "parents" in terms of customary law is considered.

3.3 The intestate succession law terms "descendant" and "parent" in terms of customary law

As mentioned above, the rule of male primogeniture only provided for intestate inheritance by a single male descendant.[184] Other descendants were excluded from intestate succession.[185] In paragraph 3.3.1, the impact of the declaration of invalidity of the rule of male primogeniture on the term "descendant" for the customary law of intestate succession is discussed. Children born to unmarried parents were treated

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179 Bonthuys 2007 *SAJHR* 533; Müller-Van der Westhuizen "Family Law" 114; Oomen 2000 *THRHR* 274; Osman and Baase 2022 *SAJHR* 6-7; Rautenbach and Meyer 2012 *TSAR* 152; Rautenbach "Families and Legal Pluralism in South Africa" 85.

180 Müller-Van der Westhuizen "Family Law" 114.

181 See para 1.1

182 Rautenbach and Meyer 2012 *TSAR* 152. See para 3.2.3 of this study.

183 See para 3.2.3 of this study.

184 See para 3.2.1 of this study.

185 See para 3.2.1 of this study.

differently from children born to married parents, especially with regard to their right to inheritance. Paragraph 3.3.2 discusses the position of children born to unmarried parents. As indicated above,[186] the recognition of customary law adoptions further extended the terms "descendant" and "parent". Paragraph 3.3.3 discusses the influence of customary law adoption on customary law intestate succession.

3.3.1 The influence of the rule of male primogeniture over the terms "descendant" and "parent" in intestate succession law in terms of customary law

As indicated above, the court in *Mthembu v Letsela*[187] refused to declare the rule of male primogeniture unconstitutional.[188] In terms of customary law, a daughter born to unmarried parents had no right under customary law to succeed to her father's intestate estate.[189] The discrimination was not because of her sex.[190] Since a son born to unmarried parents would also not have been able to succeed, equality was not infringed.[191] It was the daughter's status that prevented her from inheriting, not her sex.[192]

In the *Bhe* case, the court indicated that the rule of male primogeniture discriminates against female children and against children born to unmarried parents and infringes the rights to equality, human dignity and the best interest of the children.[193] Sons born to unmarried parents had reduced rights of inheritance under customary law, as they inherited only in the absence of any other eligible male heirs.[194] Discrimination on the grounds of birth unfairly differentiates between children born to unmarried and

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186 See para 3.2 of this study.
187 2000 3 SA 867 (SCA).
188 See para 3.2.1 of this study.
189 *Mthembu v Letsala* 2000 3 SA 867 (SCA) para 8.
190 *Mthembu v Letsala* 2000 3 SA 867 (SCA) para 19; Mbatha 2002 *SAJHR* 274.
191 *Mthembu v Letsala* 2000 3 SA 867 (SCA) para 19; Mbatha 2002 *SAJHR* 274.
192 *Mthembu v Letsala* 2000 3 SA 867 (SCA) para 19; Bonthuys 2002 *SALJ* 757; Kult 2001 *Indiana International and Comparative Law Review* 721; Rautenbach "State Intervention in the Customary Law of Succession in South Africa" 43. The *Interim Constitution* was in operation at the time *Mthembu v Letsala* 2000 3 SA 867 (SCA) was heard. The *Interim Constitution* did not contain birth as a prohibited grounds for discrimination as section 9(3) of the *Constitution* does. See s8(3) *Constitution of the Republic of South Africa Act* 200 of 1993.
193 *Bhe* case paras 93, 179; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 20; Himonga 2005 *Acta Juridica* 93; Hofmeyr and Paleker *The Law of Succession in South Africa* 839; Osman and Rautenbach "Law of Succession and Inheritance" 206-207.
194 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 58.

children born to married parents.[195] As indicated above, the rule of male primogeniture was declared invalid.[196]

The minority judgment in the *Bhe* case stated that the rule of male primogeniture should be reformed by removing the word "male" from the term "male primogeniture", thereby allowing an eldest daughter to succeed.[197] If the rule of primogeniture is extended, the eldest child will inherit irrespective of gender and the customary law duty to maintain the deceased's dependants will remain intact.[198] The duty of the eldest child to take responsibility for younger siblings amounts to a fair limitation of the right to equality of younger children.[199] Additionally, the identified heir may be removed should they prove to be unsuitable and incapable of providing the necessary care for the deceased's dependents.[200] Such an interpretation would allow the customary law duty of the heir to maintain dependents of the deceased to remain intact, thereby protecting cultural rights of persons living under customary law.[201]

As stated above, "descendants" in terms of customary law have been granted the right to inherit intestate from their "parents" and *vice versa*. In terms of the *RCLSA*, "descendants" inherit in the absence of a spouse, or together with the "spouse".[202]

3.3.2 The position of children born to unmarried parents in terms of customary law

As in common law, children born to parents who did not conclude a valid marriage were treated differently to children born to married parents in terms of customary law.[203] Children born to married parents belonged to the father's family.[204] Where there was no valid customary law marriage, children were regarded as born to unmarried parents.[205] Children born to married parents had the right to inherit from the father,

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195 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) paras 59, 69, 95; Pienaar 2006 *SAJHR* 107; Rautenbach 2008 *Journal of Comparative Law* 125.
196 See para 3.2.1 of this study.
197 *Bhe* case para 222. See para 2.2.1 of this study.
198 *Bhe* case para 183; Pienaar 2006 *SAJHR* 114.
199 *Bhe* case para 181; Himonga 2017 *Southern African Public Law* 5, 15.
200 *Bhe* case para 182.
201 See para 1.1.3.3 of this study.
202 Section 1(1)(d)(ii) of the *ISA*; De Waal and Schoeman-Malan *Erfreg* 18, 23-25.
203 See para 2.3.1 of this study.
204 Bekker and Boonzaaier 2007 *De Jure* 287.
205 Burman 1991 *Acta Juridica* 37.

or the right to be maintained by the father's heir in accordance with the rule of male primogeniture.[206]

Children born to unmarried persons formed part of the mother's family.[207] Additionally, in terms of customary law, the father's rights to his children depended on the payment of *lobolo*.[208] If *lobolo* was not paid, the children belonged to the mother's family.[209] The biological father of a child born to an unmarried woman was also recognised as the father of such a child upon making a payment that served as damages to the biological mother's guardian.[210] In terms of traditional customary law, children born to unmarried parents only qualified to inherit on the mother's side, subject to the rule of male primogeniture.[211]

In terms of the now invalid rule of male primogeniture, sons born from a marriage to a man and a woman were first choice heirs.[212] Second choice heirs were sons born outside of a marriage, but for whom the husband paid damages in accordance with customary law.[213] Sons born in terms of a seed-raiser agreement are third in line to succession.[214] Adopted children only succeeded if there were no biological children of the deceased man.[215] Sons of a wife who was not fathered by the deceased succeeded after adopted children.[216] Lastly, a son born to unmarried parents for whom damages as required by customary law had not been paid, may inherit.[217]

The declaration of invalidity of the rule of male primogeniture and the enactment of the *RCLSA* mean that children born to unmarried parents inherit equally with other descendants.[218] The *RCLSA* made the *ISA* applicable to estates subject to customary law.[219] The *ISA* determines that marital status of the parents has no bearing on the

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206 See paras 3.2.1 and 3.3.1 of this study.
207 Burman 1991 *Acta Juridica* 38, 41.
208 Peart 1984 *THRHR* 175.
209 Peart 1984 *THRHR* 175.
210 Bekker and Maithufi 1992 *Tydskrif vir Regswetenskap* 50; Mbatha 2002 *SAJHR* 276.
211 *Bhe* case para 79.
212 Osman and Rautenbach "Law of Succession and Inheritance" 196.
213 Osman and Rautenbach "Law of Succession and Inheritance" 196.
214 Osman and Rautenbach "Law of Succession and Inheritance" 196.
215 Osman and Rautenbach "Law of Succession and Inheritance" 196.
216 Osman and Rautenbach "Law of Succession and Inheritance" 196.
217 Osman and Rautenbach "Law of Succession and Inheritance" 196.
218 See para 3.2.1 of this study.
219 See para 3.2.1 of this study.

ability of children to inherit from their parents and legal adoption means that adopted children and adoptive parents are "descendants" and "parents".[220]

3.3.3 The influence of customary law adoption over the terms "descendant" and "parent" in intestate succession law

Customary law has its own adoption procedures.[221] Unlike the approach in terms of common law, adoption does not necessarily terminate the bond with the child's biological parent.[222] However, an adopted child qualifies to inherit from their adoptive family subject to the rules of customary law.[223]

To give effect to a valid adoption in terms of customary law, the family of the child to be adopted and the adoptive parents must agree to the adoption, and a public ceremony must be held to transfer the child to their new family.[224] The aims of adoption in terms of customary law include to provide a man with an heir or to provide children for a woman who cannot have any children.[225] A child may be adopted by an unmarried biological father, a step-parent or a family member of an orphaned child.[226] Where a man marries a woman who had children with another man, the man may simultaneously adopt her children.[227] The father acquires full parental rights and responsibilities pertaining to the child.[228]

Currently the only form of adoption regulated by legislation is adoption in terms of the *Children's Act*.[229] The *Children's Act* recognises the right of spouses married in terms of customary law to adopt a child.[230] The validity of an adoption in terms of customary law is therefore open to interpretation by the courts. Where an adoption in terms of customary law is not recognised, adopted children will not qualify for intestate

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220 Sections 1(2), (5) of the *ISA*. See paras 2.3.2-2.3.3 of this study.
221 Maithufi 2001 *De Jure* 393; Mokotong 2015 *THRHR* 344; Pienaar 2006 *Stell LR* 317.
222 Ferreira 2025 *THRHR* 210, 215.
223 See para 3.3.2 of this study.
224 Heaton and Roos *Family and Succession Law in South Africa* 137; Louw 2017 *Obiter* 476; Müller-Van der Westhuizen "Family Law" 115.
225 Ferreira 2025 *THRHR* 202.
226 Ferreira 2025 *THRHR* 203; Monye 2018 *Journal of Law, Society and Development* 8; Müller-Van der Westhuizen "Family Law" 114.
227 Mokotong 2015 *THRHR* 348; Müller-Van der Westhuizen "Family Law" 114-115.
228 See para 2.3.3 of this study.
229 Mokotong 2015 *THRHR* 348.
230 Section 321(1)(a) of the *Children's Act*.

succession.[231] Legislation to recognise and regulate adoptions in terms of customary law is therefore necessary.[232]

Since no legislation has been enacted to regulate customary law adoptions, the courts have been called upon to recognise customary law adoptions.[233] The courts recognised a claim for support due to the loss upon the death of the breadwinner to children who were adopted in terms of customary law ceremonies and by a stepfather who married the mother of a child and paid the customary *lobolo* for the mother and the child as well as claims from adoptive parents to contribute maintenance for the adopted child.[234]

In *Thibela v Minister van Wet en Orde*,[235] a child's stepfather died in the course of employment. The stepfather had paid *lobolo* for his wife and her minor child in terms of customary law.[236] The stepchild was recognised as the legal child of the stepfather and could claim damages for the loss of support provided by the stepfather prior to his death.[237]

In *Kewana v Santam Insurance*[238] a traditional adoption ceremony was held and attended by the family.[239] A single woman adopted a child by means of the ceremony.[240] The court determined that customary law developed to allow unmarried women to adopt children.[241] The deceased was therefore under a maintenance

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231 Mokotong 2015 *THRHR* 353.

232 Ferreira 2025 *THRHR* 215; Mokotong 2015 *THRHR* 354.

233 Ferreira 2025 *THRHR* 210; Kruger "Parental Responsibilities and Rights" 382; Mokotong 2015 *THRHR* 344.

234 *Kewana v Santam Insurance Co Ltd* 1993 5 SA 771 (TkA); *Maneli v Maneli* (GS) (unreported) case number 14/3/2/2-234/05 of 19 April 2010; *Metiso v Padongelukfonds* 2001 3 SA 1142 (T); *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T). An action upon the death of the breadwinner is a common law action for loss support in terms of the common law. To succeed with such an action, there must be a legal duty of support owed by the deceased and a legal right to support on the part of the dependant. Loubser and Midgley *The Law of Delict in South Africa* para 23.8.

235 1995 3 SA 147 (T).

236 *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T) 149G; Louw 2017 *Obiter* 464; Mosikatsana 1996 *SAJHR* 552; Müller-Van der Westhuizen "Family Law" 116.

237 *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T) 150F-I; Louw 2017 *Obiter* 464; Mosikatsana 1996 *SAJHR* 552.

238 *Kewana v Santam Insurance Co Ltd* 1993 5 SA 771 (TkA); Louw 2017 *Obiter* 463.

239 *Kewana v Santam Insurance Co Ltd* 1993 5 SA 771 (TkA) 772I-773A; Maithufi 2001 *De Jure* 390.

240 *Kewana v Santam Insurance Co Ltd* 1993 5 SA 771 (TkA) 772I-773A; Maithufi 2001 *De Jure* 390.

241 Bonthuys 2002 *SALJ* 760.

obligation to support the adopted child.[242] A claim for loss of support upon the death of the breadwinner was recognised in favour of the adopted child.[243]

In *Metiso v Padongelukfonds*[244] the court held that since the biological mother has been absent in the child's life, she does not need to be informed of a pending adoption as traditionally required by customary law.[245] Denying that a valid adoption had taken place due to the biological mother not being informed, would be contrary to the best interest of the child.[246] The adoption was recognised by the community as valid.[247] The adoptive parents therefore had a maintenance obligation, which could be enforced in terms of customary law.[248] The court therefore allowed a claim for compensation upon the death of the breadwinner.[249]

In *Maneli v Maneli*[250] a customary law adoption was entered into by a couple who did not have children of their own.[251] Customary law adoption procedures were performed.[252] Following the adoption, the child was maintained by both partners.[253] The court held that adoption in terms of customary law should be recognised, since it would be contrary to the best interests of the child not to do so.[254] Both parents, therefore, had a legal duty to support the child and had to contribute to maintenance of the child.[255]

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242 *Kewana v Santam Insurance Co Ltd* 1993 5 SA 771 (TkA) 775G, 778C-D; Louw 2017 *Obiter* 463; Maithufi 2001 *De Jure* 390.

243 *Kewana v Santam Insurance Co Ltd* 1993 5 SA 771 (TkA) 778H.

244 2001 3 SA 1142 (T).

245 *Metiso v Padongelukfonds* 2001 3 SA 1142 (T) 1147H-J; Bonthuys 2002 *SALJ* 760; Müller-Van der Westhuizen "Family Law" 116-117.

246 *Metiso v Padongelukfonds* 2001 3 SA 1142 (T) 1147I; Bonthuys 2002 *SALJ* 760.

247 *Metiso v Padongelukfonds* 2001 3 SA 1142 (T) 1149H-I; Maithufi 2001 *De Jure* 391, 396; Müller-Van der Westhuizen "Family Law" 116.

248 *Metiso v Padongelukfonds* 2001 3 SA 1142 (T) 1150C-D, G; Bonthuys 2002 *SALJ* 758; Maithufi 2001 *De Jure* 391, 396.

249 *Metiso v Padongelukfonds* 2001 3 SA 1142 (T) 1150J.

250 (GS) (unreported) case number 14/3/2/2-234/05 of 19 April 2010.

251 *Maneli v Maneli* (GS) (unreported) case number 14/3/2/2-234/05 of 19 April 2010 paras 2-3; Louw 2017 *Obiter* 465.

252 *Maneli v Maneli* (GS) (unreported) case number 14/3/2/2-234/05 of 19 April 2010 paras 4-5; Müller-Van der Westhuizen "Family Law" 117.

253 *Maneli v Maneli* (GS) (unreported) case number 14/3/2/2-234/05 of 19 April 2010 para 7; Louw 2017 *Obiter* 465.

254 *Maneli v Maneli* (GS) (unreported) case number 14/3/2/2-234/05 of 19 April 2010 paras 2-3. See para 1.1.3.4 of this study.

255 *Maneli v Maneli* (GS) (unreported) case number 14/3/2/2-234/05 of 19 April 2010 para 38; Louw 2017 *Obiter* 465.

In *Maswanganye v Baloyi*[256] the court did not recognise a customary law adoption, since the *lobolo* paid upon the child's marriage was delivered to the biological parents of the child.[257] An adoption terminates all rights, including the right to receive *lobolo* in favour of the adoptive parents.[258] Also, in *Mxhosana v Mxhosana*[259] the court found no customary law adoption was entered into, since there was no proof of a ceremony conducted in terms of customary law.[260]

In *Tshali v Nandi*[261] the court emphasised that acceptance by a person of a child must be in accordance with customary law as demanded by the *RCLSA*, and not mere acceptance.[262] The court found no evidence that an adoption ceremony in accordance with customary law was conducted, nor did the biological parents relinquish their parental rights and responsibilities.[263] The court did recognise that the children were accepted as children of the deceased, since it was so reflected on the medical aid card and work records of the deceased.[264]

In terms of intestate succession, the *RCLSA* specifically includes in its definition of "descendant" a person who was accepted as a child of the deceased during their lifetime.[265] However, as stated above, without legislation specifically regulating customary law adoptions, the courts may often be called upon to determine when a customary law adoption is legal.

Where there was no adoption ceremony in terms of customary law conducted, children and their purported parents do not qualify as "descendants" and "parents". In paragraph 3.4, persons falling outside the terms "spouse", "descendant" and "parent"

256 2015 JDR 1967 (GP).
257 *Maswanganye v Baloyi* 2015 JDR 1967 (GP) para 21; Müller-Van der Westhuizen "Family Law" 117.
258 *Maswanganye v Baloyi* 2015 JDR 1967 (GP) para 21.
259 2022 JDR 0227 (GP).
260 *Mxhosana v Mxhosana* 2022 JDR 0227 (GP) para 66.
261 2025 JDR 2324 (ECM).
262 *Tshali v Nandi* 2025 JDR 2324 (ECM) para 8.
263 *Tshali v Nandi* 2025 JDR 2324 (ECM) paras 8-10.
264 *Tshali v Nandi* 2025 JDR 2324 (ECM) para 8.
265 Himonga and Nhlapo *African Customary Law* 268; Louw 2017 *Obiter* 470; Rautenbach "State Intervention in the Customary law of Succession in South Africa" 48; Osman and Rautenbach "Law of Succession and Inheritance" 209.

are discussed. Additionally, suggestions on how persons so excluded may be included in the terms "spouse", "descendant" and "parent" is made.

3.4 Persons outside the scope of the terms "spouse", "descendant" and "parent" in ISA in terms of customary law

Problematic for the term "spouse" is the uncertainty surrounding the recognition of customary law spouses.[266] Partners in a customary law marriage might have entered into what they believe is a valid customary law marriage. However, due to precedent and the courts' creation of new requirements under customary law,[267] such marriages might be invalidated.[268] Additionally, customary law marriages are often unregistered, which means spouses in a customary law marriage are unable to prove their marriage, and might be left without recourse.[269] Particularly for women, ensuring the registration and validity of a customary law marriage, especially the validity of a second or further marriage, are not often within their control.[270]

It is submitted that courts should guard against creating new official law. Where it may be determined that there was an intention to enter into a customary law marriage and some form of custom has been followed, the marriage should not be invalidated. The potential recognition of persons in life partnerships as "spouses" while a valid customary law marriage is in place is discussed in Chapter 5.[271]

As argued previously,[272] adoptions in terms of customary law are not regulated by legislation and where there is a dispute as to the validity of such an adoption, the courts are tasked to intervene. It is recommended that adoptions in terms of customary law should be legislatively recognised to ensure legal certainty. Additionally, like with common law adoptions, informal adoptions are not recognised under customary law.[273] Where a person has assumed care for a child and parent-child relationship has been

266 Osman 2021 *SALJ* 528.
267 See para 3.2.2 of this study.
268 See para 3.2.2 of this study.
269 Bonthuys 2018 *PELJ* 9.
270 Bonthuys 2018 *PELJ* 9.
271 See para 5.3 of this study.
272 See para 3.3.3 of this study.
273 See paras 2.3.3, 2.4 and 3.3.3 of this study.

established, unless an adoption ceremony in terms of customary law was conducted, no intestate succession rights will exist between the child and the parent. As argued in paragraph 2.4, where a parent-child relationship has been established, intestate succession rights between the parent and the child should be recognised in terms of legislation.

3.5 Conclusion

As seen from the discussion of above, the rule of male primogeniture was a prominent feature of customary law of intestate succession.[274] This chapter discussed the abolition of the rule of male primogeniture, including court decisions and legislation motivating the abolition.[275] This chapter also analysed the recognition of female spouses under the term "spouse" and children other than the eldest male son under the term "descendant" following the abolition of the rule of male primogeniture.[276]

The development of the term "spouse" to include spouses married in terms of customary law was also discussed, with reference to legislation dealing with customary law marriages.[277] Specifically, court cases dealing with the recognition of customary law marriages were analysed.[278] The development of the term "spouse" to include women in seed-raiser agreements and woman-to-woman marriages was also examined.[279] Specifically, legislation recognising the right of women in seed-raiser agreements and woman-to-woman marriages was examined.[280]

The development of intestate succession rights for adopted children and adoptive parents in customary law adoptions, with specific court cases addressing customary law adoptions, was also considered in this chapter. The position of children of unmarried parents under customary law was also discussed in this chapter.[281]

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274 See paras 3.2.1 and 3.3.1 of this study.
275 See paras 3.2.1 and 3.3.1 of this study.
276 See paras 3.2.1 and 3.3.1 of this study.
277 See paras 1.1 and 3.2.2 of this study.
278 See para 3.2.2 of this study.
279 See paras 3.2.3-3.2.4 of this study.
280 See paras 3.2.3 -3.2.4 of this study.
281 See para 3.3.2 of this study.

The exclusion of women from the protection of intestate succession from their husbands should be guarded against.[282] It is therefore recommended that the courts should avoid creating new official customary law by demanding certain requirements do be met before recognising a customary law marriage as valid.[283] The focus should rather be on whether the parties intended to be married under customary law.[284]

Due to the lack of legal regulation of customary law adoption, uncertainty remains whether a child so adopted qualifies as a descendant under the *RCLSA* and *ISA*.[285] Legislative guidance in this regard is needed.[286] In addition, it is recommended that informal adoptions not strictly in accordance with customs that give rise to a worthy parent-child relationship be recognised for the purpose of intestate succession.[287] The terms "descendant" and "parent" should be extended accordingly.[288]

Apart from "family units" established in terms of common and customary law, a "family unit" may also be formed with a Muslim or Hindu marriage at its centre. Chapter 4 discusses a "family unit" established in terms of Muslim or Hindu law.

282 See para 3.4 of this study.
283 See para 3.4 of this study.
284 See para 3.4 of this study.
285 See para 3.4 of this study.
286 See para 3.4 of this study.
287 See para 3.4 of this study.
288 See para 3.4 of this study.

Chapter 4: The development of the concept of the "family unit" in the law of intestate succession in terms of Muslim and Hindu law

4.1 Introduction

As indicated in Chapter 1,[1] Muslim and Hindu rites are not recognised under South African law.[2] Additionally, "family units" governed by Muslim and Hindu law, as a result, were initially not legally recognised. Specifically crucial for the law of intestate succession, is the present uncertainty surrounding the recognition of Muslim and Hindu marriages.[3] Muslim and Hindu spouses in religious marriages were originally placed outside the ambit of protection of the law, including the intestate succession law as a result of the non-recognition of Muslim and Hindu marriages.[4] Additionally, children born from Muslim and Hindu marriages were regarded as children born to unmarried parents, limiting children's access to legal recourse.[5]

The introduction of the *Constitution* demanded that religious rights be protected and motivated a change in public policy.[6] However, no legislation was enacted to comprehensively regulate Hindu and Muslim marriages concluded in terms of the respective religious rites.[7] As a consequence, persons who live their lives in terms of the dictates of Muslim and Hindu law need to resort to court to determine whether they qualify for benefits, such as intestate inheritance, reserved only for spouses in

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1 See para 1.1 of this study.

2 Amien, Moosa and Rautenbach "Muslim Personal Law" 375; Kerr 1984 *SALJ* 526; Muneer 2023 *Journal of Comparative Law in Africa* 205; Perumal and Rautenbach "Hindu Personal Law" 302-303; Pienaar 2006 *Stell LR* 322; Rautenbach 2001 *International Journal of Discrimination and the Law* 104; Rautenbach 2003 *Fundamina* 134; Rautenbach "Families and Legal Pluralism in South Africa" 65; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 159.

3 Heaton "Religious Marriages" 289.

4 Amien 2006 *Human Rights Quarterly* 734; Amien, Moosa, and Rautenbach "Muslim Personal Law" 69; Goolam and Rautenbach 2004 *Stell LR* 369; Moosa and Abduroaf 2022 *Ahkam* 11.

5 Kaganas and Murray 1991 *Acta Juridica* 120.

6 See para 1.1 of this study.

7 Abduroaf 2020 *Obiter* 396; Amien and Rajwani 2020 *The Journal of Legal Pluralism and Unofficial Law* 330-331; Bakker 2009 *THRHR* 395; Bonthuys 2002 *SALJ* 761; Cordier and Rautenbach 2009 *Obiter* 585; Denson, Carnelley and Mukheibir 2018 *Obiter* 155; Gabru 2004 *PELJ* 1-2; Heaton 2008 *Stell LR* 453; Moosa and Abduroaf 2022 *Ahkam* 4, 7; Osman "Religious Marriages" 311; Osman-Hyder 2022 *Stell LR* 252, 263; Perumal and Rautenbach "Hindu Personal Law" 303; Rautenbach 2001 *International Journal of Discrimination and the Law* 103; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 149.

valid common law marriages. The courts have extended certain common law benefits historically only available to spouses in validly concluded common law marriages to Muslim and Hindu spouses on a piecemeal basis.[8]

One of the aims of this chapter is to explain the legal position of spouses in Muslim and Hindu marriages for a variety of rights historically only available to spouses in common law marriages.[9] Specifically, court cases recognising spouses' claims from marriage contracts concluded in terms of Muslim and Hindu law are discussed.[10] Also examined are court cases recognising spouses in marriages concluded in terms of Muslim and Hindu marriages under the action for loss of support upon the death of the breadwinner.[11]

Additionally, the recognition of spouses in marriages concluded in terms of Muslim and Hindu law under the *MSSA*, *ISA*, and the *Wills Act*[12] is also analysed.[13] Furthermore, case law that recognises spouses in marriages concluded in terms of Muslim and Hindu law under the *Maintenance Act*,[14] the *Divorce Act*,[15] the *Marriage* Act and Rule 43 of the Uniform Rules of the Court are considered.[16] Case law that highlights the initial non-recognition of Muslim and Hindu marriages is considered before the common law actions for which spouses in Muslim and Hindu marriages are recognised, is discussed.[17]

In this chapter, it is also discussed who qualifies as a "descendant" and "parent" in "family units" living under Muslim and Hindu law. In paragraph 4.2 the development of the term "spouse" in terms of Muslim and Hindu law is analysed.

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8 See para 4.2 of this study.
9 See para 4.2 of this study.
10 See para 4.2.1 of this study.
11 See para 4.2.2 of this study.
12 7 of 1983.
13 See para 4.2.3 of this study.
14 99 of 1998.
15 70 of 1979.
16 See para 4.2.4 of this study.
17 See para 4.2 of this study.

4.2 The intestate succession law term "spouse" in intestate succession in terms of Muslim law and Hindu law

As stated previously, marriages concluded in accordance with Muslim and Hindu law are currently not comprehensively regulated by legislation.[18] "Family units" with a Muslim or Hindu marriage at its centre is, therefore, not fully protected.[19] The difficulty in recognising marriages concluded in terms of Muslim and Hindu law lies in the lack of distinction between religion and law for persons following Muslim and Hindu law.[20] Aspects of Muslim and Hindu law may be at odds with the *Constitution* and legislation attempting to reconcile Muslim and Hindu law with the *Constitution* might not be accepted by Muslim and Hindu communities.

As stated previously, particularly problematic for the *ISA* was the non-recognition of marriages concluded in terms of Muslim or Hindu law.[21] As was the case with customary law marriages, Muslim and Hindu marriages were initially not recognised as valid due to potential polygyny.[22] *Bronn v Frits Bronn's Executors*[23] and *Seedat's Executors v The Master*[24] confirmed that polygyny was an affront to public policy.[25] Potentially polygynous marriages were therefore invalid.[26] Any contract flowing from such a marriage was, therefore, also invalid. The court emphasised that it was solely the legislature's responsibility to provide relief to spouses in marriages other than common law marriages.[27]

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18 See para 4.1 of this study.
19 See para 4.1 of this study.
20 Bekker 1991 *Acta Juridica* 6; Denson, Carnelley and Mukheibir 2018 *Obiter* 154; Manjoo 2004 *International Journal of Legal Information* 272.
21 See para 4.1 of this study.
22 *Seedat's Executors v The Master* 1917 AD 302 307-308; Heaton "Religious Marriages" 290; Kaganas and Murray 1991 *Acta Juridica* 120; Perumal and Rautenbach "Hindu Personal Law" 307; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 85. See para 3.2 of this study.
23 1860 3 Searle 313 (CSC).
24 1917 AD 302.
25 *Bronn v Frits Bronn's Executors* 1860 3 Searle 313 (CSC) 319; *Seedat's Executors v The Master* 1917 AD 302 308; Manjoo 2004 *International Journal of Legal Information* 276; Rautenbach 2000 *Recht van de Islam* 40; Robinson 2005 *Obiter* 491; Williams 2004 *SAJHR* 35-36; Ziehl 1997 *African Sociological Review* 51-52.
26 *Seedat's Executors v The Master* 1917 AD 302 308; Vahed 2022 *Contemporary South Asia* 46.
27 *Seedat's Executors v The Master* 1917 AD 302 309.

In *Ismail v Ismail*[28] the court was asked to reconsider the precedent set by *Bronn v Frits Bronn's Executors* and *Seedat's Executors*[29] *v The Master*.[30] Prior to *Ismail v Ismail*[31] and after the decision in *Bronn v Frits Bronn's Executors* and *Seedat's Executors v the Master*[32] the legislature recognised potentially polygynous customary law marriages for limited purposes. The question was whether polygynous marriages was therefore still contrary to public policy.[33]

The court in *Ismail v Ismail*[34] upheld *Bronn v Frits Bronn's Executors*[35] and *Seedat's Executors v The Master*[36] and confirmed that polygyny was still not acceptable in common law despite legislative recognition of customary law marriages.[37] Polygyny treated male and female persons unequally, which was determined by the court as contrary to public policy.[38] The court further determined that the fact that religious dignitaries can be registered as marriage officers did not constitute a general tolerance for Muslim marriages.[39] Additionally, spouses in Muslim marriages had the right to convert their marriages to common law marriages.[40]

Consequently, the court denied that partners in a Muslim marriage had a claim to inherit from a deceased estate, or that they had a claim for maintenance.[41] The court refused to recognise the validity of the Muslim marriage despite the marriage being monogamous.[42] Regardless of the factual monogamy of the marriage, mere potential polygyny caused a Muslim marriage to be void on the grounds of public policy.

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28 *Ismail v Ismail* 1983 1 SA 1006 (A).
29 *Bronn v Frits Bronn's Executors* 1860 3 Searle 313 (CSC).
30 *Seedat's Executors v The Master* 1917 AD 302.
31 *Ismail v Ismail* 1983 1 SA 1006 (A).
32 *Bronn v Frits Bronn's Executors* 1860 3 Searle 313 (CSC).
33 *Ismail v Ismail* 1983 1 SA 1006 (A) 1024F; Kerr 1984 *SALJ* 455.
34 *Ismail v Ismail* 1983 1 SA 1006 (A).
35 *Bronn v Frits Bronn's Executors* 1860 3 Searle 313 (CSC).
36 *Seedat's Executors v The Master* 1917 AD 302.
37 *Ismail v Ismail* 1983 1 SA 1006 (A) 1021H-1002A, 1024E; Ashmore 2018 *Without Prejudice* 27; Church 1995 *CILSA* 297; Kerr 1984 *SALJ* 446; Manjoo 2004 *International Journal of Legal Information* 276; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 86; Ziehl 1997 *African Sociological Review* 52. See para 3.2 of this study.
38 Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 86; Ziehl 1997 *African Sociological Review* 52.
39 Section 3 of the *Marriage Act*; Himonga and Bosch 2000 *SALJ* 308; Rautenbach 2000 *Recht van de Islam* 45.
40 *Ismail v Ismail* 1983 1 SA 1006 (A) 1025B; Rautenbach 2000 *Recht van de Islam* 46.
41 Osman "Religious Marriages" 316; Vahed 2022 *Contemporary South Asia* 46.
42 Church 1995 *CILSA* 297; Osman "Religious Marriages" 316.

Therefore, claims based on a custom or a contract arising from a potentially polygynous relationship were also unenforceable.[43]

The result of the non-recognition of Muslim marriages was especially detrimental to women who, as vulnerable members of society, did not receive the legal protection that legally recognised spouses did.[44] According to Muslim law, a husband is obligated to maintain his wife or wives on a reasonable and equal scale.[45] However, there was no legal mechanism in place to enforce a maintenance claim.[46] Due to the invalidity of a Muslim marriage, common law claims of maintenance were also unavailable to spouses in Muslim marriages. Additionally, spouses in Muslim marriages had no claim for loss of support upon the death of the breadwinner, no claim for maintenance in terms of the *Divorce Act* after a divorce and were not beneficiaries under the *ISA*.[47] Spouses, especially women, might not have any real choice in ensuring legal consequences for the marriage, since without registration under the *Marriage Act* they may not know that their religious marriage is not valid in law.[48]

The arguments made for the non-recognition of Muslim marriages would equally apply for Hindu marriages. Hindu marriages were also potentially polygynous. Spouses in Hindu marriages would also not have been able to claim benefits attributed to valid common law marriages, such as intestate succession claims under the *ISA*.[49]

As indicated by the court in *Ismail v Ismail*[50] partners in Muslim and Hindu marriages have the option of entering into common law marriages alongside their religious

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43 *Ismail v Ismail* 1983 1 SA 1006 (A) 1020B-C, 1025E; Amien, Moosa and Rautenbach "Muslim Personal Law" 376; Kerr 1984 *SALJ* 445; Murray 1994 *Agenda* 38; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 86, 94.

44 Amien 2010 *International Journal of Law, Policy and the Family* 363; Amien and Rajwani 2020 *The Journal of Legal Pluralism and Unofficial Law* 331; Amien, Moosa and Rautenbach "Muslim Personal Law" 69; Church 1995 *CILSA* 297; Rautenbach 2000 *Recht van de Islam* 46; Rautenbach 2004 *PELJ* 21.

45 Kaganas and Murray 1991 *Acta Juridica* 124.

46 Kaganas and Murray 1991 *Acta Juridica* 124.

47 Kaganas and Murray 1991 *Acta Juridica* 125; Rautenbach 2000 *Recht van de Islam* 46; Vahed 2022 *Contemporary South Asia* 46. See paras 4.2.1-4.2.4 for a discussion of relevant case law.

48 Kaganas and Murray 1991 *Acta Juridica* 125; Kerr 1984 *SALJ* 452; Lind 1995 *SALJ* 483.

49 Amien 2006 *Human Rights Quarterly* 734; Ashmore 2018 *Without Prejudice* 27; Kaganas and Murray 1991 *Acta Juridica* 120; Kerr 1984 *SALJ* 526; Rautenbach 2001 *International Journal of Discrimination and the Law* 104; Rautenbach 2003 *Fundamina* 134.

50 *Ismail v Ismail* 1983 1 SA 1006 (A).

marriages.[51] However, these marriages would be regulated by the *Marriage Act* and common law and not Muslim or Hindu law, which might not be acceptable to Muslim and Hindu communities.[52] Spouses in Muslim and Hindu marriages who conclude a common law marriage alongside their religious marriage, however, qualify as "spouses" under the *ISA*.

Once the *Constitution* was enacted, religious rights were recognised.[53] However, despite various calls for legislation regulating Muslim and Hindu marriages, none has been enacted.[54] Certain acts have, however, been enacted or amended to give recognition to religious marriages for specific purposes. Religious marriages are recognised, for instance, by the *Children's Act*;[55] *Civil Proceedings Evidence Act*;[56] *Criminal Procedure Act*;[57] *Demobilisation Act*;[58] *Divorce Amendment Act;* [59] *Domestic Violence Act*;[60] *Estate Duty Act*;[61] *Insolvency Act*;[62] *Pension Funds Act*;[63] *Special Pensions Act*[64] and *Transfer Duty Act*.[65]

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51 Heaton 2008 *Stell LR* 453; Heaton "Religious Marriages" 282; Moosa and Abduroaf 2022 *Ahkam* 9; Rautenbach 2000 *Recht van de Islam* 41.

52 Heaton 2008 *Stell LR* 453; Goolam and Rautenbach 2004 *Stell LR* 369; Rautenbach 2000 *Recht van de Islam* 41.

53 See para 1.1 of this study.

54 *Hoosein v Dangor* 2009 JDR 1212 (WCC) para 18; Amien 2014 *Acta Juridica* 216; Amien, Moosa and Rautenbach "Muslim Personal Law" 377; Mochela and Smith 2020 *TSAR* 484; Van Schalkwyk 2003 *De Jure* 318. See para 6.1 for a discussion of the *Marriage Bill*, which if enacted, will recognise Muslim and Hindu marriages.

55 See s1 of the *Children's Act* includes in its definition of "marriage" a marriage concluded in terms of a "system of religious law".

56 25 of 1965. S10A states that "…any marriage concluded under any system of law, shall be regarded as a valid marriage for the purposes of the law of evidence."

57 51 of 1977. S195(2) determines that "(f)or the purposes of the law of evidence in criminal proceedings 'marriage' shall include… any marriage concluded under any system of religious law."

58 99 of 1996. S1 includes surviving spouse of a deceased in a marriage "recognized as a marriage in accordance with the tenets of a religion". This act was repealed by the *Defence Laws Repeal and Amendment Act* 17 of 2015

59 1 of 2024.

60 166 of 1998. S1 includes in the definition of a "domestic relationship" a "marriage according to any… religion".

61 45 of 1955. S1 includes in the definition of "spouse" a "…marriage in accordance with the tenants of any religion…"

62 24 of 1936. S21(3) states that "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…".

63 24 of 1956. S1 means that "spouse" "means a person who is in marriage in terms of the "…tenets of religion…"

64 69 of 1996. S31(1) includes in the definition of "dependant" "the spouse of the deceased, including a party…recognised as a marriage under any Asian religion".

65 40 of 1949; S1 includes in its definition a "spouse" as a partner "in a union recognised as a marriage in accordance with the tenants of any religion…"; Bakker 2009 *THRHR* 397; Cordier and Rautenbach

Generally, the courts have been reluctant to recognise Muslim and Hindu marriages for fear of becoming entangled with religious doctrine.[66] Additionally, unlike with customary and common law, the courts do not have inherent power to develop Muslim and Hindu law.[67] However, as indicated previously, the courts have shown a willingness to recognise persons in Muslim and Hindu marriages as "spouses" for specific purposes.[68] Where the courts[69] so recognise the rights of spouses in Muslim and Hindu marriages, South African law is applied and not religious law.[70] For instance, where the courts have recognised spouses in religious marriages as "spouses" for the purposes of the *ISA*, the common law of intestate succession applies, rather than Muslim or Hindu law of intestate succession.[71] Claims for maintenance allowed by the courts also do not necessarily align with Muslim or Hindu law.[72]

Recognising Muslim succession law, however, would be problematic. Succession in terms of Muslim law discriminates on the basis of gender, birth and religion.[73] In terms of Muslim succession law, a Muslim woman inherits only half of what a male inherits, which discriminates on the grounds of sex and gender and human dignity.[74] A Muslim person marrying a person following a different religion would also not be eligible for

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2009 *Obiter* 601-604; Denson, Carnelley and Mukheibir 2018 *Obiter* 154-156; Heaton 2008 *Stell LR* 453; Heaton "Religious Marriages" 292-293; Osman "Religious Marriages" 317; Rautenbach 2000 *Recht van de Islam* 52-53; Rautenbach 2001 *International Journal of Discrimination and the Law* 106; Rautenbach 2003 *Fundamina* 137.

66 Amien and Leatt 2014 *Maryland Journal of International Law* 538. See for example *Singh v Ramparasad* 2007 3 SA 445 D discussed below. In some instances, persons living in terms of religious law do not wish secular law to be applicable to their personal relationships. This study focuses only on cases where a clear need for protection is demonstrated by vulnerable members of society.

67 Bakker 2009 *THRHR* 403. See para 1.1.1 of this study.

68 Amien, Moosa and Rautenbach "Muslim Personal Law" 410; Amien, Moosa and Rautenbach "Muslim Personal Law" 69; De Clerq, Schoeman-Malan and Van der Spuy *Deceased Estates* 28; Denson, Carnelley and Mukheibir 2018 *Obiter* 154; Heaton "Religious Marriages" 292; Manjoo 2004 *International Journal of Legal Information* 276; Neels 2012 *TSAR* 491; Rautenbach 2004 *PELJ* 1-2, 6. See paras 4.2.1-4.2.4 of this study. See also para 6.2 of this study for a discussion of legislative attempts to recognise Muslim marriages.

69 See the discussion in para 3.2.3 of *Daniels v Campbell* 2004 5 SA 331 (CC); *Govender v Ragvayah* 2009 3 SA 178 (D) and *Hassam v Jacobs* 2009 5 SA 572 (CC).

70 Osman "Religious Marriages" 313. See Rautenbach 2008 *CILSA* 109-126 for a discussion of Muslim and Hindu law of succession.

71 Amien, Moosa and Rautenbach "Muslim Personal Law" 411; Perumal and Rautenbach "Hindu Personal Law" 321, 332. See para 4.2.3 of this study.

72 Neels 2012 *TSAR* 505. See paras 4.2.1-4.2.2 of this study.

73 Neels 2012 *TSAR* 504-505.

74 Neels 2012 *TSAR* 504-505; Rautenbach 2001 *International Journal of Discrimination and the Law* 111.

inheritance, which constitutes discrimination based on religion.[75] In terms of Hindu law, a son acquires a share in joint property at birth, while a daughter does not.[76] In order for Muslim and Hindu inheritance law to be recognised, it should be reformed to conform to the *Constitution*.[77] This could be problematic, since Muslim and Hindu law is regarded as unchangeable, as mentioned above.

The courts have heard cases brought by spouses in Muslim or Hindu marriages dealing with claims for an action upon the death of the breadwinner,[78] maintenance claims arising from a religious marriage,[79] divorce claims,[80] the *Wills Act*,[81] recognition under the *Marriage Act*[82] and intestate succession[83] claims. An examination of the development of recognition of spouses in Muslim and Hindu law marriages, as well as legislation and common law actions other than intestate succession claims, is included due to the similarity in the goals of intestate succession law and other common law actions and legislation. At the core of the reasoning behind the recognition of Muslim and Hindu spouses for actions normally attributed only to spouses in valid common law marriages, is the underlying goal of providing for vulnerable members of society.

For instance, the object of a claim for support upon the death of a breadwinner is to place the dependants of a deceased person in the same position regarding maintenance as if the deceased had not died.[84] Originally, the action provided a means by which a deceased's widow, parents and children could be compensated for the death of their breadwinner.[85] The action was extended to provide for a widower to claim upon the death of his wife.[86] In *Santam BPK v Henery*[87] the court extended the

75 Abduroaf 2020 *Obiter* 405.
76 Perumal and Rautenbach "Hindu Personal Law" 322, 333.
77 Amien 2014 *Acta Juridica* 217.
78 See para 4.2.2 of this study.
79 See para 4.2.1 of this study.
80 See para 4.2.4 of this study.
81 7 of 1953. See para 4.2.3 of this study.
82 See para 4.2.4 of this study.
83 See para 4.2.3 of this study.
84 Clark and Van Heerden 2023 *SALJ* 624; Smith and Heaton 2012 *THRHR* 472.
85 Smith and Heaton 2012 *THRHR* 472.
86 Smith and Heaton 2012 *THRHR* 472.
87 1999 3 SA 421 (SCA).

right to a divorcee whose ex-husband was under an obligation for maintenance in terms of section 7(2) of the *Divorce Act*.[88]

The *MSSA* determines that the surviving spouse in a marriage has a claim for reasonable maintenance needs.[89] The *MSSA* provides that when granting an order in terms of the *MSSA*, consideration should be given to the expected means, earning capacity, financial needs and obligations of the survivor, as well as the duration of the marriage and the standard of living of the spouses during the marriage.[90] The *Maintenance Act*[91] provides for a claim for maintenance from anyone with a duty to maintain another person.[92] The *Divorce Act*[93] allows for a court to make an order for maintenance.[94] Rule 43 of the Uniform Rules of the Court entitles a spouse to claim maintenance during divorce proceedings.[95]

Since the above-mentioned legislation and common law actions are aimed at providing for a person upon the termination of a marriage, the reasoning followed for the recognition of persons other than spouses in common law marriages is instructive for a similar extension in terms of the *ISA*. What follows in paragraphs 4.2.1-4.2.4 is an evaluation of relevant case law recognising Muslim and/or Hindu spouses under certain legislation or common law actions.

4.2.1 The recognition of maintenance claims from marriage contracts concluded in terms of Muslim and Hindu law

In *Ryland v Edros*[96] (hereafter referred to as the *Ryland* case), the court determined that monogamous Muslim marriages were no longer contrary to public policy.[97] The

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88 70 of 1979; Barratt 2015 *Stell LR* 126; Smith and Heaton 2012 *THRHR* 472.

89 Section 2(1) of the *MSSA;* Heaton "Dissolution of a Civil Marriage by Death" 144; Hofmeyr and Paleker *The Law of Succession in South Africa* 72; Meyerson 2010 *Constitutional Court Review* 306; Monareng and Zounmenou 2007 *Agenda* 126; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 103; Schäfer 2006 *SALJ* 633.

90 Barratt 2020 *PELJ* 21.

91 99 of 1998.

92 Section 2 (1) of the *Maintenance Act* 99 of 1998.

93 70 of 1979.

94 Section 7(1)-(2) of *Divorce Act* 70 of 1979.

95 Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 101.

96 1997 2 SA 690 (C).

97 *Ryland* case 705; Amien and Rajwani 2020 *The Journal of Legal Pluralism and Unofficial Law* 340; Amien, Moosa and Rautenbach "Muslim Personal Law" 378; Bonthuys 2002 *SALJ* 761; Fishbayn 1999 *International Journal of Law, Policy and the Family* 160; Heaton 2008 *Stell LR* 460; Heaton

court rejected the decision in *Ismail v Ismail*[98] in light of the *Constitution* and the value of equality.[99] The marriage under consideration by the court was a monogamous Muslim marriage not formalised in terms of the *Marriage Act*.[100] The wife claimed maintenance based on a contract flowing from a Muslim marriage.[101] The court determined that the common law duty of support should be recognised where there was a legally enforceable duty of support in terms of a contract that is legally worthy of protection, irrespective of whether a legally valid marriage was concluded.[102]

The claim for maintenance based on a Muslim marriage was consequently granted, but the marriage itself was not recognised.[103] Additionally, the fact that the marriage was monogamous was emphasised.[104] The decision did not discuss polygynous Muslim marriages.[105] It is therefore unclear whether a spouse in a polygynous Muslim marriage can enforce a claim of maintenance arising from a polygynous Muslim marriage. It is, however, difficult to see, regarding the protection of the rights to equality, human

"Religious Marriages" 290; Rautenbach 2000 *Recht van de Islam* 56; Rautenbach 2003 *Fundamina* 142; Rautenbach 2004 *PELJ* 9; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 95; Vahed 2022 *Contemporary South Asia* 47; Van Schalkwyk 2003 *De Jure* 314.

98 *Ismail v Ismail* 1983 1 SA 1006 (A).

99 Bonthuys 2002 *SALJ* 761; Heaton "Religious Marriages" 290; Osman "Religious Marriages" 317; Rautenbach 2004 *PELJ* 8; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 90. See para 1.1.3.1 of this study.

100 *Ryland* case 696; Amien, Moosa and Rautenbach "Muslim Personal Law" 378; Denson, Carnelley and Mukheibir 2018 *Obiter* 156; Fishbayn 1999 *International Journal of Law, Policy and the Family* 160; Osman "Religious Marriages" 317; Rautenbach 2000 *Recht van de Islam* 54; Rautenbach 2003 *Fundamina* 139-141; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 89; Van Schalkwyk 2003 *De Jure* 313.

101 *Ryland* case 696.

102 Amien and Leatt 2014 *Maryland Journal of International Law* 537; Bonthuys 2002 *SALJ* 762; Bonthuys 2018 *PELJ* 10; Manjoo 2004 *International Journal of Legal Information* 276-277; Nhlapo 2017 *SAJHR* 3-4; Rautenbach 2000 *Recht van de Islam* 54; Rautenbach 2003 *Fundamina* 139; Rautenbach 2004 *PELJ* 7; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 159; Rautenbach "Families and Legal Pluralism in South Africa" 75; Vahed 2022 *Contemporary South Asia* 47.

103 Amien, Moosa and Rautenbach "Muslim Personal Law" 378.

104 *Ryland* case 709C-F; Amien, Moosa and Rautenbach "Muslim Personal Law" 378; Bonthuys 2002 *SALJ* 761-762; Fishbayn 1999 *International Journal of Law, Policy and the Family* 160; Heaton 2008 *Stell LR* 460; Heaton "Religious Marriages" 297; Rautenbach 2000 *Recht van de Islam* 57; Rautenbach 2003 *Fundamina* 142; Rautenbach 2004 *PELJ* 9; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 95; Vahed 2022 *Contemporary South Asia* 47; Van Schalkwyk 2003 *De Jure* 314.

105 Bakker 2009 *THRHR* 397.

dignity and religion, how spouses in polygynous marriages may be justifiably excluded.[106]

The same arguments presented in the *Ryland* case may be made for the recognition of maintenance claims by spouses in marriages concluded in terms of Hindu law. Had an argument for the recognition of a contract of maintenance based in marriages concluded in terms of Hindu law, such claims should have been recognised in consideration of the rights to equality, human dignity and religious rights. It is submitted that spouses in a Hindu marriage, regardless of whether the marriage is monogamous or polygynous, should be able to enforce a claim for maintenance arising from a marriage contract. Spouses in Muslim marriages were also recognised for the claim for maintenance upon the death of a breadwinner, which is discussed in paragraph 4.2.2.

4.2.2 The recognition of spouses in marriages concluded in terms of Muslim and Hindu law under the action for loss of support upon the death of the breadwinner

In *Amod v Multilateral Motor Vehicle Accidents Fund*[107] (hereafter referred to as the *Amod* case), the court extended the action for loss of support upon the death of the breadwinner to cover spouses in marriages concluded in terms of Muslim law.[108] The marriage concluded between the deceased and his wife was a Muslim marriage not formalised in terms of the *Marriage Act*.[109] It was argued that a Muslim marriage gave rise to a contractual duty of support between the spouses.[110] The court held that *Ismail v Ismail*[111] was incorrectly decided by the refusal to recognise an action for spouses in

106 See para 1.1.3 of this study.

107 *Amod v Multilateral Motor Vehicle Accident Fund* 1999 4 SA 1319 (SCA).

108 *Amod* case para 32; Bakker 2009 *THRHR* 397; Heaton "Introduction" 4; Smith and Heaton 2012 *THRHR* 472; Zitzke 2018 *TSAR* 184.

109 *Amod* case para 1; Amien and Leatt 2014 *Maryland Journal of International Law* 537; Amien, Moosa and Rautenbach "Muslim Personal Law" 380; Cordier and Rautenbach 2009 *Obiter* 599; Diala and Rautenbach "Introduction" 7; Manjoo 2004 *International Journal of Legal Information* 277; Osman "Religious Marriages" 318; Rautenbach 2003 *Fundamina* 142, 146; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 96; Van Schalkwyk 2003 *De Jure* 315.

110 *Amod* case para 1; Amien, Moosa and Rautenbach "Muslim Personal Law" 381-382; Heaton "Religious Marriages" 298; Heaton "Life Partnerships" 314-315; Manjoo 2004 *International Journal of Legal Information* 277; Osman "Religious Marriages" 318; Rautenbach 2003 *Fundamina* 146-147; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 159; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 97.

111 *Ismail v Ismail* 1983 1 SA 1006 (A).

a monogamous Muslim marriage due to the potential that the marriage may be polygynous.[112] The court recognised that polygynous Muslim marriages were no longer contrary to public policy.[113]

The court was not concerned with whether there was a lawful marriage, but whether there was a legal duty on the spouses to support each other based on a contract and whether this duty was worthy of protection, as established in *Santam BPK v Henery*.[114] The marriage before the court was a monogamous marriage concluded by a public ceremony in terms of a major religion, namely the Muslim religion.[115] To only recognise a claim from a validly concluded common law marriage to the exclusion of Muslim marriages would be contrary to public policy.[116] As in the *Ryland* case, the court emphasised the monogamous nature of the marriage, leaving open the question of whether a polygynous marriage would give rise to an enforceable action.[117] There was no need to rely on the *Constitution*, as the action itself could be developed to extend to spouses in monogamous Muslim marriages.[118]

Despite the court's insistence on extending the claim only to spouses in monogamous Muslim marriages, no justifiable reason can be presented to exclude spouses in polygynous Muslim marriages from the action for loss of support upon the death of the breadwinner. Also, if the action is recognised only for spouses in monogamous marriages, a spouse will be protected up to the point that a marriage becomes polygynous, after which they lose the protection. The same arguments presented in the *Amod* case may be made for spouses in marriages concluded in terms of Hindu law, should they proceed to court with an action for loss of support upon the death of

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112 *Amod* case para 29; Heaton "Religious Marriages" 298; Vahed 2022 *Contemporary South Asia* 47.

113 *Amod* case para 29; Heaton "Religious Marriages" 298; Vahed 2022 *Contemporary South Asia* 47.

114 *Amod* case para 19-20, 25; *Santam BPK v Henery* 1999 3 SA 421 (SCA); Barratt 2015 *Stell LR* 126; Cordier and Rautenbach 2009 *Obiter* 599; Heaton "Religious Marriages" 298; Pienaar 2006 *Stell LR* 315; Rautenbach 2003 *Fundamina* 146; Rautenbach 2004 *PELJ* 14-15; Rautenbach "Families and Legal Pluralism in South Africa" 75; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 97; Zitzke 2018 *TSAR*.

115 *Amod* case paras 20, 25; Amien, Moosa and Rautenbach "Muslim Personal Law" 381; Rautenbach 2004 *PELJ* 14.

116 *Amod* case paras 20, 23.

117 *Amod* case para 24; Amien and Leatt 2014 *Maryland Journal of International Law* 537; Bonthuys 2018 *PELJ* 10; Cordier and Rautenbach 2009 *Obiter* 599; Diala and Rautenbach "Introduction" 7; Manjoo 2004 *International Journal of Legal Information* 277; Rautenbach 2003 *Fundamina* 146; Rautenbach 2004 *PELJ* 15; Smith and Heaton 2012 *THRHR* 472.

118 *Amod* case para 30.

the breadwinner.[119] Denying a claim for loss of support upon the death of the breadwinner to spouses in Hindu marriages, would amount to discrimination based on religion, thereby infringing the right to equality.

Apart from recognising spouses in religious marriages claims as a result of a marriage contract and the action for loss of support upon the death of the breadwinner, the courts have also extended the term "spouse" in the *MSSA* and *ISA* to include spouses in Muslim and Hindu marriages. The judgments recognising spouses in Muslim and Hindu marriages for the purposes of the *MSSA*, *ISA* and *Wills Act*[120] are discussed in paragraph 4.2.3.

4.2.3 The recognition of spouses in marriages concluded in terms of Muslim and Hindu law under the MSSA, ISA and *Wills Act*[121]

Daniels v Campbell[122] (hereafter referred to as the *Daniels* case) was concerned with a monogamous Muslim marriage.[123] The marriage was not solemnised in terms of the *Marriage Act*.[124] The question was whether the term "spouse" in the *ISA* and the term "survivor" in the *MSSA* were unconstitutional for excluding spouses from purely Muslim marriages. Neither the term "spouse" nor "survivor" was defined in the *ISA* and the *MSSA*.[125] In the High Court, parts of the *ISA* and *MSSA* were declared unconstitutional due to the infringement of the right to equality.[126] The court ordered the words "shall include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union" to be read into the *ISA* in the definition of "spouse" and the words "and includes the surviving husband or wife of a *de facto* monogamous union

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119 See also Cordier and Rautenbach 2009 *Obiter* 599.

120 7 of 1983.

121 7 of 1983.

122 2004 5 SA 331 (CC).

123 *Daniels* case para 3; Amien 2014 *Acta Juridica* 205; Amien, Moosa and Rautenbach "Muslim Personal Law" 384; Osman "Religious Marriages" 318; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 103; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 373.

124 *Daniels* case para 3, 163; Jamneck 2014 *PELJ* 976; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 373.

125 De Waal and Mills 2021 *TSAR* 567; Denson, Carnelley and Mukheibir 2018 *Obiter* 157.

126 Amien 2014 *Acta Juridica* 208; Du Toit 2009 *SALJ* 466; Denson, Carnelley and Mukheibir 2018 *Obiter* 159-160; Goolam and Rautenbach 2004 *Stell LR* 369; Manjoo 2004 *International Journal of Legal Information* 278.

solemnised in accordance with Muslim rites" after the words "dissolved by death" in the *MSSA*.[127]

In the Constitutional Court, the court determined that spouses in a monogamous Muslim marriage could be recognised in terms of the *ISA* and the *MSSA* by declaring that Muslim spouses qualify as "spouses" in the ordinary sense of the word.[128] There was therefore no need to declare the *ISA* and *MSSA* unconstitutional. The court emphasised that the question was whether the ordinary meaning encompasses a party to a monogamous marriage, not whether a valid marriage has been concluded.[129]

The court embarked on a substantive enquiry and determined that the past definition of the terms "spouse" and "survivor" did not reflect the true ordinary meaning of the terms "spouse" and "survivor".[130] Past practice limited the meanings of "spouse" and "survivor" to spouses in common law marriages.[131] The court held that most Muslim marriages are not concurrently registered in terms of the *Marriage Act*, leaving the spouses unprotected.[132] The court determined that the purpose of the acts included

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127 Amien 2014 *Acta Juridica* 208; Ashmore 2018 *Without Prejudice* 27; Goolam and Rautenbach 2004 *Stell LR* 379; Manjoo 2004 *International Journal of Legal Information* 278.

128 *Daniels* case paras 19-22; Amien 2014 *Acta Juridica* 208-210; Amien and Rajwani 2020 *The Journal of Legal Pluralism and Unofficial Law* 340; Amien, Moosa and Rautenbach "Muslim Personal Law" 384; Bakker 2009 *THRHR* 397; Bonthuys 2018 *PELJ* 10; Cordier and Rautenbach 2009 *Obiter* 597; Denson, Carnelley and Mukheibir 2018 *Obiter* 157; Diala and Rautenbach "Introduction" 7; Du Toit 2009 *SALJ* 466; Du Toit 2021 *Journal of Civil Law Studies* 371-372; Heaton 2008 *Stell LR* 460; Heaton "Religious Marriages" 293; Hofmeyr and Paleker *The Law of Succession in South Africa* 840; Jagwanth 2005 *Acta Juridica* 140; Meyerson 2010 *Constitutional Court Review* 297, 299-300; Mochela and Smith 2020 *TSAR* 484; Osman "Religious Marriages" 318; Rautenbach 2004 *PELJ* 19; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 159; Rautenbach "Families and Legal Pluralism in South Africa" 75; Rautenbach and Tshivhase "The Phenomenon of Legal Pluralism" 14; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 108; Smith 2016 *SAJHR* 131, 136; Vahed 2022 *Contemporary South Asia* 49; Wood-Bodley 2020 *Obiter* 475; Zitzke 2018 *TSAR* 184.

129 *Daniels* case para 22; Heaton "Religious Marriages" 293; Meyerson 2010 *Constitutional Court Review* 300; Rautenbach 2004 *PELJ* 19; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 104

130 *Daniels* case para 19-22, 40; Amien 2014 *Acta Juridica* 208-209; Amien, Moosa and Rautenbach "Muslim Personal Law" 384; Boniface 2015 *Scientific Cooperations International Journal of Law and Politics* 8; Cordier and Rautenbach 2009 *Obiter* 597; Du Toit 2021 *Journal of Civil Law Studies* 371; Jagwanth 2005 *Acta Juridica* 140; Rautenbach 2004 *PELJ* 19.

131 *Daniels* case paras 19-21; Amien 2014 *Acta Juridica* 209; Amien and Leatt 2014 *Maryland Journal of International Law* 538; Cordier and Rautenbach 2009 *Obiter* 597; Du Toit 2021 *Journal of Civil Law Studies* 371; Wood-Bodley 2020 *Obiter* 475.

132 Amien 2014 *Acta Juridica* 207; Rautenbach 2023 *Acta Juridica* 114.

the protection of vulnerable women.[133] Denying spouses in Muslim marriages claims under the *ISA* and *MSSA* would, therefore, negate the purpose of the acts.[134] Also, persons marrying in terms of Muslim law intend to be married and bound by the consequences of marriage.[135] For these reasons, the court determined that spouses in monogamous Muslim marriages may claim in terms of the *ISA* and the *MSSA*.[136]

Criticism that can be levelled against the *Daniels* case include that the judgment did not recognise Muslim marriages as valid, nor did it address the question of whether spouses in a polygynous Muslim marriage may claim in terms of the *MSSA* and *ISA*.[137] Also, the extension of maintenance benefits in terms of the *MSSA* is contrary to Muslim law, since such maintenance is not recognised.[138] Under traditional Muslim law, women's intestate inheritance rights are limited.[139] Contrary to Muslim law, women will enjoy more protection under the *ISA*.[140] Similarly to the *Bhe* case which eroded the customary law principle of male primogeniture,[141] bringing spouses in Muslim marriages under legislation catering for common law marriage, might erode Muslim law, thereby infringing the right to religion.[142]

Additionally, the effect of the judgment is that Muslim spouses are regarded as "spouses" and "survivors" in terms of the *ISA* and *MSSA* until the marriage becomes a polygynous marriage, after which Muslim spouses will no longer qualify under the *ISA*

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133 *Daniels* case paras 19-23; Amien 2014 *Acta Juridica* 210; Amien, Moosa and Rautenbach "Muslim Personal Law" 385; Heaton "Religious Marriages" 293; Hofmeyr and Paleker *The Law of Succession in South Africa* 840; Meyerson 2010 *Constitutional Court Review* 300; Osman "Religious Marriages" 319; Rautenbach 2004 *PELJ* 19; Rautenbach 2023 *Acta Juridica* 114; Rautenbach and Tshivhase "The Phenomenon of Legal Pluralism" 14; Smith 2016 *SAJHR* 131.

134 *Daniels* case paras 19-23; Amien 2014 *Acta Juridica* 210; Amien, Moosa and Rautenbach "Muslim Personal Law" 385; Heaton "Religious Marriages" 293; Hofmeyr and Paleker *The Law of Succession in South Africa* 840; Meyerson 2010 *Constitutional Court Review* 300; Osman "Religious Marriages" 319; Rautenbach 2004 *PELJ* 19; Rautenbach 2023 *Acta Juridica* 114; Rautenbach and Tshivhase "The Phenomenon of Legal Pluralism" 14; Smith 2016 *SAJHR* 131.

135 Goolam and Rautenbach 2004 *Stell LR* 378.

136 *Daniels* case paras 19, 37, 40; De Waal and Schoeman-Malan *Erfreg* 19; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 109; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 373.

137 Amien 2014 *Acta Juridica* 210; Rautenbach 2004 *PELJ* 19.

138 Also see Denson, Carnelley and Mukheibir 2018 *Obiter* 154, 163.

139 Amien 2014 *Acta Juridica* 217.

140 Amien 2014 *Acta Juridica* 217; Denson, Carnelley and Mukheibir 2018 *Obiter* 161, 163; Jamneck 2014 *PELJ* 976.

141 See paras 3.2.1 and 3.3.1 of this study.

142 See para 1.1.3.3 of this study.

and the *MSSA*.[143] The question of whether Muslim law should apply to matters, such as intestate succession rights of spouses, arising from a Muslim marriage, remains unanswered. Legislative recognition of Muslim marriages is needed to specifically regulate whether Muslim law should apply when it comes to claims such as maintenance and intestate inheritance claims.[144]

Apart from recognising claims in terms of the *ISA* and *MSSA* for spouses in Muslim marriages, the court was also asked to confirm whether spouses in Hindu marriages qualify under the *ISA*. In *Govender v Ragavayah*[145] the inability to inherit under the *ISA* of persons married in terms of the Hindu religion whose marriages were not registered in terms of the *Marriage Act*, was considered.[146] The court held that the term "spouse," for the *ISA* must be interpreted to include spouses from monogamous Hindu marriages.[147] Their exclusion was unconstitutional and failed the *Harksen* test, since monogamous Muslim marriages were recognised.[148] As in the *Daniels* case, where the court refused to recognise spouses in polygynous Muslim marriages, spouses in polygynous Hindu marriages were also not recognised under the *ISA*.[149] The court was not asked to consider whether spouses in Hindu marriages could claim under the *MSSA*. Since spouses in Muslim marriages were recognised under the *MSSA* in the *Daniels* case, and considering the successful claim in the *Govender* case, spouses in Hindu marriages should also be successful in pursuing their rights to claim in terms of the *MSSA*.

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143 See para 4.2.2 of this study for a similar concern arising from the *Amod* case. Also see Wood-Bodley 2018 *Obiter* 475.

144 See paras 4.4 and 6.1 of this study.

145 2009 3 SA 178 (D).

146 *Govender* case para 12; Amien and Rajwani 2020 *The Journal of Legal Pluralism and Unofficial Law* 340; Du Toit 2021 *Journal of Civil Law Studies* 372; Heaton 2008 *Stell LR* 464; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 109; Wood-Bodley 2020 *Obiter* 474.

147 *Govender* case para 42; Cordier and Rautenbach 2009 *Obiter* 586, 598-599; De Waal and Mills 2021 *TSAR* 567; De Waal and Schoeman-Malan *Erfreg* 20; Du Toit 2009 *SALJ* 473; Du Toit 2021 *Journal of Civil Law Studies* 372; Heaton "Religious Marriages" 294; Hofmeyr and Paleker *The Law of Succession in South Africa* 73-74, 841; Mochela and Smith 2020 *TSAR* 484; Osman "Religious Marriages" 319; Perumal and Rautenbach "Hindu Personal Law" 303, 305; Rautenbach "Families and Legal Pluralism in South Africa" 76; Smith 2016 *SAJHR* 136, 276; Zitzke 2018 *TSAR* 184.

148 *Govender* case para 32; Cordier and Rautenbach 2009 *Obiter* 598-599; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the family* 109. See para 1.1.3.1 of this study for a discussion of the *Harksen* test.

149 *Govender* case para 42; Heaton 2008 *Stell LR* 465.

As indicated above, another reason for the failure to recognise Muslim and Hindu spouses was the potential polygyny of these marriages, which might infringe on the rights of equality of women in Muslim and Hindu marriages.[150] The courts have continuously avoided the issue of polygynous religious marriages in the hope that the legislature would address the issue. However, in *Hassam v Jacobs*[151] the issue of polygynous marriages could no longer be avoided. The court was asked to consider whether a spouse from a polygynous Muslim marriage ought to inherit in terms of the *ISA*.[152] A Muslim marriage was concluded, but subsequently, another marriage was concluded without the first wife's consent or knowledge.[153]

The court determined that the term "spouse" did not include spouses in polygynous marriages in the ordinary meaning of the word "spouse".[154] In considering whether spouses in polygynous Muslim marriages should be granted the right to claim in terms of the *ISA*, the court recognised that spouses in Muslim marriages were worthy of protection.[155] Additionally, the intestate succession law is aimed at protecting vulnerable marginalised groups such as women.[156] The court found that there was differentiation between spouses in monogamous Muslim marriages and spouses in polygynous Muslim marriages, as well as differentiation between polygynous marriages concluded in terms of Muslim law and polygynous customary law marriages.[157] The differentiation infringed the dignity of Muslim widows and unfairly discriminated

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150 See also Du Toit 2021 *Journal of Civil Law Studies* 372.

151 2009 5 SA 572 (CC).

152 *Hassam* case para 1; Amien 2014 *Acta Juridica* 211; Amien, Moosa and Rautenbach "Muslim Personal Law" 384; Cordier and Rautenbach 2009 *Obiter* 598; Denson, Carnelley and Mukheibir 2018 *Obiter* 163; Du Toit 2021 *Journal of Civil Law Studies* 372; Heaton "Introduction" 4; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 109; Smith 2016 *SAJHR* 139; Wood-Bodley 2018 *Obiter* 276.

153 *Hassam* case para 1; Amien 2014 *Acta Juridica* 212; Meyerson 2010 *Constitutional Court Review* 299; Mochela and Smith 2020 *TSAR* 484.

154 *Hassam* case paras 48, 53, 57; Amien 2014 *Acta Juridica* 212; Amien and Leatt 2014 *Maryland Journal of International Law* 538; Bonthuys 2018 *PELJ* 110; Denson, Carnelley and Mukheibir 2018 *Obiter* 165-166; Du Toit 2021 *Journal of Civil Law Studies* 373; Heaton "Religious Marriages" 294; Meyerson 2010 *Constitutional Court Review* 300; Mochela and Smith 2020 *TSAR* 484; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 106; Wood-Bodley 2020 *Obiter* 474-475; Zitzke 2018 *TSAR* 184.

155 *Hassam* case para 57; Amien 2014 *Acta Juridica* 212; Denson, Carnelley and Mukheibir 2018 *Obiter* 165.

156 *Hassam* case para 57; Amien 2014 *Acta Juridica* 212; Denson, Carnelley and Mukheibir 2018 *Obiter* 165.

157 *Hassam* case para 57; Denson, Carnelley and Mukheibir 2018 *Obiter* 165; Meyerson 2010 *Constitutional Court Review* 300.

against their rights to equality based on the grounds of marital status and gender.[158] It amounted to unfair discrimination that could not be justified.[159]

The court accordingly declared section 1(4)(f) of the *ISA* inconsistent with the constitution based on discrimination on the grounds of marital status, religion, culture and the infringement of the right to human dignity.[160] The court extended the terms "spouse" and "surviving partners" to include spouses in polygynous Muslim marriages.[161] The court ordered that the words "or spouses" be read in after the word "spouse" in the *ISA*.[162] Spouses from polygynous Muslim marriages may therefore inherit in terms of the *ISA*.[163] The arguments made for the inclusion of spouses in polygynous Muslim marriages may be made for the inclusion of spouses in polygynous Hindu marriages.

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158 Bonthuys 2018 *PELJ* 11; Denson, Carnelley and Mukheibir 2018 *Obiter* 165; Du Toit 2021 *Journal of Civil Law Studies* 373; Meyerson 2010 *Constitutional Court Review* 300-301. See paras 1.1.3.1-1.1.3.2 of this study

159 *Hassam* case para 42; Denson, Carnelley and Mukheibir 2018 *Obiter* 165; Meyerson 2010 *Constitutional Court Review* 301; Mochela and Smith 2020 *TSAR* 484; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 105; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 109. See paras 1.3.2 and 1.1.4 of this study.

160 *Hassam* case paras 53, 57; Amien 2014 *Acta Juridica* 212; Amien and Leatt 2014 *Maryland Journal of International Law* 538; Amien, Moosa and Rautenbach "Muslim Personal Law" 385; Bonthuys 2018 *PELJ* 110; Denson, Carnelley and Mukheibir 2018 *Obiter* 164-165; Du Toit 2009 *SALJ* 474; Heaton "Religious Marriages" 294; Meyerson 2010 *Constitutional Court Review* 300; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 105; Wood-Bodley 2020 *Obiter* 474; Zitzke 2018 *TSAL* 184.

161 *Hassam* case paras 34-35, 37-38; Amien 2014 *Acta Juridica* 212; Amien and Leatt 2014 *Maryland Journal of International Law* 538; Amien, Moosa and Rautenbach "Muslim Personal Law" 385; Bonthuys 2018 *PELJ* 11; Cordier and Rautenbach 2009 *Obiter* 598; Denson, Carnelley and Mukheibir 2018 *Obiter* 163-164; Diala and Rautenbach "Introduction" 7; Du Toit 2021 *Journal of Civil Law Studies* 372; Heaton "Religious Marriages" 294; Jamneck 2014 *PELJ* 977; Meyerson 2010 *Constitutional Court Review* 297; Osman "Religious Marriages" 319; Rautenbach "Families and Legal Pluralism in South Africa" 75; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 159-160; Smith 2016 *SAJHR* 137.

162 *Hassam* case para 53, 57; Amien 2014 *Acta Juridica* 212; Amien, Moosa and Rautenbach "Muslim Personal Law" 385; De Waal and Schoeman-Malan *Erfreg* 19; Denson, Carnelley and Mukheibir 2018 *Obiter* 165-166; Du Toit 2021 *Journal of Civil Law Studies* 373; Heaton "Religious Marriages" 294; Hofmeyr and Paleker *The Law of Succession in South Africa* 74, 840; Meyerson 2010 *Constitutional Court Review* 300-301; Mochela and Smith 2020 *TSAR* 484; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 107; Rautenbach and Tshivhase "The Phenomenon of Legal Pluralism" 15; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 109; Smith 2016 *SAJHR* 139; Wood-Bodley 2018 *Obiter* 276; Wood-Bodley 2020 *Obiter* 474-475; Zitzke 2018 *TSAR* 184.

163 *Hassam* case para 53, 57; Amien 2014 *Acta Juridica* 212; Amien and Leatt 2014 *Maryland Journal of International Law* 538; Bonthuys 2018 *PELJ* 110; Heaton "Introduction" 4; Wood-Bodley 2020 *Obiter* 474; Zitzke 2018 *TSAR* 184.

Criticism that could be levelled against the *Hassam* case includes the court's disregard for Muslim law.[164] The question of whether the intestate laws of religious marriages should be recognised remains unanswered. Legislation is needed to determine whether the *ISA* or the laws of intestate succession should prevail under religious law.[165] Additionally, the court should have recognised that polygynous spouses could be included in the ordinary meaning of the word spouse since polygyny is no longer against public policy.[166] In terms of the court's reasoning, a spouse in a monogamous Muslim marriage is a spouse in the ordinary sense of the word up to the marriage becoming polygynous, after which the spouse is no longer a spouse in the ordinary sense of the word.

In *Moosa v Minister of Justice*[167] (hereafter the *Moosa* case), the court held that Muslim spouses were unfairly excluded from the *Wills Act*[168] and declared that a surviving spouse includes spouses in monogamous and polygynous Muslim marriages.[169] Two wives survived the deceased.[170] Both marriages were concluded in terms of Muslim law.[171] The *Wills Act*[172] differentiated between those married in terms of the *Marriage Act* and those married in terms of Muslim law, between monogamous and polygynous marriages and marriages in terms of customary law and Muslim law.[173]

The court held that the *Wills Act*,[174] therefore, infringed the right to equality on the grounds of marital status and religion and unfairly discriminated against spouses in polygynous Muslim marriages by recognising the first spouse and not recognising the

164 Denson, Carnelley and Mukheibir 2018 *Obiter* 166.
165 See paras 4.4 and 6.1 of this study for suggestions for the regulation of intestate succession rights of spouses in religious marriages.
166 See also Meyerson 2010 *Constitutional Court Review* 302; Wood-Bodley 2020 *Obiter* 475.
167 2018 5 SA 13 (CC).
168 7 of 1953.
169 *Moosa* case paras 16, 21; Amien, Moosa and Rautenbach "Muslim Personal Law" 386; Heaton "Religious Marriages" 294; Osman "Religious Marriages" 320.
170 *Moosa* case para 4; Rautenbach "Families and Legal Pluralism in South Africa" 76; Wood-Bodley 2020 *Obiter* 465.
171 *Moosa* case para 4; Wood-Bodley 2020 *Obiter* 465.
172 7 of 1953.
173 *Moosa* case para 10; Wood-Bodley 2020 *Obiter* 466-467.
174 7 of 1953.

second spouse.[175] The court found no legitimate purpose for the discrimination.[176] The court cured the *Wills Act*[177] of constitutional invalidity by means of a reading-in order, with the effect that the terms "surviving spouse" include not only a surviving spouse but also spouses married in terms of Muslim law.[178]

The arguments presented in the *Moosa* case can also be applied to the argument for including spouses in a Hindu marriage.[179] Criticism against this case include that the court did not consider the ordinary meaning of the term "spouse" to include spouses in a Muslim marriage.[180] As seen in the *Daniels* and *Govender* cases, the courts recognised spouses in Muslim and Hindu marriages as spouses in the ordinary sense of the word, without resorting to a declaration of invalidity under the *Constitution*. A similar approach could have been followed in the *Moosa* case. Regarding spouses in Muslim and Hindu marriages as spouses in the ordinary sense of the word promotes the constitutional values of equality and human dignity, as also argued in the *Daniels* and *Govender* cases discussed above.

In paragraph 4.2.4 the recognition of spouses in Muslim and Hindu marriages for claims under the *Maintenance Act*, [181] the *Divorce Act,*[182] the *Marriage Act* and Rule 43 of the Uniform Rules of the Court is discussed.

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175 *Moosa* case paras 12, 16; Amien, Moosa and Rautenbach "Muslim Personal Law" 386; Rautenbach "Families and Legal Pluralism in South Africa" 76; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 110; Wood-Bodley 2020 *Obiter* 466-467.

176 *Moosa* case para 16; Wood-Bodley 2020 *Obiter* 466.

177 7 of 1953.

178 *Moosa* case para 21; Amien, Moosa and Rautenbach "Muslim Personal Law" 386; Du Toit 2021 *Journal of Civil Law Studies* 373-374; Heaton "Religious Marriages" 294-295; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 110; Wood-Bodley 2020 *Obiter* 467. See para 1.1.2 of this study.

179 See also Wood-Bodley 2020 *Obiter* 480.

180 Wood-Bodley 2020 *Obiter* 476.

181 99 of 1998.

182 70 of 1979.

4.2.4 The recognition of spouses in marriages concluded in terms of Muslim and Hindu law under the Maintenance Act,[183] the Divorce Act,[184] the Marriage Act and Rule 43

In *Khan v Khan*[185] (hereafter the *Khan* case), the court confirmed that a duty of support arising from a Muslim marriage was worthy of protection.[186] This case concerned a claim for post-separation maintenance in terms of the *Maintenance Act*[187] by a spouse who was in a polygynous Muslim marriage.[188] The court determined that section 2(1) of the *Maintenance Act*[189] applied to persons with a legal duty to maintain another person.[190] The court recognised a legal duty of support owed by spouses in a polygynous Muslim marriage under the *Maintenance Act*.[191]

The court held that it would be unfair to recognise monogamous marriages but not polygynous marriages, since polygyny is no longer contrary to public policy.[192] The non-recognition of protection of spouses in Muslim marriages would leave a particular vulnerable section of society, namely Muslim women, without essential legal protection.[193] Additionally, the purpose of the family law was to protect vulnerable family members and common law may be adapted to do so.[194] Therefore, a spouse in

183 99 of 1998.
184 70 of 1979.
185 2005 2 SA 272 (T).
186 *Khan* case para 2; Amien, Moosa and Rautenbach "Muslim Personal Law" 381-382; Heaton "Religious Marriages" 298; Smith and Heaton 2012 *THRHR* 475.
187 99 of 1998.
188 *Khan* case para 2; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 109.
189 99 of 1998.
190 *Khan* case para 9; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 109.
191 99 of 1998; *Khan* case para 11; Amien and Leatt 2014 *Maryland Journal of International Law* 538; Amien and Rajwani 2020 *The Journal of Legal Pluralism and Unofficial Law* 340; Amien, Moosa and Rautenbach "Muslim Personal Law" 381; Ashmore 2018 *Without Prejudice* 27-28; Cordier and Denson, Carnelley and Mukheibir 2018 *Obiter* 166; Osman "Religious Marriages" 318; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 159; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 99; Vahed 2022 *Contemporary South Asia* 49.
192 *Khan* case para 11; Bakker 2009 *THRHR* 397; Bonthuys 2018 *PELJ* 16; Heaton "Religious Marriages" 298; Osman "Religious Marriages" 318; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 100.
193 *Khan* case para 11; Bakker 2009 *THRHR* 398.
194 *Khan* case para 10; Denson, Carnelley and Mukheibir 2018 *Obiter* 166.

a Muslim marriage, irrespective of whether it is monogamous or polygynous, has a claim under the *Maintenance Act*.[195]

The *Khan* case was limited to Muslim marriages. The same arguments may, however, be advanced to recognise the right of spouses in Hindu marriages to claim in terms of the *Maintenance Act*.[196] There is therefore no reason to exclude spouses in religious marriages from the protection of the *Maintenance Act*.[197] However, the *Maintenance Act*[198] does not align with maintenance duties spouses owe each other in Muslim and Hindu marriages. Therefore, legislation to determine whether spouses in religious marriages ought to be included under the *Maintenance Act*[199] is desirable. Legislation should also direct whether maintenance claims recognised by Muslim and Hindu law should be enforced.

In *Singh v Ramparsad*[200] (hereafter the *Singh* case), the question was whether a Hindu marriage could be regulated in terms of the *Divorce Act*.[201] The *Divorce Act*[202] obliges courts to make a just maintenance order in the circumstances of each case.[203] In its refusal of the request to bring Hindu marriage under the *Divorce Act*, [204] the court held that the *Marriage Act* does not preclude a religious marriage from being concluded.[205] Additionally, the *Marriage Act* allows for the appointment of marriage officers.[206] A Hindu marriage may therefore be solemnised which would convert it to a common law marriage in terms of the *Marriage Act* that would be subject to the *Divorce Act*.[207]

The court held that there was no violation of the right to equality and dignity by denying the application of the *Divorce Act*[208] to Hindu marriages not also formalised in

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195 99 of 1998.
196 99 of 1998.
197 99 of 1998.
198 99 of 1998.
199 99 of 1998.
200 2007 3 SA 445 D.
201 70 of 1979; Heaton 2008 *Stell LR* 454.
202 70 of 1979.
203 Barratt 2020 *PELJ* 22.
204 70 of 1979.
205 *Singh* case para 34; Amien, Moosa and Rautenbach "Religious, Personal, and Family Law Systems in South Africa" 71; Heaton 2008 *Stell LR* 455; Perumal and Rautenbach "Hindu Personal Law" 304. Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 160.
206 Section 3(1) of the *Marriage Act*; *Singh* case para 34; Heaton 2008 *Stell LR* 455.
207 70 of 1979; *Singh* case para 34; Heaton 2008 *Stell LR* 455-456.
208 70 of 1979.

terms of the *Marriage Act*.[209] The *Marriage Act* does not discriminate based on religion, since the *Marriage Act* does not prohibit spouses in Hindu marriages from concluding a marriage in terms of the *Marriage Act*.[210]

The court could also not become engaged in religious doctrine.[211] The court did not have the power to convert a Hindu marriage not solemnised in terms of the *Marriage Act* into a common law marriage.[212] Such an order would replace a religious marriage with a secular one.[213] Additionally, Hindu law did not allow divorce.[214] Merely granting a secular divorce order would not necessarily end the religious one.[215] The court could not grant a secular divorce order, as no marriage could have been dissolved by a secular divorce order.[216] The court held that if Hindu law is to recognise divorce, that is up to the legislature to decide.[217]

In terms of Muslim law, similar arguments may lead to a denial of spouses in Muslim marriages from being recognised in terms of the *Divorce Act*.[218] A Muslim marriage concluded alongside a common law marriage would also not necessarily be dissolved by a secular court order. However, divorce is permissible under Muslim law. The *Divorce Amendment Act,*[219] which was enacted in reaction to the *Women's Legal Centre Trust v President of the Republic of South Africa*[220] case, now recognises religious marriages under the *Divorce Act*,[221] discussed below.

In *Hoosain v Dangor*[222] the court considered an application for maintenance in terms of Rule 43 of the Uniform Rules of Court.[223] Rule 43 of the Uniform Rules of the Court

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209 *Singh* cases para 47, 49; Heaton 2008 *Stell LR* 461; Perumal and Rautenbach "Hindu Personal Law" 304.
210 *Singh* case paras 37, 53; Heaton 2008 *Stell LR* 463.
211 *Singh* case paras 50-51; Heaton 2008 *Stell LR* 458; Heaton "Religious Marriages" 298.
212 *Singh* case para 39; Heaton 2008 *Stell LR* 453, 456.
213 *Singh* case para 51; Heaton 2008 *Stell LR* 457.
214 *Singh* case paras 1, 7; Heaton 2008 *Stell LR* 453; Heaton "Religious Marriages" 298; Perumal and Rautenbach "Hindu Personal Law" 305.
215 *Singh* case para 52; Heaton 2008 *Stell LR* 457.
216 *Singh* case para 52; Heaton 2008 *Stell LR* 458.
217 *Singh* case para 53; Heaton 2008 *Stell LR* 459.
218 70 of 1979.
219 1 of 2024.
220 2022 JDR 1733 (CC).
221 70 of 1979.
222 2009 JDR 1212 (WCC).
223 *Hoosein v Dangor* 2009 JDR 1212 (WCC) para 1.

entitles a spouse to claim maintenance during a divorce action.[224] The court recognised that religions other than Christianity suffered from historical non-recognition which infringed the rights of persons following other religions.[225] Because of the right to religion and the continued lack of legislation comprehensively regulating Muslim marriages, piecemeal relief needs to be afforded to spouses in Muslim marriages. Therefore, spouses in Muslim marriages must be allowed to claim maintenance in terms of Rule 43.[226]

Criticism against *Hoosain v Dangor*[227] includes that the court did not follow Muslim law, which does not recognise claims similar to Rule 43 maintenance claims.[228] Applications for relief to spouses in Muslim marriages in terms of Rule 43 of the Uniform Rules of the Court were also granted in *AM v RM*,[229] *TM v ZJ*,[230] and *NR v NK*.[231] If a spouse married in terms of Hindu law approaches the courts with a claim in terms of Rule 43 of the Uniform Rules of the Court, such a claim should be successful on the basis of similar arguments advanced in *Hoosein v Dangor*.[232] What is evident is that clear legislation is required as to whether Rule 43 ought to be available to spouses in Muslim and Hindu marriages.[233]

In *FR v FR*[234] the court recognised a maintenance claim and a half share in the pension fund upon a Muslim divorce.[235] A common law marriage was concluded and subsequently ended by divorce.[236] Prior to the divorce being completed, a Muslim

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224 Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 101.

225 *Hoosein v Dangor* 2009 JDR 1212 (WCC) para 13.

226 *Hoosein v Dangor* 2009 JDR 1212 (WCC) para 27-28; Amien, Moosa and Rautenbach "Muslim Personal Law" 383; Denson, Carnelley and Mukheibir 2018 *Obiter* 168; Heaton "Religious Marriages" 296-297; Osman "Religious Marriages" 320; Rautenbach "Families and Legal Pluralism in South Africa" 76.

227 2009 JDR 1212 (WCC).

228 Denson, Carnelley and Mukheibir 2018 *Obiter* 168.

229 *AM v RM* 2010 2 SA 223 (ECP) para 15.

230 *TM v ZJ* 2016 1 SA 71 (KZD) para 19.

231 *NR v NK* 2019 JDR 1788 (GJ) para 4; Amien, Moosa and Rautenbach "Muslim Personal Law" 383.

232 2009 JDR 1212 (WCC).

233 See paras 4.4 and 6.1 of this study for recommendations for the recognition of spouses in Muslim and Hindu marriages.

234 *FR v FR* (WC) unreported case number 14770/2011 of 29 January 2015.

235 *FR v FR* (WC) unreported case number 14770/2011 of 29 January 2015 para 61; Amien, Moosa and Rautenbach "Muslim Personal Law" 384; Bonthuys 2018 *PELJ* 1.

236 *FR v FR* (WC) unreported case number 14770/2011 of 29 January 2015 paras 10-12; Bonthuys 2018 *PELJ* 1; Denson, Carnelley and Mukheibir 2018 *Obiter* 169-170.

marriage was entered into.[237] The court held that the pre-existing common law marriage did not preclude the claim for maintenance.[238] It would be unconstitutional to allow spouses in monogamous Muslim marriages to benefit but to continue to deny benefits to spouses in polygynous Muslim marriages.[239] However, the second marriage was void under common law, as the man could not enter into a further marriage while a valid common law marriage existed.[240] The question of whether polygynous marriages should be recognised if there is a pre-existing common law marriage poses problems for intestate succession claims as well. Due to common law marriages being strictly monogamous, it is doubtful whether a claim for intestate succession may be recognised if a deceased spouse was in a common law marriage with another.[241]

The court in *Women's Legal Centre Trust v President of the Republic of South Africa*[242] (hereafter the *Women's Legal Centre Trust*) considered the persistent non-recognition of Muslim marriages and whether the *Marriage Act* and the *Divorce Act*[243] could be made applicable to Muslim marriages.[244] The court recognised that marriages concluded in terms of Muslim law suffered from a lack of recognition due to the pre-constitutional view that polygyny was contrary to public policy.[245]

The court held that the exclusion of women married in terms of Muslim law from the *Marriage Act* and the *Divorce Act*[246] infringed the rights to equality and human dignity of persons married in terms of Muslim law, and the best interests of children born to

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237 *FR v FR* (WC) unreported case number 14770/2011 of 29 January 2015 paras 10-12; Bonthuys 2018 *PELJ* 1.

238 *FR v FR* (WC) unreported case number 14770/2011 of 29 January 2015 para 61; Bonthuys 2018 *PELJ* 17.

239 *FR v FR* (WC) unreported case number 14770/2011 of 29 January 2015 para 58; Denson, Carnelley and Mukheibir 2018 *Obiter* 170.

240 *FR v FR* (WC) unreported case number 14770/2011 of 29 January 2015 para 61; Scott 2019 *TSAR* 881.

241 See para 5.3 of this study.

242 2022 JDR 1733 (CC).

243 70 of 1979.

244 70 of 1979; *Women's Legal Centre Trust* case para 1; Clark and Van Heerden 2024 *SALJ* 470; Heaton "Religious Marriages" 295.

245 *Women's Legal Centre Trust* case para 43.

246 70 of 1979.

parents married in terms of Muslim law were also infringed.[247] The exclusion denied Muslim women and children the remedies associated with common law marriage.[248]

The court found discrimination on the grounds of religion, marital status and gender.[249] The discrimination was accordingly presumed unfair.[250] In considering whether the discrimination was unjustified, the court considered that men in religious marriages may have polygynous marriages, while women may not have polyandrous marriages.[251] Additionally, women in polygynous Muslim marriages may not be in a position to ensure registration of their marriages.[252] Also, women in religious marriages have great difficulty in obtaining divorces.[253] Not recognising Muslim marriages as valid marriages, creates the impression that they are not worthy of legal recognition or protection, which infringes spouses' rights to human dignity.[254]

The court found no justification for the infringement of the rights of spouses in Muslim marriages.[255] Additionally, the court held that the president and cabinet failed to exercise their constitutional obligation by failing to enact legislation to govern Muslim marriages, which left Muslim women without protection.[256] As a result, the common law, along with the *Marriage Act* and the *Divorce Act*,[257] were declared unconstitutional for its failure to recognise unregistered Muslim marriages.[258] The court ordered Parliament to enact legislation to recognise Muslim marriages.[259] The order was

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247 *Women's Legal Centre Trust* case para 60.
248 Heaton "Religious Marriages" 295.
249 *Women's Legal Centre Trust* case paras 48, 50; Heaton "Religious Marriages" 295; Perumal and Rautenbach "Hindu Personal Law" 334. See para 1.1.3.2 of this study.
250 *Women's Legal Centre Trust* case para 53. See para 1.1.3.2 of this study
251 Amien, Moosa, and Rautenbach "Muslim Personal Law" 74.
252 *Women's Legal Centre Trust* case paras 55-56.
253 Amien, Moosa, and Rautenbach "Muslim Personal Law" 74; Perumal and Rautenbach "Hindu Personal Law" 333-334.
254 *Women's Legal Centre Trust* case paras 55, 65-66.
255 *Women's Legal Centre Trust* case paras 55, 63; Heaton "Religious Marriages" 295. See para 1.1.4 of this study.
256 *Women's Legal Centre Trust* case para 21; Perumal and Rautenbach "Hindu Personal Law" 333; Osman-Hyder 2022 *Stell LR* 267; Vahed 2020 *Contemporary South Asia* 52.
257 70 of 1979.
258 *Women's Legal Centre Trust* case paras 65-66, 68, 83, 86; Clark and Van Heerden 2024 *SALJ* 469; Heaton "Religious Marriages" 295; Osman "Religious Marriages" 320; Rautenbach "Families and Legal Pluralism in South Africa" 68.
259 *Women's Legal Centre Trust* case para 86; Diala and Rautenbach "Introduction" 8; Heaton "The Legal Requirements for a Civil Marriage" 18; Osman "Religious Marriages" 320.

suspended for two years.[260] Failure to enact legislation would mean that the termination of Muslim marriages will be regulated by *Divorce Act*.[261] The court was not required to determine whether Muslim law is valid and consistent with the *Constitution*.[262] Whether Muslim law should be recognised under South African law remains up to Parliament to determine.

After the judgment, the *Divorce Amendment Act*[263] addressed the constitutional defects of the *Divorce Act*[264] by recognising that Muslim marriages may be dissolved in terms of the *Divorce Act*.[265] Legislation comprehensively recognising religious marriages is, however, still pending.[266] The date for Parliament to enact legislation to govern Muslim marriages has been extended to 27 June 2026.[267]

Hindu marriages are still not recognised under either the *Divorce Act*[268] or the *Marriage Act*. However, the same arguments made to include Muslim spouses in terms of the *Divorce Act*[269] and the *Marriage Act* may be made to include Hindu spouses.

What is important to this study from the above analyses of cases, is that Muslim and Hindu spouses form part of the "family unit". In particular for the *ISA*, a "spouse" in terms of the *ISA* includes spouses in monogamous Muslim or Hindu marriages, and spouses in polygynous Muslim marriages. Spouses in polygynous Hindu marriages are not yet recognised for the purposes of the *ISA*, but should a challenge be launched in court, there appears to be no reason to exclude Hindu spouses from the protection of

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260 Heaton "Religious Marriages" 295; Rautenbach "Families and Legal Pluralism in South Africa" 68.

261 70 of 1979; Heaton "Introduction" 4; Osman "Religious Marriages" 320; Perumal and Rautenbach "Hindu Personal Law" 334; Vahed 2022 *Contemporary South Asia* 52.

262 *Women's Legal Centre Trust* case para 60.

263 1 of 2024.

264 Section 1 of the *Divorce Act* 70 of 1979 defines "Muslim marriage" as "…a marriage entered into or concluded in accordance with the tenets of Islam". Muslim marriages are recognised in ss3, 6, 7 and 9 of the *Divorce Act* 70 of 1979.

265 Section 1 of the *Divorce Act* 70 of 1979 defines "Muslim marriage" as "…a marriage entered into or concluded in accordance with the tenets of Islam". Muslim marriages are recognised in ss3, 6, 7 and 9 of the *Divorce Act* 70 of 1979.

266 See para 6.2 of this study.

267 *Speaker of the National Assembly v Women's Legal Centre Trust* (CC) unreported case number CCT 24/21 paras 5, 21

268 *Divorce Act* 70 of 1979.

269 *Divorce Act* 70 of 1979.

the *ISA*. General succession rules prescribed by religious rites laws were not considered by courts resulting that only the *ISA* is applicable to intestate estates.

From the examination of the judgments above, it is clear that polygynous religious marriages are no longer regarded as contrary to public policy. The main criticism against these judgments is that common law actions are made applicable to Muslim and Hindu marriages without specific consideration of Muslim and Hindu law. The lack of enforceability of actions recognised in terms of Muslim and Hindu law may constitute an infringement of the right to religion.[270] The courts, however, have shied away from pronouncing on the constitutionality of Muslim and Hindu law due largely to refraining from involving themselves in religious doctrine and the continued expectancy that the legislature will enact necessary legislation.[271] As clearly illustrated, there is a need for legislation recognising Muslim and Hindu law, specifically for the regulation of Muslim and Hindu marriages.[272]

Apart from the piecemeal recognition of spouses in Muslim and Hindu marriages, the terms and "descendant" and "parent" were also developed to recognise spouses in Muslim marriages as "parents" and *vice versa.* In paragraph 4.3 the terms "descendant" and "parent" in terms of Muslim and Hindu law are discussed.

4.3 The terms "descendant" and "parent" in intestate succession in terms of Muslim law and Hindu law

Prior to the introduction of the *Constitution,* children born to Muslim and Hindu marriages were regarded as "illegitimate" since such marriages were contrary to public policy.[273] Fathers in Muslim and Hindu marriages were in the same position as unmarried fathers in terms of the common law.[274] Consequently, husbands did not

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270 See para 1.1.3.3 of this study.
271 See para 6.2 of this study.
272 See para 6.1 of this study.
273 Amien 2014 *Acta Juridica* 203; Kerr 1984 *SALJ* 452; Rautenbach 2000 *Recht van de Islam* 38.
274 See para 2.3.2 of this study. This study focuses on the rights available in terms of South African law. The practice of *Kafalah* is available to persons living in terms of Muslim law. *Kafalah* is a practise where a child is taken in by a family without gaining rights of inheritance. A detailed examination of this practise is beyond the scope of this study. See Assim and Sloth-Nielsen *African Human Rights Law Journal* 329.

have parental rights or responsibilities over their children.[275] Once the *ISA* was enacted, children and their parents could inherit from each other, provided they were biologically related. Muslim and Hindu spouses could not initially adopt children together as spouses.[276] The *Children's Act* allows Muslim and Hindu spouses to adopt children together.[277]

Spouses in religious marriages are recognised as "parents" of their biological children in terms of the *ISA*, since the *ISA* protects intestate succession rights regardless of the marital status of parents of children.[278] Biological children born to spouses in religious marriages are "descendants" in terms of the *ISA*.[279]

However, similar to spouses, "descendants" in terms of the *ISA* do not necessarily have the same inheritance rights under Muslim law and Hindu law.[280] As seen from the above, Muslim and Hindu law provide for male heirs to inherit more than female heirs.[281] Additionally, in terms of Muslim succession law, adopted children do not inherit alongside biological children.[282] Children born to unmarried parents do not inherit from either parent.[283] The question emerges whether succession laws of religion ought to be applicable or whether all deceased estates should be governed by the *ISA*. It is submitted that comprehensive legislation should be enacted to clarify whether Muslim and Hindu laws of succession ought to be followed.[284]

As stated above, Muslim and Hindu marriages are not comprehensively regulated by legislation. Fathers in Muslim and Hindu marriages are therefore in the same position as unmarried fathers in terms of common law, meaning that they must comply with the *Children's Act* to be recognised as fathers.[285]

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275 Kerr 1984 *SALJ* 452; Rautenbach 2000 *Recht van de Islam* 38; Sachs 1990 *Agenda* 47.
276 Van der Walt 2014 *Obiter* 443.
277 See para 2.3.3 of this study for a comprehensive discussion of the development of adoption.
278 See para 2.3.1 of this study.
279 See para 2.3.1 of this study.
280 See para 4.1 of this study.
281 See para 4.1 of this study.
282 Amien, Moosa and Rautenbach "Muslim Personal Law" 410; Neels 2012 *TSAR* 504-505.
283 Neels 2012 *TSAR* 504-505.
284 See para 6.1 of this study.
285 See paras 2.3 and 4.3 of this study.

To summarise, spouses in Muslim and Hindu marriages, irrespective of whether the marriages are monogamous or polygynous, and their children, biological or adopted in terms of the *Children's Act*, form a "family unit" that is deserving of legal protection. In paragraph 4.4, persons living in terms of Muslim or Hindu law who remain outside the scope of the *ISA* are identified and suggestions for their inclusion are made.

4.4 Persons outside the scope of the terms "spouse", "descendant" and "parent" in the ISA in terms of Muslim and Hindu law

As indicated above, spouses married in terms of Muslim or Hindu law qualify as "spouses" under the *ISA*, except for spouses in polygynous Hindu marriages.[286] It is submitted that the *ISA* should be amended to include spouses in polygynous Hindu marriages under the term "spouse". Where a Muslim and Hindu marriage is registered under the *Marriage Act*, and a second or further marriage in terms of Muslim and Hindu law is concluded, the question emerges whether the wife in the second or further marriage may qualify as a "spouse" under the *ISA*.[287]

Due to the strict requirement of monogamy of common law marriages, it is doubtful whether intestate succession rights will be available between spouses in a second or further marriage.[288] It is likely that a second or further marriage so concluded is invalid. In paragraph 5.3 the question whether a life partnership may be recognised alongside a common law marriage and the possibility of intestate succession rights between partners in such a life partnership, is considered.

Any children accepted by spouses in a Muslim or Hindu marriage as their own, but not formally adopted in terms of the *Children's Act*, will not qualify as "descendants" of the purported parents, and *vice versa*.[289] The possibility of recognising informal adoptions where a parent-child relationship was established is discussed in paragraph 2.4 of this study.

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286 See para 4.2.3 of this study.
287 See para 4.2.4 of this study.
288 See para 2.2 of this study.
289 See para 2.3.3 of this study.

4.5 Conclusion

Due to the non-recognition of religious marriages, spouses in Muslim and Hindu marriages were left without recourse to legal protection upon the death of a spouse.[290] This chapter discussed court cases initially refusing to recognise Muslim and Hindu marriages.[291] Spouses in Muslim and Hindu marriages had to approach the courts to gain access to legal rights normally available only to spouses in common law marriages.[292] This chapter analysed the recognition of spouses in Muslim and Hindu marriages for a variety of rights historically only available to spouses in common law marriages.[293] Specifically, court cases recognising spouses' claims from marriage contracts concluded in terms of Muslim and Hindu law were analysed.[294] This chapter also examined court cases recognising spouses in marriages concluded in terms of Muslim and Hindu marriages under the action for loss of support upon the death of the breadwinner.[295]

Additionally, the recognition of spouses in marriages concluded in terms of Muslim and Hindu law under the *MSSA*, *ISA*, and the *Wills Act*[296] were discussed.[297] Also examined were court cases recognising spouses in marriages concluded in terms of Muslim and Hindu law under the *Maintenance Act*,[298] the *Divorce Act*,[299] the *Marriage* Act and Rule 43 of the Uniform Rules of the Court.[300]

This chapter also considered who qualifies as a "descendant" and "parent" in "family units" living under Muslim and Hindu law. "Family units" established in terms of Muslim and Hindu law are recognised in terms of intestate succession law.

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290 See para 4.2 of this study.
291 See para 4.2 of this study.
292 See para 4.2 of this study.
293 See para 4.2 of this study.
294 See para 4.2.1 of this study.
295 See para 4.2.2 of this study.
296 7 of 1983.
297 See para 4.2.3 of this study.
298 99 of 1998.
299 70 of 1979.
300 See para 4.2.4 of this study.

Specifically excluded from the term "spouse" are spouses in a polygynous Hindu marriage.[301] It is recommended that legislation be amended to include spouses in polygynous Hindu marriages in the term "spouse" in the *ISA*.[302]

Another means of establishing a valid "family unit" is life partnerships. The recognition of these partnerships is discussed in Chapter 5.

301 See para 4.4 of this study.
302 See para 4.4 of this study.

Chapter 5: The development of the concept of "family unit" in the law of intestate succession in relation to life partnerships

5.1 Introduction

A life partnership, as an institution, is not comprehensively regulated by law.[1] Life partnerships foster a sense of responsibility commitment and interdependence between partners.[2] As previously indicted, life partners may be of the same- or opposite-sex and life partnerships may be monogamous or polygamous.[3] As with Muslim and Hindu marriages, life partnerships have been recognised for limited purposes by certain acts and court decisions.[4]

The limited recognition indicates that life partners are capable of establishing a "family unit" that may be legally recognised.[5] In this chapter, the recognition of life partnerships as an institution is analysed.[6] Additionally, reasons why persons enter into life partnerships instead of legal marriages are explored.[7] Legislation specifically recognising life partnerships and extending benefits historically only available to spouses in common law marriages is also discussed.[8]

Judgments extending certain benefits to life partners in permanent life partners are comprehensively discussed.[9] The courts initially focused on extending benefits to same-sex life partners in permanent life partnerships due to their inability to marry.[10] Same-sex partners were granted benefits under the *Aliens Control Act*;[11] insurance policies,[12] medical aid schemes,[13] the *Judges Remuneration and Conditions of*

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1 Bonthuys 2007 *SAJHR* 527; Heaton and Roos *Family and Succession Law in South Africa* 123; Monareng and Zounmenou 2007 *Agenda* 122.
2 Goldblatt 2003 *SALJ* 611.
3 Goldblatt 2003 *SALJ* 611; Monareng and Zounmenou 2007 *Agenda* 122. See para 1.1 of this study.
4 Heaton and Roos *Family and Succession Law in South Africa* 123. See paras 4.2 and 5.2 of this study.
5 See para 5.2 of this study.
6 See para 5.2 of this study.
7 See para 5.2 of this study.
8 See para 5.2 of this study.
9 See paras 5.2.1-5.2.2 of this study.
10 See para 5.2.1 of this study.
11 96 of 1991. See para 5.2.1.1 of this study.
12 See para 5.2.1.1 of this study.
13 See para 5.2.1.1 of this study.

Employment Act,[14] the action for the loss of support upon the death of the breadwinner[15] and the *ISA*.[16] The judgments extending the aforementioned rights to same-sex partners are comprehensively analysed in this chapter.[17]

Initially opposite-sex life partners were denied benefits under the *MSSA*.[18] This chapter analyses the exclusion of opposite-sex life partnerships from the *MSSA*.[19] Judgments where the courts have come to the aid of opposite-sex life partners by extending them rights in terms of the action for loss of support upon the death of the breadwinner,[20] recognising opposite-sex partners under the *ISA*[21] and by recognising opposite-sex life partnerships as universal partnerships[22] are also discussed in this chapter. The eventual reconsideration of opposite-sex life partnerships for recognition under the *MSSA* is also discussed.[23]

Judgments recognising polygynous relationships where a life partnership was entered into alongside a common law marriage is also evaluated in this chapter.[24] Persons in life partnerships who have not been recognised under law is identified in this chapter, and suggestions for their inclusion are presented.[25]

Since unmarried parents have received rights to children prior to the introduction of the *Constitution* and the piecemeal recognition of life partnerships, their rights are discussed in Chapter 2.[26] Persons in life partnerships are also recognised as persons who may adopt jointly, which is also discussed in Chapter 2.[27] Persons in life partnerships who may also utilise artificial insemination and surrogate agreements to become "parents"; also discussed in Chapter 2.[28] No discussion of the terms

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14 88 of 1989. See para 5.2.1.1 of this study.
15 See para 5.2.1.1 of this study.
16 See para 5.2.1.2 of this study.
17 See paras 5.2.1.1-5.2.1.2 of this study.
18 See para 5.2.2.1 of this study.
19 See para 5.2.2.1 of this study.
20 See para 5.2.2.2 of this study.
21 See para 5.2.2.4 of this study.
22 See para 5.2.2.3 of this study.
23 See para 5.2.2.4 of this study.
24 See para 5.2.2.5 of this study.
25 See para 5.2.2.1 of this study.
26 See para 2.3.2 of this study.
27 See para 5.3 of this study.
28 See paras 2.3.4-2.3.5 of this study.

"descendant" and "parent" is therefore presented in Chapter 5, since the discussion of "descendant" and "parent" in paragraph 2.3 is also applicable to life partnerships.

In paragraph 5.2, the development of the term "spouse" to include partners in life partnerships is discussed.

5.2 The development of the term "spouse" in life partnerships

Prior to the enactment of the *Constitution*, partners in life partnerships did not constitute "family units" with legally binding consequences.[29] Marriage was treated as "sacred" and may therefore demand certain duties of spouses in a marriage and not of partners in life partnerships.[30] However, life partnerships are a lived reality for many.[31] The question of whether life partnerships should have legal recognition has been the subject of many court decisions, with many answering in the affirmative.[32]

The recognition of human rights upon the enactment of the *Constitution* and the resultant emphasis on the rights of equality and human dignity led to the recognition that a common law marriage is not the only means by which a "family unit" can be established.[33] For instance, in *Volks v Robinson*[34] (hereafter the *Volks* case) Sachs, in a dissenting judgment, posed the question:

> Should a person who has shared her home and life with her deceased partner, born and raised children with him, cared for him in health and sickness, and dedicated her life to support the family they created together, be treated as a legal stranger to his estate, with no claim for subsistence because they were never married? Should marriage be the exclusive touchstone of a survivor's legal entitlement as against the rights of legatees and heirs? [35]

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29 Barratt 2015 *Stell LR* 128; Bilchitz and Judge 2007 *SAJHR* 496; Bonthuys 2007 *SAJHR* 527; Clark and Van Heerden 2024 *SALJ* 472; De Vos 2004 *SAJHR* 188; Goldblatt 2006 *Feminist Legal Studies* 266; Mochela and Smith 2020 *TSAR* 481; Madzika 2020 *De Jure* 397; Meyerson 2010 *Constitutional Court Review* 295; Moosa and Abduroaf 2022 *Ahkam* 7; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 103; Smith 2011 *SALJ* 560; Smith 2016 *SALJ* 287; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 360; Ziehl 1997 *African Sociological Review* 47-48. See para 1.1 of this study.

30 *Dawood v Ministers of Home Affairs* 2000 3 SA 936 (CC) paras 31, 33; Amien 2006 *Human Rights Quarterly* 733; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 361; Ziehl 1997 *African Sociological Review* 48.

31 Barratt and Denson "Domestic Partnerships" 332; Barratt and Domingo "Introduction" 128-129.

32 See paras 5.2.1-5.2.2 of this study.

33 Goldblatt 2003 *SALJ* 616-617.

34 *Volks v Robinson* 2009 JDR 1018 (CC).

35 *Volks* case para 148.

Despite the recognition that life partnerships can give rise to a valid "family unit", there is no comprehensive legislation to regulate life partnerships, the same as with Muslim and Hindu marriages.[36] As with Muslim and Hindu marriages, only piecemeal extension of rights by legislation and court decisions to partners in life partnerships have been granted. Various calls for legislation by courts and academics alike have been made to regulate life partnerships.[37] Regarding the continued non-recognition of life partnerships, the court in *Bwanya v the Master of the High Court*[38] stated that

> (i)n my view the issues dealt with here have been long outstanding (:) the Legislature has been a waited on to remedy the hardships that heterosexual permanent life partnerships go through … it is almost two decades and there is absence of protection for the cohabitants or opposite sex permanent life partnerships.[39]

As a result of the lack of official regulation of life partnerships, no legal consequences automatically attached to life partnerships.[40] For instance, the duty of support between partners in a life partnership, maintenance claims available to the partners upon the termination of the relationship, and importantly for this study, intestate succession rights between partners in a life partnership were not automatically made applicable to life partners in life partnerships.[41] Therefore, termination of the life partnership resulted in partners in life partnerships not having legal protection.[42] Rights such as maintenance claims and intestate succession rights had to be extended by court decisions and legislation.[43]

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36 Barratt 2015 *Stell LR* 128; Bilchitz and Judge 2007 *SAJHR* 496; Bonthuys 2007 *SAJHR* 527; Bonthuys 2018 *PELJ* 20; De Vos 2004 *SAJHR* 188; Goldblatt 2006 *Feminist Legal Studies* 266; Madzika 2020 *De Jure* 397; Meyerson 2010 *Constitutional Court Review* 295; Mochela and Smith 2020 *TSAR* 481, 700; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 103; Smith 2011 *SALJ* 560; Smith 2016 *SALJ* 287; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 360.

37 *Volks v Robinson* para 65; Barratt 2015 *Stell LR* 112; Bilchitz and Judge 2007 *SAJHR* 497; Smith 2010 *PELJ* 246; Smith 2016 *SAJHR* 132, 153-154; Smith 2018 *THRHR* 160-161; Smith and Heaton 2012 *THRHR* 484.

38 *Bwanya v The Master of the High Court* 2021 1 SA 138 (WCC) para 212.

39 *Bwanya v The Master of the High Court* 2021 1 SA 138 (WCC) para 212.

40 Barratt and Denson "Domestic Partnerships" 333; Bonthuys 2018 *PELJ* 12; Heaton "Life Partnerships" 303; Madzika 2020 *De Jure* 397, 399; Mochela and Smith 2020 *TSAR* 482; Smith 2020 *TSAR* 577.

41 Barratt and Denson "Domestic Partnerships" 339; Clark 2002 *SALJ* 639; Lind 1995 *SALJ* 486-487; Monareng and Zounmenou 2007 *Agenda* 122, 126; Smith 2011 *SALJ* 560.

42 Clark 2002 *SALJ* 635, 637.

43 See paras 5.2.1-5.2.2 of this study.

In a life partnership, one partner often functions as the primary breadwinner and the other as the primary caregiver.[44] A life partnership, therefore, often features dependence on one partner by the other.[45] The primary caregiver (usually a woman) often gives up gainful employment and does not establish an estate.[46] The primary caregiver is therefore usually economically vulnerable when they separate from their partners.[47]

Reasons why persons enter life partnerships include the wish of the partners to conclude relationships other than a marriage.[48] The parties may be engaged to be married, but may not have done so yet.[49] Partners might mistakenly believe that their relationships have automatic legal recognition.[50] Women might enter into life partnerships due to men's ability to access work and their capacity to support women financially.[51] Partners in life partnerships might not have a choice to enter into a marriage if one partner refuses.[52] Partners might be unable to compel their partner to marry them due to the one partner's economic power over the other.[53] Women might also be unable to enter valid marriages with their male partners because the male partner is married to another woman.[54]

The importance of protecting vulnerable members of society has been a strong motivation to provide legal relief to life partnerships.[55] Currently, limited recognition is afforded to life partnerships through legislation and court decisions.[56] Statutes that

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44 Barratt 2015 *Stell LR* 111.
45 Barratt 2015 *Stell LR* 113.
46 Barratt 2015 *Stell LR* 111-112; De Vos 2004 *SAJHR* 205.
47 Barratt 2015 *Stell LR* 110-111; Monareng and Zounmenou 2007 *Agenda* 126.
48 Goldblatt 2003 *SALJ* 613; Williams 2004 *SAJHR* 38.
49 Goldblatt 2003 *SALJ* 614.
50 Goldblatt 2003 *SALJ* 614; Meyerson 2010 *Constitutional Court Review* 296, 310; Monareng and Zounmenou 2007 *Agenda* 127; Schäfer 2006 *SALJ* 642.
51 Monareng and Zounmenou 2007 *Agenda* 127.
52 Barratt and Denson "Domestic Partnerships" 333; Goldblatt 2003 *SALJ* 614-615; Meyerson 2010 *Constitutional Court Review* 296; Monareng and Zounmenou 2007 *Agenda* 127.
53 Barratt and Denson "Domestic Partnerships" 333; Goldblatt 2003 *SALJ* 614-615; Meyerson 2010 *Constitutional Court Review* 296; Monareng and Zounmenou 2007 *Agenda* 127.
54 Barratt and Denson "Domestic Partnerships" 333; Bonthuys 2018 *PELJ* 21; Goldblatt 2003 *SALJ* 613; Monareng and Zounmenou 2007 *Agenda* 128.
55 Goldblatt 2003 *SALJ* 616-617; Rautenbach 2023 *Acta Juridica* 99; Smith 2011 *SALJ* 562; Smith 2016 *SALJ* 299. See paras 5.2.1-5.2.2.
56 Barratt 2015 *Stell LR* 110, 128; Heaton and Roos *Family and Succession Law in South Africa* 124; Madzika 2020 *De Jure* 400; Mochela and Smith 2020 *TSAR* 481, 699; Smith 2011 *SALJ* 560-561; Smith 2016 *SALJ* 287. See paras 5.2.1-5.2.2.

recognise life partnerships include the *Insolvency Act*,[57] the *Estate Duty Act*,[58] the *Domestic Violence Act*,[59] the *Pension Funds Act*,[60] the *Transfer Duty Act*,[61] the *Compensation for Occupational Injuries and Diseases Act*,[62] the *Immigration Act*,[63] the *Basic Conditions of Employment Act*,[64] the *Independent Media Commission Act*,[65] the *MSSA*, the *ISA* and the *Employment Equity Act*.[66]

The courts have also recognised life partnerships between unmarried couples who live together in monogamous, marriage-like permanent life partnerships.[67] To recognise life partnerships, the courts have considered various factors.[68] Factors include whether there was a reciprocal duty of support between the partners, the duration of the relationship, whether there was a shared household, whether the partners had children together, financial dependence one another, provision in wills in favour of each other,

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57 24 of 1936. S21(3) includes in the definition of "spouse" "…a women living with a man as his wife or a man living with a woman as her husband although not married to one another".

58 45 of 1955. S1 includes in the term "spouse" a person "in a same-sex or heterosexual union which the commissioner is satisfied is intended to be permanent."

59 116 of 1998. S1 includes in a "domestic relationship" persons where "they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage…".

60 24 of 1956. S1 defines "spouse" to include "a person who is the permanent life partner…".

61 40 of 1949. S1 defines a "spouse" to include "…the partners… in a same-sex or heterosexual union which the commissioner is satisfied is intended to be permanent."

62 130 of 1993. S1 defines a "dependent" to include "…a person with whom the employee was at the time of the employee's death living as husband and wife."

63 13 of 2002. S1 includes in its definition of spouse "…a person who is a permanent homosexual or heterosexual relationship as prescribed".

64 75 of 1997. S27(2)(c) recognises an employee's "spouse or life partner".

65 148 of 1993. Section 1 defines "spouse" to include "a person in a permanent life partnership in which the partners undertook reciprocal duties of support" and "survivor" to mean "the surviving partner of a permanent life partnership…in which the partners undertook reciprocal duties of support…".

66 55 of 1998. S1 recognises partners under "family responsibility". Barratt and Denson "Domestic Partnerships" 338; De Ru 2013 *Fundamina* 233-234; De Vos 2004 *SAJHR* 192; Goldblatt 2003 *SALJ* 620; Heaton "Life Partnerships" 312-313; Heaton and Roos *Family and Succession Law in South Africa* 125; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 162; Smith 2011 *SALJ* 561.

67 Barratt 2015 *Stell LR* 110; Barratt 2020 *PELJ* 10-11; Bonthuys 2018 *PELJ* 11, 21; Clark 2002 *SALJ* 636. See paras 5.2.1-5.2.2 of this study for a comprehensive discussion of court cases extending legal protection to partners in life partnerships.

68 *Bwanya v Master of the High Court* 2022 3 SA 250 (CC) para 76; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 27; Barratt 2020 *PELJ* 10-11; Bonthuys 2018 *PELJ* 11, 21; Goldblatt 2003 *SALJ* 625; Heaton "Life Partnerships" 316; Heaton and Roos *Family and Succession Law in South Africa* 124.

whether friends and family accept them as a couple, if they planned to get married and a shared commitment to a relationship.[69]

The courts have also recognised a contract of support between partners as giving rise to a legally enforceable right between life partners.[70] A contract of support may be concluded tacitly or expressly.[71] The piecemeal extension of rights and duties to life partners are an unsatisfactory method to ensure the protection of life partnerships.[72]

The courts have extended recognition to life partners in terms of the *Aliens Control Act*,[73] insurance policies,[74] medical aid schemes,[75] the *Judges Remuneration and Conditions of Employment Act*,[76] the action for the loss of support upon the death of the breadwinner,[77] intestate succession rights,[78] the *MSSA*,[79] and universal partnerships.[80] As explained in paragraph 4.2 of this study, the recognition of persons under legislation or common law actions other than for intestate succession is also examined. This is informative for this study due to the similarity of the primary aim of such actions and legislation to that of intestate succession. The primary motivation for providing relief to unrecognised persons is their perceived vulnerability in society and there being a reciprocal duty of support between partners in a permanent relationship.

Life partners have been recognised under similar acts and common law actions as spouses in Muslim and Hindu marriages.[81] Life partners have also been granted a claim in a universal partnership. A universal partnership dictates that each partner must

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69 *Bwanya v Master of the High Court* 2022 3 SA 250 (CC) para 76; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 27; Barratt 2020 *PELJ* 10-11; Bonthuys 2018 *PELJ* 11, 21; Goldblatt 2003 *SALJ* 625; Heaton "Life Partnerships" 316; Heaton and Roos *Family and Succession Law in South Africa* 124.

70 Barratt 2015 *Stell LR* 111. See paras 5.2.1-5.2.2 for a comprehensive discussion of cases recognising a contract of support between life partners in life partnerships.

71 Bonthuys 2018 *PELJ* 13; Mochela and Smith 2020 *TSAR* 482.

72 *Fourie* case para 125; Heaton "Life Partnerships" 303; Mochela and Smith 2020 *TSAR* 490, 699.

73 96 of 1991. See para 5.2.1 of this study.

74 See para 5.2.1 of this study.

75 See para 5.2.1 of this study.

76 47 of 2001. See para 5.2.1 of this study.

77 See paras 5.2.1-5.2.2 of this study.

78 See paras 5.2.1-5.2.2 of this study.

79 See para 5.2.2 of this study.

80 See para 5.2.2 of this study.

81 See para 4.2 of this study.

bring something into the partnership, such as money, skill expertise or labour.[82] The partnership must be for the joint benefit of all partners, and its primary objective must be to generate profit.[83] Although life partners may not be able to make a profit, life partners intend to save money by running a joint household.[84]

A universal partnership's primary aim is therefore not to provide relief to vulnerable members in society. Yet the courts have strived to recognise life partnerships as universal partnerships to provide relief to life partners who cannot claim relief in terms of the *Divorce Act*.[85] The arguments for recognising life partnerships as universal partnerships are therefore instructive for this study, as they illustrate that life partners may form a legally recognisable institution.

5.2.1 The development of the term "spouse" to include same-sex life partners

As illustrated in Chapter 1, same-sex couples suffer from a long history of discrimination and purposeful exclusion from the "family unit".[86] As a result, same-sex life partnerships were recognised primarily because such couples were unable to marry prior to the enactment of the *Civil Union Act*.[87]

In paragraph 5.2.1.1, court cases where partners in life partnerships were recognised under the *Aliens Control Act*,[88] insurance policies, medical aid schemes, the *Judges Remuneration and Conditions of Employment Act*[89] and the action for the loss of support upon the death of the breadwinner are discussed.

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82 Barratt 2015 *Stell LR* 122-123; Barratt and Denson "Domestic Partnerships" 335.
83 Barratt 2015 *Stell LR* 122-123; Barratt and Denson "Domestic Partnerships" 335.
84 Barratt and Denson "Domestic Partnerships" 335.
85 70 of 1979. See para 5.2.2 of this study.
86 Cameron 1993 *SALJ* 456-459; Lind 1995 *SALJ* 486, 491; Wolhuter 1997 *SALJ* 390-392.
87 Barratt 2020 *PELJ* 10; Bilchitz and Judge 2007 *SAJHR* 496; Bonthuys 2002 *SALJ* 756; Bonthuys 2018 *PELJ* 12; De Vos 2004 *SAJHR* 196; De Vos 2007 *SAJHR* 462; Heaton "Life Partnerships" 309; Meyerson 2010 *Constitutional Court Review* 306; Smith 2011 *SALJ* 561; Smith 2016 *SALJ* 288, 291; Smith 2016 *SAJHR* 138; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 369; Williamson 2004 *SAJHR* 56. See para 2.2.1 of this study.
88 96 of 1991. The *Aliens Control Act* was repealed by the *Immigration Act* 13 of 2002.
89 88 of 1989.

5.2.1.1 The inclusion of same-sex life partners under the *Aliens Control Act*,[90] insurance policies, medical aid schemes, the *Judges Remuneration and Conditions of Employment Act*[91] and the action for the loss of support upon the death of the breadwinner

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[92] (hereafter the *National Coalition v Minister of Home Affairs* case) the court coined the term "life partnership" and recognised that marriage-like, same-sex life partnerships could attract legal rights and duties.[93] The *National Coalition v Minister of Home Affairs* case dealt with immigration rights of life partners of South African residents.[94] Same-sex partners in permanent life partnerships did not have access to protection from the *Aliens Control Act*[95] since they were unable to marry.[96]

The court held that same-sex partners could establish all the elements of a "family unit" and should be afforded the same protection as other families.[97] However, not all same-sex relationships should be protected.[98] Same-sex relationships resembling a marriage should be protected.[99] The partners should owe each other a reciprocal duty of support, for example, have a joint responsibility for supporting and raising children born of the marriage.[100]

For a court to recognise a life partnership, there should be a consideration based on the facts of each case. Factors to be taken into account include whether the partners showed that they owed each other a reciprocal duty of support; their respective ages; the duration of the partnership; whether there was a ceremony to establish the

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90 96 of 1991. The *Aliens Control Act* was repealed by the *Immigration Act* 13 of 2002.
91 88 of 1989.
92 2000 2 SA 1 (CC).
93 *National Coalition v Minister of Home Affairs* para 97; De Vos 2007 *SAJHR* 450; De Ru 2013 *Fundamina* 236; Schäfer 2006 *SALJ* 627.
94 *National Coalition v Minister of Home Affairs* para 1; Bilchitz and Judge 2007 *SAJHR* 470; Bonthuys 2002 *SALJ* 753; Bonthuys 2007 *SAJHR* 528; De Ru 2013 *Fundamina* 236.
95 96 of 1991. The *Aliens Control Act* was repealed by the *Immigration Act* 13 of 2002.
96 *National Coalition v Minister of Home Affairs* para 36; Mochela and Smith 2020 *TSAR* 486; Schäfer 2006 *SALJ* 629, 631-632.
97 *National Coalition v Minister of Affairs* para 17; Bonthuys 2002 *SAJL* 754; De Vos 2004 *SAJHR* 196; Goldblatt 2006 *Feminist Legal Studies* 265; Schäfer 2006 *SALJ* 627.
98 *National Coalition v Minister of Home Affairs* para 33; De Vos 2007 *SAJHR* 450.
99 *National Coalition v Minister of Home Affairs* para 27; De Vos 2004 *SAJHR* 196, 198-203; De Vos 2007 *SAJHR* 452-453.
100 *National Coalition v Minister of Home Affairs* para 27; De Vos 2004 *SAJHR* 196.

permanency of the relationship; how friends and family viewed the partnership; whether the partners owned or leased a joint property; whether the partners shared living expenses and provided financial support to one another; whether partners provided medical and pension benefits to one another; whether there is a partnership agreement or whether the partners provided for each other in their wills.[101] These considerations are not comprehensive or all-inclusive.[102]

The court determined that the ordinary meaning of the term "spouse" did not include same-sex partners.[103] The court found that a life partnership has come into existence between the partners and held that the right to equality was infringed due to the inability of same-sex partners to marry.[104] Discrimination was on the grounds of sexual orientation and marital status.[105] It also infringed the rights to dignity and privacy.[106] The discrimination had a negative impact on a minority group of society by reinforcing harmful stereotypes against gay and lesbian persons.[107] There was no justification for the discrimination, and the *Aliens Control Act*[108] was declared unconstitutional.[109] To cure the constitutional defects, the court read in the words "partner in a permanent

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101 *National Coalition v Minister of Home Affairs* para 27; Bonthuys 2018 *PELJ* 11; De Vos 2004 *SAJHR* 197; De Vos 2007 *SAJHR* 451-452; Heaton "Life Partnerships" 316.

102 De Vos 2004 *SAJHR* 197; Smith 2010 *PELJ* 265.

103 *National Coalition v Minister of Home Affairs* para 25; Bonthuys 2002 *SALJ* 755; Louw 2005 *Journal of Homosexuality* 152; Robinson and Swanepoel 2004 *PELJ* 3.

104 *National Coalition v Minister of Home Affairs* paras 40, 57; Barratt and Denson "Domestic Partnerships" 339; Bonthuys 2002 *SALJ* 753; De Ru 2013 *Fundamina* 236; Mochela and Smith 2020 *TSAR* 486; Schäfer 2006 *SALJ* 631. See para 1.1.3.1 of this study.

105 *National Coalition v Minister of Home Affairs* para 40; Barratt and Denson "Domestic Partnerships" 339; Bonthuys 2002 *SALJ* 753; De Ru 2013 *Fundamina* 236; Mochela and Smith 2020 *TSAR* 486; Schäfer 2006 *SALJ* 631.

106 *National Coalition v Minister of Home Affairs* para 57; Bonthuys 2002 *SALJ* 753. See para 1.1.3.1 of this study.

107 *National Coalition v Minister of Home Affairs* para 49.

108 96 of 1991.

109 *National Coalition v Minister of Home Affairs* paras 41, 59; Reddy 2006 *Agenda* 148. See para 1.1.3.1 of this study.

same-sex partnership" after the words "spouse" or "partner" in the *Aliens Control Act*,[110] wherever they appear.[111]

Despite opposite-sex couples ability to establish a marriage-like relationship, the court did not consider the position of unmarried opposite-sex life partners.[112] Although the court did identify discrimination against same-sex life partners on the grounds of sexual orientation and marital status, it was the inability of persons to marry that justified the extension of the term spouse in the *Aliens Control Act*.[113] Whether legislation like the *Aliens Control Act*[114] unfairly discriminated against opposite-sex life partners remained an unanswered question.[115] The precedent created by *National Coalition v Minister of Home Affairs* case is that intimate relationships not similar to a heterosexual, monogamous marriage are not worthy of protection.[116] This precedent has been confirmed by further judgments dealing with life partnerships.[117] Therefore, partners in relationships not resembling a monogamous common law marriage are not protected under South African law.[118]

In *Farr v Mutual and Federal Insurance Co Ltd*[119] the court held that the phrase "a member of the policy holder's family" in an insurance policy includes a same-sex life partner.[120] The court confirmed that same-sex partners can establish a relationship that resembles a marriage worthy of legal protection.[121] Therefore, insurance benefits available to married spouses should be extended to same-sex life partners.[122] As in the

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110 96 of 1991.

111 96 of 1991; *National Coalition v Minister of Home Affairs* paras 73, 82, 86, 97; *Bwanya v The Master of the High Court* 2021 1 SA 138 (WCC) para 106; Barratt and Denson "Domestic Partnerships" 339; Bichitz and Judge 2007 *SAJHR* 470; Bonthuys 2002 *SAJL* 754; Clark 2002 *SALJ* 638; De Vos 2007 *SAJHR* 451; Goldblatt 2003 *SALJ* 620; Goldblatt 2006 *Feminist Legal Studies* 266; Mochela and Smith 2020 *TSAR* 486; Reddy 2006 *Agenda* 148; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and The Family* 103.

112 Reddy 2006 *Agenda* 148.

113 96 of 1991.

114 96 of 1991.

115 See para 5.2.2 of this study.

116 De Vos 2004 *SAJHR* 196.

117 See paras 5.2.1-5.2.2 of this study.

118 See para 5.3 for a discussion of the possible recognition of other forms of life partnerships.

119 2000 3 SA 684 (C).

120 *Farr v Mutual and Federal Insurance CO Ltd* 2000 3 SA 684 (C) para 96I; Barratt and Denson "Domestic Partnerships" 340; De Ru 2013 *Fundamina* 238.

121 Louw 2005 *Journal of Homosexuality* 150-151.

122 Bonthuys 2007 *SAJHR* 528.

National Coalition v Minister of Home Affairs case, the inclusion of same-sex partners under insurance policies was due to their inability to marry. Opposite-sex partners were not considered in *Farr v Mutual and Federal Insurance Co Ltd*[123] and remain unable to claim benefits of insurance policies, unless explicitly included.[124] The focus was again on whether the relationship resembled a common law marriage, excluding partners in other forms of life partnerships.[125]

Also, in *Langemaat v Minister of Safety and Security*[126] (hereafter the *Langemaat* case), the court recognised that a life partnership had existed for years, the partners shared a home and owed each other a duty of support.[127] The relationship was therefore similar to a marriage.[128] The question was whether a same-sex life partner fell within the definition of dependants of a medical aid scheme established in terms of the *Police Act*.[129] The court held that only spouses in legally concluded marriages, not same-sex partners, qualified for benefits of the medical aid.[130]

The court determined that the exclusion of same-sex partners from the benefits of the medical aid was an infringement of the right to equality.[131] The court recognised that a dependant is someone who relies on another for maintenance.[132] To deny that same-sex partners can be dependent on each other amounted to discrimination against same-sex life partners, which was unconstitutional.[133]

As determined in the *National Coalition v Minister of Home Affairs* case and *Farr v Mutual and Federal Insurance Co Ltd*,[134] the court in the *Langemaat* case concluded that same-sex life partnerships are as worthy of protection as marriages.[135] Without

123 2000 3 SA 684 (C).
124 See para 5.2.2 of this study.
125 See para 5.3 of this study.
126 1998 19 ILJ 240 (T).
127 *Langemaat* case 243B-C, 245J; Barratt 2020 *PELJ* 10; Bonthuys 2002 *SALJ* 755; Louw 2005 *Journal of Homosexuality* 144.
128 *Langemaat* case 245J; Bonthuys 2018 *PELJ* 12; Louw 2005 *Journal of Homosexuality* 143; Williams 2004 *SAJHR* 36.
129 7 of 1958; *Langemaat* case 243H-I; Bonthuys 2002 *SALJ* 754-755; Louw 2005 *Journal of Homosexuality* 143.
130 *Langemaat* case 243H-I.
131 *Langemaat* case 244C; Bonthuys 2002 *SALJ* 754; De Ru 2013 *Fundamina* 237.
132 *Langemaat* case 244H-I.
133 *Langemaat* case 244J; Bonthuys 2002 *SALJ* 754.
134 2000 3 SA 684 (C).
135 *Langemaat* 244J-H; Louw 2005 *Journal of Homosexuality* 144.

indicating on which grounds the medical aid discriminated against same-sex partners, the court held the discrimination unconstitutional for denying same-sex partners benefits in medical aid schemes established in terms of the *Police Act*.[136] Therefore, same-sex partners have the right of access to statutory health schemes.[137]

Criticism of the judgment in the *Langemaat* case is that it lacked a proper investigation into the impact of the discrimination on the right to equality.[138] It appears that the court simply assumed equality based on the presiding officer's subjective experiences.[139] However, had the court engaged in a proper investigation as to whether the right to equality was infringed, similar conclusions could have been reached as in *National Coalition v Minister of Home Affairs* case and *Farr v Mutual and Federal Insurance Co Ltd*.[140] The historical denial of rights to same-sex partners would have clearly indicated discrimination on the grounds of sexual orientation and allowed the court to properly substantiate the inclusion of same-sex partners under medical aid schemes. The court in the *Langemaat* case only considered same-sex life partnerships to the exclusion of opposite-sex life partnerships, as the preceding judgments discussed above.[141] The inability of same-sex partners to conclude a valid marriage was again the main motivation for the extension of benefits to same-sex partners.

In *Satchwell v President of the Republic of South Africa*[142] (hereafter the *Satchwell* case) the court again confirmed that the duty of support does not only arise in the context of a marriage.[143] The constitutionality of the *Judges Remuneration and Conditions of Employment Act*,[144] which denied spousal benefits to same-sex partners

136 7 of 1958; *Langemaat* 245J; De Ru 2013 *Fundamina* 237

137 Bonthuys 2007 *SAJHR* 528; Reddy 2006 *Agenda* 147-148; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 163; Robinson 2005 *Obiter* 497; Robinson and Smith 2008 *International Journal of Law, Policy and the Family* 387.

138 Bonthuys 2002 *SALJ* 755; Louw 2005 *Journal of Homosexuality* 145.

139 Bonthuys 2002 *SALJ* 755; Louw 2005 *Journal of Homosexuality* 145. See for example where the court held "I would ignore my experience and knowledge of several same-sex couples who have lived together for years. The stability … no different from the many married couples I know." *Langemaat* case 244G-H.

140 2000 3 SA 684 (C).

141 See also para 5.2.2 of this study.

142 2002 6 SA 1 (CC).

143 *Satchwell* case para 15; Barratt 2020 *PELJ* 10; Smith and Heaton 2012 *THRHR* 475.

144 88 of 1989.

of judges, was challenged.[145] The partners lived together in a permanent life partnership.[146] The partners had assumed reciprocal duties of support.[147]

The court determined that a reciprocal duty of support was automatically applicable where the partners lived together for a significant period of time.[148] However, the couples were unable to marry at the time the case was heard and could therefore not access the benefits in the *Judges Remuneration and Conditions of Employment Act*.[149] The court held that since the relationship was similar to a marriage, and the partners owed each other a reciprocal duty of support, the usual consequences of marriage should apply.[150]

The court held that the failure to afford the same benefits to a marriage-like relationship constituted unfair discrimination on the grounds of marital status and sexual orientation.[151] The right to equality was therefore infringed.[152] Parts of the *Judges Remuneration and Conditions of Employment Act*[153] was therefore unconstitutional.[154] The court ordered that sections 8 and 9 of the *Judges Remuneration and Conditions of Employment Act*[155] and the regulations to the act must be read as if the words "or partner in a permanent same-sex life partnership" were inserted after the word "spouse" wherever it appears in the act.[156] Same-sex

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145 *Satchwell* case para 3; Bonthuys 2002 *SALJ* 755.
146 *Satchwell* case para 4; Reddy 2006 *Agenda* 149.
147 *Satchwell* case para 5; Cordier and Rautenbach 2009 *Obiter* 595; Schäfer 2006 *SALJ* 630.
148 *Satchwell* case para 16; Barratt 2020 *PELJ* 10.
149 88 of 1989; *Satchwell* case para 10; Barratt 2020 *PELJ* 10; De Ru 2013 *Fundamina* 237; Reddy 2006 *Agenda* 149.
150 *Satchwell* case para 14; Barratt 2020 *PELJ* 10-11.
151 *National Coalition v Minister of Home Affairs* case para 40; *Satchwell* case paras 14, 17-54, 23-24; Barratt 2020 *PELJ* 11; Boniface 2023 *THRHR* 517; Bonthys 2002 *SALJ* 755; De Ru 2013 *Fundamina* 237.
152 *Satchwell* case para 21; De Ru 2013 *Fundamina* 236-237.
153 88 of 1989.
154 *Satchwell* case para 26; Barratt 2020 *PELJ* 10; Reddy 2006 *Agenda* 149.
155 88 of 1989.
156 *Satchwell* case para 33; Barratt 2020 *PELJ* 10; De Ru 2013 *Fundamina* 237; Reddy 2006 *Agenda* 149; Robinson and Swanepoel 2004 *PELJ* 3; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and The Family* 103; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 387.

partners are therefore entitled to benefits promised by the *Judges Remuneration and Conditions of Employment Act*.[157]

The court in the *Satchwell* case again did not consider whether partners in opposite-sex life partnerships should be recognised under the *Judges Remuneration and Conditions of Employment Act*.[158] The main consideration was again the inability of same-sex partners to enter into a valid marriage.

Following the *Satchwell* case, the *Judges Remuneration and Conditions of Employment Act*[159] was replaced.[160] The new *Judges Remuneration and Conditions of Employment Act*[161] re-enacted the unconstitutional exclusion of same-sex partners.[162] Upon application, the court declared the new *Judges Remuneration and Conditions of Employment Act*[163] unconstitutional on the same basis as the first judgment and ordered a similar reading-in order.[164]

In *Du Plessis v Road Accident Fund*[165] (hereafter the *Du Plessis* case) the court extended rights in terms of the common law action for loss of support on the death of a breadwinner to same-sex life partners.[166] To succeed with an action of loss of support upon the death of a breadwinner, the claimant must have had a duty to support the

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157 88 of 1989; Barratt and Denson "Domestic Partnerships" 340; Bilchitz and Judge 2007 *SAJHR* 470; Bonthuys 2007 *SAJHR* 528; Goldblatt 2006 *Feminist Legal Studies* 266; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 163; Robinson 2005 *Obiter* 497.

158 88 of 1989; Barratt and Denson "Domestic Partnerships" 340; Bilchitz and Judge 2007 *SAJHR* 470; Bonthuys 2007 *SAJHR* 528; Goldblatt 2006 *Feminist Legal Studies* 266; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 163; Robinson 2005 *Obiter* 497. See para 5.2.2 of this study.

159 88 of 1989.

160 *Satchwell v President of the Republic of South Africa* 2003 4 SA 266 (CC) para 2.

161 47 of 2001.

162 *Satchwell v President of the Republic of South Africa* 2003 4 SA 266 (CC) para 2.

163 47 of 2001.

164 *Satchwell v President of the Republic of South Africa* 2003 4 SA 266 (CC) paras 13-14; De Ru 2013 *Fundamina* 237.

165 2004 1 SA 359 (SCA).

166 *Du Plessis* case para 42; Barratt and Denson "Domestic Partnerships" 340; Bonthuys 2007 *SAJHR* 528; De Ru 2013 *Fundamina* 237-238; Heaton "Introduction" 5; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 103; Reddy 2006 *Agenda* 147; Smith and Heaton 2012 *THRHR* 473; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 371.

dependant, the duty must be legally enforceable and be worthy of protection determined by public policy.[167]

In considering whether to recognise same-sex partners for the action for loss of support upon the death of the breadwinner, the court noted that the couple was in a permanent life partnership similar to marriage.[168] Same-sex partners were not able to conclude a valid marriage, but they could enter into a contract, either expressly or tacitly, for reciprocal duties of support.[169] The court held that the same-sex permanent life partnership in question was worthy of legal protection.[170] Denying same-sex partners a claim for maintenance upon the death of a breadwinner infringed their rights to equality and human dignity.[171] Therefore, same-sex life partners may claim in terms of the action for loss of support upon the death of the breadwinner.[172]

The court in the *Du Plessis* case left open the question whether opposite-sex life partners should be recognised under the action for loss of support upon the death of the breadwinner.[173] Important for the court in the *Du Plessis* case to extend the action for loss of support upon the death of the breadwinner was whether a reciprocal duty of support worthy of protection existed between the partners. The ability to conclude a valid marriage is therefore irrelevant for the action of the loss of support upon the death of the breadwinner.

The result of the *Langemaat* case, *Farr v Mutual and Federal Insurance Co Ltd*,[174] the *Satchwell* case and the *Du Plessis* case is that same-sex life partners were recognised as a valid means by which a "family unit" may be established. The recognition of same-sex life partners was mainly due to their inability to marry legally. Opposite-sex life

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167 *Du Plessis* case para 12; Smith and Heaton 2012 *THRHR* 473.

168 *Du Plessis* case paras 3, 15; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 163; Smith and Heaton 2012 *THRHR* 473.

169 *Du Plessis* case para 16; Schäfer 2006 *SALJ* 630; Smith 2010 *PELJ* 253; Smith and Heaton 2012 *THRHR* 473; Zitzke 2018 *TSAR* 186.

170 *Du Plessis* case para 33; Zitzke 2018 *TSAR* 186.

171 *Du Plessis* case para 26; De Ru 2013 *Fundamina* 238. See paras 1.1.3.1-1.1.3.2 of this study.

172 *Du Plessis* case para 42; Barratt and Denson "Domestic Partnerships" 340; Bonthuys 2007 *SAJHR* 528; De Ru 2013 *Fundamina* 237-238; Heaton "Introduction" 5; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 103; Reddy 2006 *Agenda* 147; Smith and Heaton 2012 *THRHR* 473; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 371.

173 *Du Plessis* case para 43.

174 2000 3 SA 684 (C).

partners were not extended the same rights, which created, upon the enactment of the *Civil Union Act*, the anomalous position where same-sex life partners enjoyed more rights than opposite-sex life partners.[175]

In paragraph 5.2.1.2, court cases recognising same-sex partners in life partnerships under the *ISA* are discussed.

5.2.1.2 The development of the term "spouse" to include same-sex life partners under the *ISA*

In *Gory v Kolver*[176] (hereafter the *Gory* case), the court held that the differentiation of opposite-sex spouses in valid marriages as opposed to same-sex partners in life partnerships resulted in unfair discrimination.[177] The *Gory* case was decided before the enactment of the *Civil Union Act*.[178] Same-sex couples were therefore not able to marry.[179] The partners were involved in a same-sex life partnership with reciprocal duties of support owed to each other.[180] They shared expenses and supported each other financially.[181] The court determined that the *ISA*, by excluding same-sex life partners, infringed the rights of equality, specifically on the grounds of sexual orientation and human dignity of life partners.[182]

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175 Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 371. See para 5.2.2 of this study for the recognition of opposite-sex life partners.

176 2007 4 SA 97 (CC). See para 1.1.3.2 of this study.

177 *Gory* case para 19; De Ru 2013 *Fundamina* 239; Du Toit 2021 *Journal of Civil Law Studies* 374; Hofmeyr and Paleker *The Law of Succession in South Africa* 841; Mochela and Smith 2020 *TSAR* 486; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 163; Smith 2010 *PELJ* 260.

178 *Gory* case para 19; De Waal and Schoeman-Malan *Erfreg* 21; Du Toit 2021 *Journal of Civil Law Studies* 375; Heaton "Life Partnerships" 310; Hofmeyr and Paleker *The Law of Succession in South Africa* 841; Jamneck 2014 *PELJ* 975; Rautenbach 2023 *Acta Juridica* 102; Rautenbach "Families and Legal Pluralism in South Africa" 87.

179 Hofmeyr and Paleker *The Law of Succession in South Africa* 841; Jamneck 2014 *PELJ* 975; Smith 2018 *THRHR* 153; Meyerson 2010 *Constitutional Court Review* 306; Rautenbach "Families and Legal Pluralism in South Africa" 87; Zitzke 2018 *TSAR* 18.

180 *Gory* case para 2; Barratt 2020 *PELJ* 11; Barratt and Denson "Domestic Partnerships" 340; Hofmeyr and Paleker *The Law of Succession in South Africa* 841; Mochela and Smith 2020 *TSAR* 486; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 163; Smith 2010 *PELJ* 261, 266; Smith 2016 *SALJ* 291; Smith 2018 *THRHR* 153.

181 *Gory* case para 2; Barratt 2020 *PELJ* 12; Smith 2018 *THRHR* 153.

182 *Gory* case para 19; De Ru 2013 *Fundamina* 239; Du Toit 2021 *Journal of Civil Law Studies* 374; Hofmeyr and Paleker *The Law of Succession in South Africa* 841; Mochela and Smith 2020 *TSAR* 486; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 163; Smith 2010 *PELJ* 260.

The exclusion of the surviving partners of same-sex relationships from the right to inherit was therefore unconstitutional.[183] The court ordered the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support" be read into the *ISA* after the word "spouse".[184] Same-sex partners are therefore recognised as "spouses" in intestate succession.[185]

Despite the *Civil Union Act* being imminent, the court held that same-sex life partners would not necessarily able to claim in terms of the *ISA* even after they had gained the right to marry, unless legislation was enacted that specifically included same-sex life partners.[186] The court recognised that recognising same-sex partners without recognising opposite-sex partners would amount to unfair discrimination against opposite-sex partners.[187] Once they get married, there would be no good reason to distinguish between opposite and same-sex couples.[188] Parliament could amend the inequality by enacting legislation.[189] Same-sex life partners should therefore be granted intestate succession rights, as there is no guarantee that they would be granted such rights under the *Civil Union Act*.[190]

The result of the *Gory* case was that opposite-sex partners did not have the right inherit in terms of the *ISA*, while same-sex partners did. After the *Gory* case was

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183 *Gory* case para 19; De Ru 2013 *Fundamina* 239; Du Toit 2009 *SALJ* 468; Smith 2010 *PELJ* 260; Wood-Bodley 2018 *Obiter* 276.

184 *Gory* case paras 28-29, 31 66; Barratt 2020 *PELJ* 3, 12; De Waal and Mills 2021 *TSAR* 567; De Vos 2007 *SAJHR* 462; De Waal and Schoeman-Malan *Erfreg* 20; Du Toit 2009 *SALJ* 468; Du Toit 2021 *Journal of Civil Law Studies* 374; Hofmeyr and Paleker *The Law of Succession in South Africa* 841; Kruuse 2017 *The International Survey of Family Law* 352; Meyerson 2010 *Constitutional Court Review* 306; Mochela and Smith 2020 *TSAR* 486; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and The Family* 103; Smith 2010 *PELJ* 260; Smith 2016 *SAJHR* 138, 291; Smith 2018 *THRHR* 154; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 373-374; Wood-Bodley 2018 *Obiter* 276; Zitzke 2018 *TSAR* 186-187.

185 Barratt 2020 *PELJ* 12; Madzika 2020 *De Jure* 39, 39, 53; Rautenbach 2023 *Acta Juridica* 102.

186 *Gory* case para 29; Barratt 2020 *PELJ* 12; Barratt and Denson "Domestic Partnerships" 340; De Vos 2007 *SAJHR* 462; Kruuse 2017 *The International Survey of Family Law* 352; Meyerson 2010 *Constitutional Court Review* 306; Smith 2011 *SALJ* 561; Smith 2016 *SAJHR* 140; Smith and Heaton 2012 *THRHR* 481; Zitzke 2018 *TSAR* 186.

187 *Gory* case para 28; Smith 2010 *PELJ* 260; Zitzke 2018 *TSAR* 186.

188 *Gory* case para 29; Kruuse 2017 *The International Survey of Family Law* 352; Meyerson 2010 *Constitutional Court Review* 306; Smith 2016 *SAJHR* 141.

189 *Gory* case para 28; Barratt 2020 *PELJ* 12; De Vos 2007 *SAJHR* 462; Meyerson 2010 *Constitutional Court Review* 361; Smith 2010 *PELJ* 261; Zitzke 2018 *TSAR* 186-187.

190 *Gory* case para 28; Bonthuys 2007 *SAJHR* 528; De Vos and Barnard 2007 *SALJ* 823; Heaton "Life Partnerships" 310.

decided, the *Civil Union Act* was enacted, which had the effect that civil union partners or spouses were recognised under the *ISA*.[191]

In *Laubscher v Duplan*[192] (hereafter referred to as the *Laubscher* case), the Constitutional Court had to decide whether the enactment of the *Civil Union Act* invalidated the *Gory* decision.[193] The *Laubscher* case concerned a couple who lived in a partnership with mutual support obligations without entering into a civil union.[194] The court determined that until the legislature specifically amends the outcome of the *Gory* decision, the benefit made available in the *Gory* case would remain available to same-sex partners in permanent life partnerships where there is a reciprocal duty to maintain each other.[195] Opposite-sex life partners remained unable to claim intestate succession rights from each other.[196] The court held that it is highly unlikely that Parliament amended the *ISA* to exclude same-sex life partners when the *Civil Union Act* was enacted.[197] The inequality between same-sex and heterosexual partners was not sufficient justification to deprive same-sex partners of the benefits contained in *ISA*.[198]

The argument was made that once same-sex couples gained the right to marry, the legal impediment that prohibits them from entering into a relationship where the *ISA* would be applicable, would be removed.[199] The *Laubscher* case was heard after *Volks v Robinson*,[200] discussed below, where the court denied an opposite-sex couple the

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191 See para 2.2.2 of this study.

192 2017 2 SA 264 (CC).

193 *Laubscher* case para 2; Du Toit 2021 *Journal of Law of Civil Studies* 375; Smith 2018 *THRHR* 152; Wood-Bodley 2018 *Obiter* 279.

194 *Laubscher* case para 1; Hofmeyr and Paleker *The Law of Succession in South Africa* 842; Mochela and Smith 2020 *TSAR* 488; Rautenbach 2023 *Acta Juridica* 104; Smith 2018 *THRHR* 152; Wood-Bodley 2018 *Obiter* 278; Zitzke 2018 *TSAR* 183.

195 *Laubscher* case para 55; Barratt 2020 *PELJ* 13; Barratt and Denson "Domestic Partnerships" 340; Du Toit 2021 *Journal of Civil Law Studies* 375-376; Heaton "Life Partnerships" 310; Hofmeyr and Paleker *The Law of Succession in South Africa* 842-843; Mochela and Smith 2020 *TSAR* 480, 489; Rautenbach 2023 *Acta Juridica* 104; Rautenbach "Families and Legal Pluralism in South Africa" 87; Smith 2016 *SALJ* 294; Smith 2018 *THRHR* 155; Wood-Bodley 2018 *Obiter* 278, 281; Zitzke 2018 *TSAR* 188.

196 Smith 2016 *SALJ* 289.

197 *Laubscher* case paras 23-24, 32, 34, 55; Barratt 2020 *PELJ* 13; Bonthuys 2018 *PELJ* 28; Hofmeyr and Paleker *The Law of Succession in South Africa* 842; Mochela and Smith 2020 *TSAR* 480; Smith 2016 *SALJ* 291, 294; Smith 2018 *THRHR* 155; Wood-Bodley 2018 *Obiter* 280.

198 *Laubscher* case paras 22-23; Rautenbach 2023 *Acta Juridica* 102.

199 *Laubscher* case para 22; Smith 2018 *THRHR* 155; Wood-Bodley 2018 *Obiter* 279.

200 2005 5 BCLR 446 (CC). See para 5.2.2 of this study.

right to claim maintenance in terms of the *MSSA* since they had the choice to marry. The court in the *Laubscher* case distinguished its decision from the decision in the *Volks* case on the basis that the *Volks* case dealt with the *MSSA* and *Laubscher* case dealt with the *ISA*.[201] Additionally, in the *Volks* case, a valid will was present, whereas in the *Laubscher* case there was no will.[202] Also, in the *Laubscher* case, there was not an equality challenge, but rather a question of interpretation.[203]

The court stated that there might be a time to reconsider the *Volks* case, since there was no reason to distinguish between same- and opposite-sex life partners, but that the facts of the case did not render it necessary to reconsider the decision in the *Volks* case.[204] The court therefore confirmed the right of a surviving same-sex life partner to inherit on intestacy irrespective of the existence of a civil union.[205]

The minority judgment held that the *Gory* case was temporary and the *Civil Union Act* solved the problem presented in the *Gory* case.[206] The decision should, however, stand because of the hardships faced by same-sex people to freely enter into civil unions due to historical prejudice.[207] Allowing the *Gory* decision to stand would lead to unfair discrimination against opposite-sex life partners.[208] At no point did the court in the main judgment address discrimination on marital status.[209] The minority judgment held that the *Volks* case barred a claim of intestate succession of partners in permanent life-partnerships, since same-sex partners were entitled to exercise their choice to enter into a civil union in terms of the *Civil Union Act*.[210] The *Volks* case was wrong and should have been reconsidered.[211]

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201 *Laubscher* case para 48; Mochela and Smith 2020 *TSAR* 489; Rautenbach 2023 *Acta Juridica* 103; Smith 2018 *THRHR* 156; Wood-Bodley 2018 *Obiter* 281; Zitzke 2018 *TSAR* 188.

202 *Laubscher* case para 48; Wood-Bodley 2018 *Obiter* 281.

203 *Laubscher* case para 48; Smith 2018 *THRHR* 156; Wood-Bodley 2018 *Obiter* 281; Zitzke 2018 *TSAR* 188.

204 *Laubscher* case paras 53, 66, 87; Hofmeyr and Paleker *The Law of Succession in South Africa* 843.

205 Clark and Van Heerden 2023 *SALJ* 622; Smith and Heaton 2012 *THRHR* 473.

206 *Laubscher* case para 59; Clark and Van Heerden 2023 *SALJ* 623; Hofmeyr and Paleker *The Law of Succession in South Africa* 843; Wood-Bodley 2018 *Obiter* 282; Zitzke 2018 *TSAR* 189.

207 *Laubscher* case paras 66, 84; Hofmeyr and Paleker *The Law of Succession in South Africa* 843.

208 *Laubscher* case para 86; Hofmeyr and Paleker *The Law of Succession in South Africa* 842.

209 *Laubscher* case para 82; Zitzke 2018 *TSAR* 189.

210 *Laubscher* case para 77; Hofmeyr and Paleker *The Law of Succession in South Africa* 842; Wood-Bodley 2018 *Obiter* 282.

211 *Laubscher* case paras 84-85; Clark and Van Heerden 2023 *SALJ* 623; Smith 2018 *THRHR* 157; Wood-Bodley 2018 *Obiter* 282; Zitzke 2018 *TSAR* 189.

Criticism against the *Laubscher* judgments includes that since same-sex cohabitants may marry, the choice argument presented in *Volks* should preclude same-sex partners from marriage-like rights as suggested in the minority judgment.[212] The minority judgment however fails to provide a detailed explanation as to why the exclusion of life partners from the *ISA* amounted to discrimination.[213] A proper investigation into substantive equality might have proven the decision in the *Volks* case wrong.[214]

Other critics agree with the conclusion that the *Gory* case was not temporary.[215] The *Civil Union Act* did not consider the intestate succession rights of unmarried same-sex life partners.[216] Not recognising same-sex life partners as spouses might amount to unfair discrimination.[217] An argument may be made that, due to prevailing homophobia in society, same-sex couples deserve more protection than opposite-sex couples.[218] However, due to the vulnerability of women, who, like same-sex couples, are deserving of protection, such an argument cannot be sustained.[219]

Additionally, the attempted distinction from the *Volks* case, as tried by the court in the *Laubscher* case, is problematic. Maintenance rights claimed in terms of the *MSSA* and intestate succession rights are similar claims, as both are aimed at protecting the vulnerable dependants of a deceased.[220] Both systems are essentially concerned with the financial implications for surviving family members of the deceased.[221] On the other hand, the *MSSA* provides for surviving spouses only if they are unable to provide for themselves, whereas intestate succession identifies who inherits an intestate estate.[222] Despite the *MSSA* and the *ISA*'s difference in their end goals, the main motivation, namely providing for vulnerable dependents, remains the same. If a life partner is

212 Bonthuys 2018 *PELJ* 28; Smith 2010 *PELJ* 263.
213 Bonthuys 2018 *PELJ* 29; Mochela and Smith 2020 *TSAR* 489.
214 Zitzke 2018 *TSAR* 194.
215 Wood-Bodley 2018 *Obiter* 283, 287.
216 Wood-Bodley 2018 *Obiter* 284.
217 Wood-Bodley 2018 *Obiter* 283.
218 Wood-Bodley 2018 *Obiter* 285.
219 Smith 2010 *PELJ* 264.
220 Rautenbach 2023 *Acta Juridica* 103; Zitzke 2018 *TSAR* 191.
221 Rautenbach 2023 *Acta Juridica* 103; Zitzke 2018 *TSAR* 191.
222 Smith 2010 *PELJ* 262; Wood-Bodley 2018 *Obiter* 285.

unable to claim necessary maintenance from a deceased estate, it is difficult to see how life partners could be intestate succession heirs.[223]

It is submitted that the minority judgment was correct in its determination that the *Gory* case was temporary, especially considering the preceding judgments discussed in paragraph 5.2.1.1, which specifically extended benefits to same-sex partners due to their inability to enter into valid marriages. The *Civil Union Act* allowed same-sex partners to enter into a formal union with the same consequences as a common law marriage. Same-sex partners were thereby placed in the same position as unmarried opposite-sex partners.

It is further submitted that, as indicated above, the distinction between the *MSSA* and the *ISA* is superficial when it comes to the consideration of extending the scope of the acts. It is therefore submitted that the *Volks* case did bar a claim to intestate succession of life partners. The court in the *Laubscher* case should have reconsidered the *Volks* case. The judgments preceding the *Laubscher* case alluded that discrimination based on marital status could render the denial of rights to life partners unconstitutional.[224] A proper equality analysis could have led the court to a finding of unfair discrimination based on marital status between married spouses and unmarried life partners.[225]

Nevertheless, same-sex life partners were recognised as "spouses" under the *ISA*. Opposite-sex life partners remained outside the definition of "spouse" in the *ISA* for a considerable time after the *Laubscher* decision. In paragraph 5.2.2 the recognition of opposite-sex life partners under the term "spouse" is discussed.

5.2.2 The development of the term "spouse" to include opposite-sex life partners

As stated above, opposite-sex life partners initially did not receive the same protection as same-sex life partners.[226] The first case to consider opposite-sex life partners was the *Volks* case, in which the court denied opposite-sex life partners the right to claim

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223 See paras 1.1 and 4.2 of this study.
224 See para 5.2.1.1 of this study.
225 See para 5.2.2 of this study.
226 Barratt 2015 *Stell LR* 110; Bilchitz and Judge 2007 *SAJHR* 496; De Vos 2007 *SAJHR* 462; Smith 2016 *SALJ* 288, 295, 297; Smith 2016 *SAJHR* 132.

in terms of the *MSSA*.[227] The *Volks* case, combined with the enactment of the *Civil Union Act*, casts doubt on whether life partnerships, of the opposite- or same-sex, would be recognised for any rights afforded to legally married spouses. The courts have, however, gone to great lengths to distinguish facts and circumstances from the *Volks* case without overturning the decision in the *Volks* case to give protection to opposite-sex life partners and validate life partnerships as a "family unit".[228] This paragraph analyses relevant court judgments recognising opposite-sex life partners as "spouses" and, importantly to this study, the eventual recognition of opposite-sex life partners under the *ISA*.

5.2.2.1 The denial of the rights of opposite-sex partners to claim in terms of the *MSSA*

As stated above, the *Volks* case denied a claim to opposite-sex life partners for maintenance in terms of the *MSSA*.[229] However, the court *a quo* declared the *MSSA* unconstitutional for excluding life partners from the *MSSA*.[230] The court recognised the existence of a life partnership similar to marriage, since there was evidence of a reciprocal duty of support between the spouses.[231] The couple lived together permanently, the deceased supported his life partner financially, she was a dependent on his medical aid scheme, she took care of him during his illness, they were regarded as husband and wife, she took care of the household duties. [232] However, she wished to be married while he did not.[233]

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227 Bonthuys 2018 *PELJ* 15; Cordier and Rautenbach 2009 *Obiter* 598; De Waal and Schoeman-Malan *Erfreg* 21; Du Toit 2021 *Journal of Civil Law Study* 376; Hofmeyr and Paleker *The Law of Succession in South Africa* 74-75; Louw 2017 *Obiter* 469; Manthwa 2021 *TSAR* 206; Meyerson 2010 *Constitutional Court Review* 306, 308; Monareng and Zounmenou 2007 *Agenda* 126.

228 Osman 2021 *SALJ* 526-527; Smith 2018 *THRHR* 152.

229 Bonthuys 2018 *PELJ* 15; De Vos and Barnard 2007 *SALJ* 822; Jamneck 2014 *PELJ* 975; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 162; Smith 2016 *SALJ* 292; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 371.

230 Du Toit 2009 *SALJ* 467; Heaton "Life Partnerships" 310; Smith 2010 *PELJ* 241.

231 Bonthuys 2018 *PELJ* 23; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 103; Smith 2016 *SALJ* 292; Smith 2018 *THRHR* 150-151; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 371.

232 Jamneck 2014 *PELJ* 974; Lind 2005 *Acta Juridica* 110; Meyerson 2010 *Constitutional Court Review* 308; Schäfer 2006 *SALJ* 633; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 103; Smith 2010 *PELJ* 240; Smith 2018 *THRHR* 151; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 371.

233 Lind 2005 *Acta Juridica* 110; Jamneck 2014 *PELJ* 974; Meyerson 2010 *Constitutional Court Review* 308; Schäfer 2006 *SALJ* 633; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law,*

The High Court held that the *MSSA* infringed the rights of equality and human dignity of partners in life partnerships.[234] Partners in life partnerships had the option to choose that certain legal consequences should not apply to their relationship; however, there was no evidence that the partners had done so.[235] The court cured the constitutional defects by reading in the words "and includes the surviving partner of a life partnership" after the words "survivor" and "spouse" in the *MSSA*.[236]

The Constitutional Court, however, rejected the maintenance claim of the surviving life partner on the basis that she did not qualify to be a "spouse" in terms of the definition of a spouse.[237] The court found that there were clear differences between surviving life partners and surviving spouses.[238] Life partners as opposed to spouses in validly concluded marriages had no reciprocal duties of support and they cannot claim benefits of marriage.[239] There was, therefore, no legally enforceable duty to support each other.[240] Additionally, the court found that a right to maintenance could not be imposed after the death of a life partner where it has not legally been undertaken during the lifetime of the deceased.[241] The fact that the partners have supported each other played no role in attaching legal consequences to a reciprocal duty of support.[242]

The court denied the claim on the basis that opposite-sex life partners had a choice to enter into a marriage or not.[243] There was no legal impediment to prevent opposite-

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Policy and the Family 103; Smith 2010 *PELJ* 240; Smith 2018 *THRHR* 151; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 371.

234 Heaton "Life Partnerships" 310.

235 Bonthuys 2018 *PELJ* 23.

236 Du Toit 2009 *SALJ* 467; Smith 2010 *PELJ* 242.

237 *Volks* case para 65; Manthwa 2021 *TSAR* 206.

238 *Volks* case para 54; Louw 2017 *Obiter* 469.

239 *Volks* case para 54; Jagwanth 2005 *Acta Juridica* 136; Jamneck 2014 *PELJ* 974; Mochela and Smith 2020 *TSAR* 488; Schäfer 2006 *SALJ* 633; Smith 2010 *PELJ* 242; Smith 2016 *SAJHR* 141; Smith 2016 *SALJ* 293; Smith 2018 *THRHR* 151; Zitzke 2018 *TSAR* 184.

240 *Volks* case para 52; Cordier and Rautenbach 2009 *Obiter* 598; Lind 2005 *Acta Juridica* 114; Madzika 2020 *De Jure* 401; Monareng and Zounmenou 2007 *Agenda* 126; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 103; Smith 2010 *PELJ* 251; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 372.

241 *Volks* case para 56; Cordier and Rautenbach 2009 *Obiter* 598; Goldblatt 2006 *Feminist Legal Studies* 267; Heaton "Life Partnerships" 310; Lind 2005 *Acta Juridica* 114, 121; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and The Family* 103; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 372.

242 *Volks* case para 55; Lind 2005 *Acta Juridica* 122.

243 *Volks* case para 58; Barratt and Denson "Domestic Partnerships" 340; Bonthuys 2018 *PELJ* 3, 15; Kruuse 2017 *The International Survey of Family Law* 356; Mochela and Smith 2020 *TSAR* 488; Osman 2021 *SALJ* 527; Schäfer 2006 *SALJ* 633; Smith 2010 *PELJ* 238; Smith 2016 *SALJ* 288; Smith

sex life partners from getting married.[244] Only surviving spouses from legal marriages may claim in terms of the *MSSA*.[245]

In its analysis of the constitutionality of the *MSSA*, the court recognised that the distinction between married spouses and unmarried partners in life partnerships amounted to discrimination on the grounds of marital status, which was presumed to be unfair.[246] The court determined that there was no unfair discrimination against the deceased's surviving life partner, because the state may legitimately distinguish between married and unmarried couples.[247] The rights to equality, on the grounds of marital status, and human dignity were therefore not infringed.[248]

The court also indicated that life partnerships in general received very little protection in terms of law.[249] It is up to the legislature to extend rights, normally attributed to marriages, to opposite-sex partners if it wishes to do so.[250] The recognition of life partners in terms of the *MSSA* would not extend the necessary protection to life partnerships.[251]

In a dissenting judgment, the court emphasised women as a vulnerable group in society.[252] What mattered was whether there was a commitment to reciprocal support

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2016 *SAJHR* 141; Smith 2018 *THRHR* 150; Smith and Heaton 2012 *THRHR* 478; Zitzke 2018 *TSAR* 185.

244 *Volks* case para 56; *Flynn* case para 41; Rautenbach "Families and Legal Pluralism in South Africa" 87; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 103.

245 *Volks* case para 56; Lind 2005 *Acta Juridica* 113; Madzika 2020 *De Jure* 394; Meyerson 2010 *Constitutional Court Review* 306, 308.

246 *Volks* case para 50; Du Toit 2009 *SALJ* 468; Jamneck 2014 *PELJ* 974; Madzika 2020 *De Jure* 401; Schäfer 2006 *SALJ* 633; Smith 2010 *PELJ* 242-243; Zitzke 2018 *TSAR* 184.

247 *Volks* paras 50-57, 80-87; Barratt 2020 *PELJ* 4; Bonthuys 2007 *SAJHR* 539; Bonthuys 2018 *PELJ* 3, 20; Du Toit 2009 *SALJ* 468; Goldblatt 2006 *Feminist Legal Studies* 267; Hofmeyr and Paleker *The Law of Succession in South Africa* 75; Jagwanth 2005 *Acta Juridica* 136; Jamneck 2014 *PELJ* 974; Lind 2005 *Acta Juridica* 114; Madzika 2020 *De Jure* 395, 401; Meyerson 2010 *Constitutional Court Review* 298, 308; Monareng and Zounmenou 2007 *Agenda* 126; Schäfer 2006 *SALJ* 633; Smith 2010 *PELJ* 242; Smith 2016 *SALJ* 288; Smith 2016 *SAJHR* 141; Smith 2018 *THRHR* 151; Smith and Heaton 2012 *THRHR* 478; Wood Bodley 2018 *Obiter* 277, 280.

248 *Volks* case paras 59, 62; Barratt and Denson "Domestic Partnerships" 341; Mochela and Smith 2020 *TSAR* 488; Smith and Heaton 2012 *THRHR* 478.

249 *Volks* case para 65; Barratt and Denson "Domestic Partnerships" 333.

250 *Volks* case para 64-66; Barratt 2015 *Stell LR* 112; Barratt and Denson "Domestic Partnerships" 333; Bonthuys 2018 *PELJ* 7, 15; Goldblatt 2006 *Feminist Legal Studies* 268-269; Jagwanth 2005 *Acta Juridica* 136; Lind 2005 *Acta Juridica* 108; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and The Family* 103.

251 *Volks* case para 65; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 103.

252 *Volks* case para 199; Du Toit 2009 *SALJ* 481.

that was worthy of protection, not whether a valid marriage existed.[253] Life partners who had expressly or tacitly undertaken reciprocal duties of support should be bound thereto.[254] A life partnership in which the partners had undertaken a reciprocal duty of support was evident from the facts and was deserving of protection.[255]

The majority judgment did not give due recognition to the contractual duty of support, which was worthy of support.[256] The non-recognition of the duty of support contradicts previous judgments recognising a duty of support between life partners.[257] In the dissenting judgment the court determined that there was unfair discrimination against unmarried persons and an infringement of the rights to equality and human dignity.[258]

Criticism of the *Volks* case include that the court failed to conduct a substantive equality analysis regarding the social and economic context and patterns of disadvantage faced by women.[259] The court ignored its own test for unfair discrimination.[260] For instance, in the *Daniels* and *Hassam* cases, spouses in religious marriages also had the choice to enter into a valid marriage; yet, the court extended benefits to them that were normally only available to married spouses.[261]

As indicated in the dissenting judgment, women in life partnerships are a particularly vulnerable segment of society.[262] The inequalities faced by women must be addressed through legislation, but the courts should provide relief when asked to do so.[263] As indicated above, the court left it to the legislature to extend rights to partners in life partnerships, since it determined that merely recognising life partners under the *MSSA* would not adequately protect them. However, the court was not required to draft comprehensive legislation recognising life partnerships, only to extend the benefits of

253 *Volks* case para 88; Smith 2010 *PELJ* 249-250; Smith 2016 *SAJHR* 143.
254 *Volks* case para 88; Smith 2010 *PELJ* 247; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 372.
255 *Volks* case para 88; Smith 2010 *PELJ* 249-250.
256 *Volks* case para 89; Smith 2010 *PELJ* 252.
257 *Volks* case para 214; Smith 2010 *PELJ* 257. See paras 4.2 and 5.2.1 of this study.
258 *Volks* case para 239; Madzika 2020 *De Jure* 402; Meyerson 2010 *Constitutional Court Review* 309.
259 Jagwanth 2005 *Acta Juridica* 136.
260 Rautenbach and Malherbe *Rautenbach-Malherbe Constitutional Law* 332.
261 Meyerson 2010 *Constitutional Court Review* 309. See para 4.2.3 of this study.
262 Jagwanth 2005 *Acta Juridica* 136.
263 Jagwanth 2005 *Acta Juridica* 136.

the *MSSA*.[264] It is submitted that the court failed in exercising its duty in protecting the rights of partners in a life partnership by failing to recognise the discrimination based on marital status.[265]

The main criticism by academics against the judgment in the *Volks* case was its reliance on the choice argument to deny life partners the rights contained in the *MSSA*.[266] A woman's choice to enter into marriage may be theoretical.[267] The court also overlooked the fact that life partnerships have become socially acceptable.[268] Many couples in life partnerships incorrectly believed that living together in a life partnership automatically attracted legal validity.[269]

It is submitted that the court should have extended the *MSSA* to cover partners in life partnerships, irrespective of whether the life partnership was of the same- or opposite-sex. Life partnerships were recognised as relationships capable of establishing a "family unit".[270] The *MSSA* was eventually extended to cover partners in a life partnership.[271]

As previously stated,[272] it was anticipated that the *Volks* case would be an insurmountable obstacle to extending rights, usually attributed to spouses in legal marriages, to partners in life partnerships. However, as seen from the judgments below,[273] the courts were able to avoid being bound by the judgment in the *Volks* case. The courts avoided being bound by the judgment in the *Volks* case by distinguishing the goals of the *MSSA* from those of other legislation and common law actions.

As argued above, common law actions have the underlying motivation of providing for a dependent upon the end of a relationship. The provision for vulnerable members is often used as a motivation by the courts to recognise life-partnerships for certain purposes. The distinction between the *MSSA* and other actions and laws is, therefore,

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264 *Volks* case para 67; Lind 2005 *Acta Juridica* 120.
265 See para 1.1.2 of this study.
266 Smith 2016 *SALJ* 298.
267 Goldblatt 2006 *Feminist Legal Studies* 267.
268 Smith 2016 *SALJ* 298-299; Smith and Robinson 2008 *International Journal of Law, Policy and the Family* 372.
269 Lind 2005 *Acta Juridica* 116; Smith 2010 *PELJ* 244; Smith 2016 *SALJ* 299.
270 See para 5.2.1 of this study.
271 See para 5.2.2.4 of this study.
272 See para 5.2 of this study.
273 See paras 5.2.2.2-5.2.2.5 of this study.

a superficial way to avoid being bound by the *Volks* case, considering a strong case could be made that the *Volks* case was wrongly decided.[274] However, judgments recognising life partnerships provided much needed relief to a significant and vulnerable section of society.

In paragraph 5.2.2.2, the inclusion of opposite-sex life partners under the action for loss of support upon the death of the breadwinner is discussed.

5.2.2.2 The inclusion of opposite-sex life partners under the action for loss of support upon the death of the breadwinner

As discussed in paragraph 5.2.1.1, the court in the *Du Plessis* case recognised the right of same-sex couples to claim in terms of an action for loss of support upon the death of the breadwinner. In the *Paixão* case the court was asked to recognise opposite-sex life partners under the action for loss of support upon the death of the breadwinner.

The *Paixão* case involved a life partnership between opposite-sex life partners.[275] However, the man was in a marriage for which he obtained a divorce in South Africa, but which was still legal in Portugal.[276] The man was killed in a car accident, and the woman instituted a claim for loss of support upon the death of the breadwinner.[277]

The court distinguished the *Volks* case by arguing that the *MSSA* is different from the dependent's action available in common law.[278] The right of a dependent to claim upon the death of a breadwinner arises because of the actions of the wrongdoer.[279] Unlike with the *MSSA*, the benefit did not solely extend to married persons.[280]

In order to recognise life partners for the action of the death of the breadwinner, the court demanded that a life partnership must be akin to marriage in its duty of support.[281] A duty of support does not arise by law, but rather by a contractual

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274 See para 5.2.2.4 of this study.
275 *Paixão* case para 2; Barratt 2012 *Stell LR* 128.
276 *Paixão* case para 8.
277 *Paixão* case para 10; Barratt and Denson "Domestic Partnerships" 337.
278 *Paixão* case para 26; Bonthuys 2018 *PELJ* 18-19; Clark and Van Heerden 2023 *SALJ* 625; Zitzke 2018 *TSAR* 185.
279 *Paixão* case para 26; Bonthuys 2018 *PELJ* 16; Clark and Van Heerden 2023 *SALJ* 625.
280 *Paixão* case paras 26-27; Smith 2016 *SALJ* 296.
281 *Paixão* case para 29; Bonthuys 2018 *PELJ* 19.

agreement between the partners.[282] The court followed *Santam BPK v Henery*,[283] where it was established that a duty of support should be proven, that the duty of support is legally enforceable and worthy of legal protection as determined by public policy.[284]

Based on the facts, the court held that there was an enforceable duty of support that was capable of legal recognition in terms of public policy.[285] The common law dependent's action for loss of support was therefore extended to include the surviving partner of an opposite-sex life partnership in which contractual reciprocal duties of support had been undertaken.[286]

The main criticism of the *Paixão* case is that the deceased was in a marriage valid outside of South Africa with another person upon entering into a life partnership.[287] The judgment created the impression that our law would recognise a contractual undertaking establishing reciprocal duties of support between a married man and an unmarried woman while the man's legal marriage still subsisted.[288] In South African law, contracts closely associated with a contract undermining marriage are illegal.[289]

Also, in *Verheem v Road Accident Fund*[290] (hereafter the *Verheem* case), the court confirmed that the dependent's action for loss of support upon the death of a breadwinner was available to the surviving partner in an opposite-sex life partnership following a motor vehicle accident.[291] The court recognised the permanent life partnership due to the partners' commitment to marry; they were regarded as husband

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282 *Paixão* case para 29; Bonthuys 2018 *PELJ* 18-19.

283 1999 3 SA 421 (SCA).

284 *Paixão* case para 13; Barratt 2015 *Stell LR* 126; Barratt and Denson "Domestic Partnerships" 338; Rautenbach "Key Judgments on the Accommodation of Muslim Family Law in South Africa" 96; Scott 2019 *TSAR* 799, 802.

285 *Paixão* case para 19; Barratt 2012 *Stell LR* 127; Barratt 2015 *Stell LR* 127-128; Barratt and Denson "Domestic Partnerships" 338.

286 *Paixão* case para 40; Barratt 2015 *Stell LR* 125; Barratt and Denson "Domestic Partnerships" 337; Bonthuys 2018 *PELJ* 17; Clark and Van Heerden 2023 *SALJ* 625; Smith 2016 *SALJ* 296; Wood-Bodley 2018 *Obiter* 281.

287 Bonthuys 2018 *PELJ* 17. See the discussion of *Jacobs v Road Accident Fund* 2019 2 SA 275 (GP) for a counter position on the court's decision to extend rights to the partners in the *Paixão* case.

288 Rautenbach 2023 *Acta Juridica* 800. See paras 5.2.2.5 and 5.3 of this study.

289 Bonthuys 2018 *PELJ* 18.

290 2012 2 SA 409 (GNP).

291 *Verheem* case paras 12; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 103; Smith 2011 *SALJ* 561; Smith and Heaton 2012 *THRHR* 472.

and wife by friends and family and a contract of reciprocal duty of support existed between the partners.[292] Partners in opposite-sex life partnerships have a claim worthy of protection.[293] The court found that the survivor of an opposite-sex life partnership could institute an action for the loss of support upon the death of a breadwinner.[294]

What is important to note from the *Paixão* case and the *Verheem* case is the importance the court placed on the existence of a contract for reciprocal duties of support. The requirement of a reciprocal duty of support has been used by courts as a strong indication that a life partnership was established.[295]

Apart from an action for the loss of support upon the death of a breadwinner, the court also provided relief to partners in life partnerships by recognising a universal partnership between partners upon the dissolution of a relationship, discussed in paragraph 5.2.3.

5.2.2.3 The recognition of opposite-sex life partnerships as universal partnerships

In *Butters v Mncora*[296] (hereafter the *Butters* case), the court recognised a tacit universal partnership between the parties based on a relationship where the woman raised the family and the man provided for her financially.[297] They lived together as husband and wife.[298] The court held that they were not only living together as husband and wife, but also as universal partners.[299]

As stated previously, a universal partnership requires that each of the parties bring something into the partnership, either money, labour, or a skill, so that the partnership is carried on for the joint benefit, and the object should be profit.[300] The court

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292 *Verheem* case paras 12; Smith and Heaton 2012 *THRHR* 475-476.
293 *Verheem* case paras 12; Smith and Heaton 2012 *THRHR* 482-483.
294 *Verheem* case paras 12; Smith and Heaton 2012 *THRHR* 472.
295 See para 5.2.2.4 of this study.
296 2012 4 SA 1 (SCA).
297 Barratt 2015 *Stell LR* 122; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 104.
298 *Butters v Mncora* 2012 4 SA 1 (SCA) para 1; Barratt 2015 *Stell LR* 122; Barratt and Denson "Domestic Partnerships" 336.
299 *Butters v Mncora* 2012 4 SA 1 (SCA) paras 7, 9; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 104.
300 *Butters v Mncora* 2012 4 SA 1 (SCA) para 1; Barratt 2015 *Stell LR* 122-123; Madzika 2020 *De Jure* 395. See para 5.2 of this study.

determined that the woman was the caregiver and the man the breadwinner.[301] The man acquired a vast estate, while the woman hardly owned anything.[302] The court contended that it would be illogical to argue that the woman contributed everything to the man only for him to acquire assets for himself to her exclusion.[303]

The relationship ended after the man married another woman without his life partner knowing.[304] The court held that, prior to the end of the relationship, the woman made a significant contribution to the universal partnership.[305] A universal partnership encompasses both commercial and non-profit contributions from its partners.[306] The universal partnership was entered into by the parties tacitly.[307]

The dissenting judgment held that no universal partnership came into existence.[308] In a familial relationship, the principal breadwinner typically contributes substantially, while the other party, usually the woman, is responsible for the children's upbringing.[309] The argument that she will be left without recourse has no bearing on the existence of a universal partnership.[310] The man would have maintained the woman for the rest of her life, and her expectations did not go beyond this.[311] The woman did not show any interest in the business.[312] Nor did she show any intention of sharing in the estate.[313] The man did nothing other than treat the woman as the recipient of his gifts.[314] No universal partnership was therefore established.[315]

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301 *Butters v Mncora* 2012 4 SA 1 (SCA) paras 7, 9; Barratt 2015 *Stell LR* 122.
302 *Butters v Mncora* 2012 4 SA 1 (SCA) para 1; Barratt and Denson "Domestic Partnerships" 336.
303 *Butters v Mncora* 2012 4 SA 1 (SCA) para 26.
304 *Butters v Mncora* 2012 4 SA 1 (SCA) para 10; Barratt and Denson "Domestic Partnerships" 336.
305 *Butters v Mncora* 2012 4 SA 1 (SCA) para 19; Barratt 2015 *Stell LR* 124; Barratt and Denson "Domestic Partnerships" 337; Heaton "Life Partnerships" 306.
306 *Butters v Mncora* 2012 4 SA 1 (SCA) paras 1, 22; Barratt and Denson "Domestic Partnerships" 336; Heaton "Life Partnerships" 306; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 104.
307 *Butters v Mncora* 2012 4 SA 1 (SCA) para 31; Barratt 2015 *Stell LR* 124; Barratt 2022 *PELJ* 15; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 104.
308 *Butters v Mncora* 2012 4 SA 1 (SCA) para 33.
309 *Butters v Mncora* 2012 4 SA 1 (SCA) para 37.
310 *Butters v Mncora* 2012 4 SA 1 (SCA) para 37.
311 *Butters v Mncora* 2012 4 SA 1 (SCA) para 43.
312 *Butters v Mncora* 2012 4 SA 1 (SCA) paras 39, 42.
313 *Butters v Mncora* 2012 4 SA 1 (SCA) para 44.
314 *Butters v Mncora* 2012 4 SA 1 (SCA) para 44.
315 *Butters v Mncora* 2012 4 SA 1 (SCA) para 45.

Ponelat v Schrepfer[316] (hereafter referred to as the *Ponelat* case) involved two claims.[317] There was an order sought for a declaration of the existence of a universal partnership and a maintenance claim.[318] The *Ponelat* case concerned a relationship between a man and a woman who lived together on a permanent basis.[319] The man had a successful business, undertook to maintain the child of the woman and promised to enter into a marriage with the woman in due course.[320] For the majority of the relationship the woman took care of the household, but while gainfully employed, the woman's contributions went to the joint household.[321] The woman also did some administrative work for the man's business.[322] The majority of the assets were registered in the name of the man.[323] Once the relationship ended, the woman had very little financial assets.[324]

The court confirmed that a universal partnership may exist between a couple engaged to be married.[325] The court found that in the *Ponelat* case, a tacit universal partnership did come into existence, since the partners pooled their resources in a joint venture. Each partner contributed money, time and labour to further the joint venture.[326] The maintenance claim was presented as an alternative and not considered by the court.[327]

In *McDonald v Young*[328] (hereafter the *McDonald* case), the court denied a claim for the existence of a universal partnership or maintenance between opposite-sex life partnerships.[329] The *McDonald* case concerned a relationship between a man and a woman where the man was financially dependent on the woman.[330] The court found

316 2012 1 SA 206 (SCA).
317 *Ponelat* case para 2.
318 *Ponelat* case para 2.
319 *Ponelat* case para 5.
320 *Ponelat* case para 5.
321 *Ponelat* case para 6.
322 *Ponelat* case para 8.
323 *Ponelat* case para 15.
324 *Ponelat* case para 15.
325 *Ponelat* case para 22.
326 *Ponelat* case paras 23-24, 27.
327 *Ponelat* case para 27.
328 2012 3 SA 1 (SCA).
329 *McDonald* case paras 13-14, 25; Bonthuys 2018 *PELJ* 19.
330 *McDonald* case para 3.

that no joint venture existed between the partners mainly because the man failed to prove an agreement as to what he would be entitled to gain from the venture.[331]

In consideration of a maintenance claim, the court confirmed that no duty of support arises by operation of law and must be contracted into.[332] The court could find no evidence for the existence of a tacit agreement for maintenance, based on the evidence given by the man that he expected no financial support from the woman should the relationship end.[333]

Due to the non-regulation of life partnerships, no legal mechanism exists to regulate the division of estates upon the end of a life partnership. From the *Butters* case, *Ponelat* case and the *McDonald* case, it is evident that such regulation is needed.[334] Where life partners have lived together for a substantial period of time and invested or sacrificed financial resources in the context of the relationship, the end of the relationship might be financially devastating for one of the parties.

To provide relief in such cases, the courts in the *Butters* case and *Ponelat* case were able to provide some relief to potentially financially vulnerable persons by relying on a universal partnership. However, in these cases, a universal partnership had to be proved. If no universal partnership could be proved, a financially vulnerable partner might be left destitute. It is therefore undesirable and untenable for life partners to resort to proving a life partnership to secure financial security in the event that a life partnership comes to an end by agreement.

The *Butters* case*, Ponelat* case *and McDonald* case dealt with opposite-sex life partnerships. However, the courts did not specifically limit the judgments to opposite-sex life partnerships. A universal partnership may consequently also be established between same-sex life partnerships.

331 *McDonald* case paras 13-14; Bonthuys 2018 *PELJ* 19.
332 *McDonald* case paras 19-20
333 *McDonald* case para 25.
334 See para 6.1 of this study.

Where a life partnership comes to an end due to the death of one of the partners, the court was asked to recognise life partners under the *ISA* and *MSSA*, which is discussed in paragraph 5.2.2.4.

5.2.2.4 The development of the term "spouse" to include opposite-sex life partners under the *ISA* and the *MSSA*

As indicated previously, the courts opted to distinguish between the decision in the *Volks* case to deny opposite-sex life partners a claim in terms of the *MSSA* and other claims in terms of the common law and other statutes rather than re-examining and overturning the judgment in the *Volks* case. However, in *Bwanya v The Master*[335] (hereafter the *Bwanya* case) the court was directly confronted with the decision in the *Volks* case and the inability of opposite-sex partners to claim in terms of the *MSSA*.

In the *Bwanya* case, a woman and a man lived together in a permanent life partnership.[336] The partners intended to get married to each other.[337] Plans to negotiate *lobolo* were in place.[338] The partners intended to start a family.[339] The man took care of all the expenses, while the woman managed the household.[340] Their mutual friends recognised them as a couple.[341] The relationship resembled marriage.[342] The high court declared the *ISA* unconstitutional, but could not do the same for the *MSSA* because of the precedent set in the *Volks* case.[343]

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335 2022 3 SA 250 (CC)

336 *Bwanya* case paras 3-6; Barratt 2022 *PELJ* 2; Boniface 2023 *THRHR* 514; Clark and Van Heerden 2023 *SALJ* 630.

337 *Bwanya* case paras 3-6; *Bwanya v The Master* 2021 1 SA 138 (WCC) para 5; Barratt 2020 *PELJ* 2; Boniface 2023 *THRHR* 513; Heaton "Life Partnerships" 311; Osman 2021 *SALJ* 522.

338 *Bwanya* case paras 3-6; *Bwanya v The Master* 2021 1 SA 138 (WCC) para 5; Barratt 2020 *PELJ* 2; Osman 2021 *SALJ* 522; Osman 2024 *Constitutional Court Review* 442.

339 *Bwanya* case paras 3-6; *Bwanya v The Master* 2021 1 SA 138 (WCC) para 5; Barratt 2020 *PELJ* 2; Osman 2021 *SALJ* 522; Osman 2024 *Constitutional Court Review* 442.

340 *Bwanya* case paras 3-6; *Bwanya v The Master* 2021 1 SA 138 (WCC) para 5; Barratt 2020 *PELJ* 2; Boniface 2023 *THRHR* 513; Osman 2021 *SALJ* 522.

341 *Bwanya* case paras 3-6; *Bwanya v The Master* 2021 1 SA 138 (WCC) para 5; Barratt 2020 *PELJ* 2; Boniface 2023 *THRHR* 514; Clark and Van Heerden 2023 *SALJ* 630.

342 *Bwanya* case para 3; *Bwanya v The Master* 2021 1 SA 138 (WCC) para 5; Osman 2021 *SALJ* 522.

343 *Bwanya* case para 11; *Bwanya v The Master of the High Court* 2021 1 SA 138 (WCC) paras 192, 209; Barratt 2020 *PELJ* 3; Barratt and Denson "Domestic Partnerships" 341; Hofmeyr and Paleker *The Law of Succession in South Africa* 844; Madzika 2020 *De Jure* 403-404; Osman 2021 *SALJ* 526; Osman 2024 *Constitutional Court Review* 443-444.

In the Constitutional Court, the issues were whether a surviving partner in a permanent heterosexual life partnership in which the partners had undertaken reciprocal duties of support is entitled to claim under the *MSSA* and the *ISA*.[344] The court has recognised that life partnerships are plentiful and growing, increasing the need for the protection of life partnerships.[345] The *ISA* and the *MSSA* normally attach to a legally recognised marriage.[346] The court confirmed that the *Volks* case bars a claim by a life partner under the *MSSA*.[347]

The court determined that, since the *ISA* and the *MSSA* were different acts, the *Volks* case did not bar the extension of the benefits under the *ISA*.[348] The court specifically recognised the family-like nature of the partnership and accepted that it should be extended to benefits in terms of the *ISA*.[349]

In relation to the *MSSA*, the court claimed that the facts presented a different context than in the *Volks* case, which made it possible to reach a different outcome.[350] However, the precedent set by the *Volks* case could only be overturned if it were proven to be clearly wrong.[351] The court held that not everyone chooses to marry, thereby proving the decision in the *Volks* case wrong.[352] However, the court was unwilling to declare the judgment in the *Volks* case clearly wrong.[353] Therefore, the *Volks* case was not overturned, but held to be wrong in part because all the facts were not properly pleaded before the court in the *Volks* case.[354] Because the *Volks* case was wrongly decided, a court may depart therefrom.

In considering the incorrectness of the decision reached in the *Volks* case, the court considered that the *Volks* case held that a maintenance duty was an invariable

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344 *Bwanya v The Master of the High Court* 2022 3 SA 250 (CC) para 1.
345 *Bwanya v The Master of the High Court* 2022 3 SA 250 (CC) para 1.
346 Osman 2021 *SALJ* 527.
347 *Bwanya v The Master of the High Court* 2022 3 SA 250 (CC) para 1.
348 *Bwanya v The Master of the High Court* 2022 3 SA 250 (CC) para 1; Barratt 2022 *PELJ* 3.
349 *Bwanya v The Master of the High Court* 2022 3 SA 250 (CC) para 1; Barratt 2022 *PELJ* 16.
350 *Bwanya v The Master of the High Court* 2022 3 SA 250 (CC) para 48.
351 Barratt 2020 *PELJ* 5; Osman 2024 *Constitutional Court Review* 456.
352 Barratt 2020 *PELJ* 5; Boniface 2023 *THRHR* 516.
353 *Bwanya* case para 47; Du Toit 2022 *Journal of Civil Law Studies* 378; Heaton "Life Partnerships" 311; Osman 2024 *Constitutional Court Review* 456.
354 *Bwanya* case para 47; Du Toit 2022 *Journal of Civil Law Studies* 378; Heaton "Life Partnerships" 311; Osman 2024 *Constitutional Court Review* 456.

consequence of marriage and arose by automatic operation of law.[355] In the *Volks* case the court determined that married spouses had reciprocal support duties while alive, but the obligation could not extend beyond death.[356] However, the court in the *Bwanya* case held that the legal context had changed post the *Volks* case as determined by the various court decisions recognising life partnerships.[357] Had the argument in the *Volks* case been made for the existence of a contract of reciprocal duty of support, they might have been successful.[358]

The question whether there will always be a choice to marry is a factual question, not a question of law, which was not pleaded before the *Volks* case.[359] The choice principle set in the *Volks* case was rejected in the *Bwanya* case.[360] The choice principle was rejected because women lack bargaining power to ensure conclusion of a marriage, dependence of women and children on men and the mistaken belief that they are in a legally binding relationship.[361] Additionally, the court in the *Bwanya* case held that the *Volks* case has been incorrectly decided, as it did not give due consideration to the prominence of life partnerships and the consequences of not recognising them.[362] The court further concluded that whether the partners had a choice to enter into a marriage was the incorrect question to ask.[363] The question to ask was whether permanent life partnerships are deserving of legal protection.[364]

The court in the *Volks* case also argued against the recognition of life partnerships due to the importance of marriage.[365] Marriage and family are important social institutions of society.[366] Marriage and permanent life partnerships are not one institution and

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355 Barratt 2022 *PELJ* 6.
356 Barratt 2022 *PELJ* 6.
357 Clark and Van Heerden 2023 *SALJ* 635; Heaton "Life Partnerships" 311.
358 Barratt 2022 *PELJ* 15; Osman 2024 *Constitutional Court Review* 458
359 *Bwanya* case para 62; Barratt 2020 *PELJ* 5; Boniface 2023 *THRHR* 516; Clark and Van Heerden 2023 *SALJ* 632-633; Du Toit 2022 *Journal of Civil Law Studies* 378-379.
360 *Bwanya* case paras 47, 62; Du Toit 2022 *Journal of Civil Law Studies* 378-379; Heaton "Life Partnerships" 311.
361 *Bwanya* case para 62.
362 *Bwanya* case para 47, 52; Clark and Van Heerden 2023 *SALJ* 631; Du Toit 2022 *Journal of Civil Law Studies* 378; Hofmeyr and Paleker *The Law of Succession in South Africa* 75; Osman 2024 *Constitutional Court Review* 455.
363 *Bwanya* case paras 48, 68; Du Toit 2022 *Journal of Civil Law Studies* 379; Rautenbach "Families and Legal Pluralism in South Africa: Celebrating Diversity but at what Cost?" 89.
364 *Bwanya* case para 68-70; Barratt 2022 *PELJ* 6.
365 *Bwanya* case para 50.
366 *Bwanya* case para 50.

cannot be treated as such.[367] The court in the *Bwanya* case held that giving deserved protection to surviving permanent life partners does not devalue marriage.[368] The court also recognised that not all forms of families deserve legal protection.[369]

However, the reality is that a substantial number of families fall within the category of life partnerships.[370] When noting the importance of the family, one particular family form should not be granted preference over another.[371] Marriage will not be better protected by denying rights to persons not in marriages.[372] Permanent life partnerships where the partners undertook reciprocal duties of support are similar to marriages.[373] Permanent life partnerships are meant to last until death, and through express or tacit agreement have a reciprocal duty of support.[374]

Another issue addressed by the *Bwanya* case is the uncertainty surrounding proving the existence of permanent life partnerships.[375] Factors were developed to determine the existence of life partnerships,[376] including

> the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership; the nature of that ceremony; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep for the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; whether and to what extent the partners have made provision in their wills; whether the partners have children together and whether they have associated in public as an intimate couple.[377]

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367 *Bwanya* case para 54.
368 *Bwanya* case para 51.
369 *Bwanya* case para 53.
370 *Bwanya* case para 52.
371 *Bwanya* case para 52.
372 *Bwanya* case para 79.
373 *Bwanya* case para 56.
374 *Bwanya* case para 54.
375 *Bwanya* case para 75.
376 *Bwanya* case paras 75-78; Du Toit 2022 *Journal of Civil Law Studies* 379.
377 *Bwanya* case para 76-77.

The court also suggested that whether the partners have children together and whether they have associated in public as an intimate couple should be taken into account.[378] It is therefore possible to recognise life partnerships.[379]

The court, after showing that it is not bound by the *Volks* decision, held that the exclusion of permanent heterosexual life partners from the benefit afforded by section 2(1) of the *MSSA* amounts to discrimination on the grounds of marital status.[380] The discrimination negatively impacted the interests of heterosexual permanent life partners who are dependent on one another.[381] The court also held that it would be unfair discrimination to allow same-sex life partners to benefit from the *ISA*, but to deny the same to opposite-sex life partners based on sexual orientation, affecting their right to equality and human dignity.[382] There is no reason why surviving partners in opposite-sex life partnerships should be denied the right to intestate inheritance while same-sex partners do not.[383] There is therefore no justification for the discrimination.[384]

Section 1 of the *ISA* and *MSSA* was consequently declared unconstitutional for excluding opposite-sex life partners with a reciprocal duty of support in permanent life partnerships.[385] The court ordered the words "opposite-sex partner in which the partners undertook reciprocal duties of support" to be read in the *ISA* and *MSSA*.[386]

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378 *Bwanya* case para 76.

379 *Bwanya* case para 76.

380 *Bwanya* case para 84; *Bwanya v The Master of the High Court* 2022 3 SA 250 (CC) para 49; Clark and Van Heerden 2023 *SALJ* 638; Du Toit 2022 *Journal of Civil Law Studies* 379; Hofmeyr and Paleker *The Law of Succession in South Africa* 844.

381 *Bwanya* case para 73; Barratt 2020 *PELJ* 8.

382 *Bwanya* case para 82; Barratt 2020 *PELJ* 3; Bonthuys 2018 *PELJ* 21.

383 *Bwanya v The Master* 2021 1 SA 138 (WCC) para 190; Du Toit 2022 *Journal of Civil Law Studies* 378.

384 *Bwanya v The Master of the High Court* 2022 3 SA 250 (CC) para 80; Clark and Van Heerden 2023 *SALJ* 636; Du Toit 2022 *Journal of Civil Law Studies* 379.

385 *Bwanya* case paras 81-82, 95; Barratt 2020 *PELJ* 13; Boniface 2023 *THRHR* 513; Heaton "Life Partnerships" 312; Hofmeyr and Paleker *The Law of Succession in South Africa* 844; Osman 2024 *Constitutional Court Review* 442; Rautenbach "Families and Legal Pluralism in South Africa: Celebrating Diversity but at what Cost?" 88.

386 *Bwanya* case para 82; Barratt 2020 *PELJ* 2, 13; Barratt and Denson "Domestic Partnerships" 341; Clark and Van Heerden 2023 *SALJ* 636, 638; Du Toit 2022 *Journal of Civil Law Studies* 378-379; Hofmeyr and Paleker *The Law of Succession in South Africa* 76; Rautenbach "Families and Legal Pluralism in South Africa: Celebrating Diversity but at what Cost?" 88.

The court suspended its order of reading in to allow Parliament to cure the defect.[387] Partners who owe each other a duty of support in permanent life partnerships are therefore recognised as "spouses" in terms of intestate succession law.[388] The *ISA* and the *MSSA* were subsequently amended by Parliament to include partners in permanent life partnerships.[389]

In one of the dissenting judgments, the court indicated that the *Volks case* held that discrimination based on marital status is justifiable since the parties are free to choose whether to get married or not.[390] Women, like men, have the power and the right to decide whether or not to be married.[391] The choice principle remains real and not illusionary.[392] However, following a substantive equality approach, as observed in the main judgment, choice is limited and that a more preferable approach is one recognising a factual reciprocal duty of support.

The dissenting judgment also pointed out that the majority decision did not adequately explain why the decision was wrong or why it may be departed from.[393] Marriage is different to life partnerships due to public solemnisation and property regimes that apply to marriage and not to life partnerships.[394] A life partnership often forms more informally.[395] Life partnerships are not as readily ascertainable as the majority decisions suggested.[396] It must be left to the legislature to provide for the recognition of life partners.[397] It is submitted that the majority judgment's argument of recognising life partnerships does not infringe the importance of marriage. The difference in nature and conclusion between marriage and life partnerships does not constitute sufficient justification to deny life partners benefits under the *ISA* and the *MSSA*. Additionally, it

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387 *Bwanya* case paras 82, 95; Clark and Van Heerden 2023 *SALJ* 637; Du Toit 2022 *Journal of Civil Law Studies* 379.
388 Barratt 2022 *PELJ* 8; Barratt 2020 *PELJ* 16; Boniface 2023 *THRHR* 515; Hofmeyr and Paleker *The Law of Succession in South Africa* 76.
389 See the *Judicial Amendment Act* 15 of 2023.
390 *Bwanya* case para 109; Boniface 2023 *THRHR* 514.
391 *Bwanya* case para 121.
392 Du Toit 2022 *Journal of Civil Law Studies* 381.
393 *Bwanya* case para 110.
394 *Bwanya* case para 111; Clark and Van Heerden 2023 *SALJ* 638.
395 *Bwanya* case para 112.
396 *Bwanya* case para 114.
397 Du Toit 2022 *Journal of Civil Law Studies* 381.

is submitted that life partnerships are, in most cases, fairly easily ascertainable, as demonstrated by the majority judgment.

The dissenting judgment also determined that the main argument for the lack of choice to marry discussed in the majority judgment is that men are in financially stronger positions.[398] Additionally, some men are unwilling to marry.[399] Leaving these relationships will leave women destitute.[400] Nevertheless, couples have a choice to marry, even if the option is difficult to exercise.[401] The courts must not encourage relationships that keep women "captive" in oppressive relationships.[402] Any life partnership where women are forced by circumstances to continue with the relationship, rather than freely choose to remain in, should not be considered a worthy life partnership in the context of the apparently soaring numbers of life partnerships and the need for legal recognition and protection being contended for.[403]

It is difficult to see how the recognition of life partnerships will trap women in undesirable relationships. Even in legal marriages, women might feel a financial reliance on their husbands and choose not to exit it despite it being oppressive. The difference is that if a woman in a valid marriage exercises a choice to leave the relationship, she has some protection in terms of legislation,[404] whereas life partners do not. In fact, providing life partners with adequate protection might encourage them to leave oppressive relationships. Nevertheless, where a relationship ends due to the death of one of the partners, the question should not be whether the partners stayed in the relationship because they felt they had no other choice, but whether a life partnership with reciprocal duties of support was established. The partners are entitled to protection upon the termination of the relationship.

Another argument posed by the dissenting judgment is that the law does not prevent heterosexual couples from being married and from becoming part of all the benefits

398 *Bwanya* case para 123.
399 *Bwanya* case para 123.
400 *Bwanya* case para 123.
401 *Bwanya* case para 127.
402 *Bwanya* case para 128.
403 *Bwanya* case para 131.
404 For instance, the *Divorce Act* 70 of 1979.

that flow from marriage.[405] It would be inappropriate to infer a legally enforceable duty of support from the mere existence of a familial or spouse-like relationship.[406] The question should be whether the law provides adequate support for unmarried couples who deserve it.[407] Therefore, the declaration of unconstitutionality should be set aside, since the discrimination is fair.[408]

In the second dissenting judgment, the court held that the High Court's declaration of invalidity of the *ISA* should be confirmed.[409] The *Volks* case stood in the way of the High Court from declaring the *MSSA* unconstitutional.[410] The same interpretation is binding on the Constitutional Court unless the decision in the *Volks* case was clearly wrong, which could not be proven.[411] It is up to Parliament to enact legislative reform to regulate permanent life partnerships.[412]

It is submitted that the *Volks* judgment is clearly wrong. The court in the main judgment should have overturned the *Volks* judgment and not merely determined that it was wrongly decided.[413]

It is clear from the discussion of the court cases in paragraphs 5.2.1 and 5.2.2.1-5.2.2.4 that life partners in life partnerships that resemble a marriage where the partners undertook reciprocal duties of support form part of the "family unit". Life partners now enjoy recognition as "spouses" under the *ISA*.[414] Whether polygamous relationships are deserving of legal protection has not been addressed by the judgments in paragraphs 5.2.1 and 5.2.2.1-5.2.2.4.[415] In paragraph 5.2.2.5, court cases dealing with polygamous life partnerships are analysed.

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405 *Bwanya* case para 136.
406 *Bwanya* case para 138.
407 *Bwanya* case para 140.
408 *Bwanya* case para 150.
409 *Bwanya* case para 152.
410 *Bwanya* case para 153.
411 *Bwanya* case para 156, 158; Clark and Van Heerden 2023 *SALJ* 641.
412 *Bwanya v The Master of the High Court* 2022 3 SA 250 (CC) para 175; Clark and Van Heerden 2023 *SALJ* 641.
413 See the argument presented in the minority judgment in the *Volks* case. See para 5.2.2.1 of this study.
414 See the *Judicial Amendment Act* 15 of 2023.
415 Hofmeyr and Paleker *The Law of Succession in South Africa* 847.

5.2.2.5 Polygynous life partnerships

In *Zulu v Zulu*[416] (hereafter the *Zulu* case), a man was in a valid common law marriage and entered into a second marriage without the second wife being aware of the first marriage.[417] The court recognised that each spouse in a valid marriage enjoyed an equal undivided share in the estate.[418] However, property could not be unilaterally redistributed by one spouse, therefore, the joint estate only existed between the first wife and the deceased.[419] A universal partnership could not have come into existence between the man and the second wife, as the second marriage was unlawful because the deceased had been married prior to the conclusion of the second marriage.[420] Criticism against the decision in the *Zulu* case is that the court could have recognised that the second marriage was a putative marriage with no fault on the part of the second wife.[421] Both wives would have been entitled to a claim from the valid marriage and the putative marriage.[422]

In *Jacobs v Road Accident Fund*[423] (hereafter the *Jacobs v Road Accident Fund* case), a man entered into a new relationship while still married to another.[424] The marriage was at an end and divorce proceedings had started.[425] The court held that a reciprocal duty of support between the man and the second woman was tacitly agreed upon.[426]

The court confirmed that marriage is an important institution and the sanctity of marriage is to be protected.[427] However, the court determined that for a man to have a relationship outside of his marriage has become acceptable practice in South African communities and is no longer contrary to public policy.[428] The relationship between

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416 2008 4 12 (D).
417 *Zulu* case 14A-B; Smith 2011 *SALJ* 567.
418 *Zulu* case 16D; Smith 2011 *SALJ* 567.
419 *Zulu* case 15E; Smith 2011 *SALJ* 567.
420 *Zulu* case 15E-F; Smith 2011 *SALJ* 568-569.
421 Smith 2011 *SALJ* 569.
422 Smith 2011 *SALJ* 569.
423 2019 2 SA 275 (GP).
424 *Jacobs v Road Accident Fund* para 6; Heaton "Life Partnerships" 315; Mochela and Smith 2020 *TSAR* 684; Osman 2021 *SALJ* 533; Smith 2020 *TSAR* 578.
425 *Jacobs v Road Accident Fund* para 6; Osman 2021 *SALJ* 533; Smith 2020 *TSAR* 578.
426 *Jacobs v Road Accident Fund* para 15; Heaton "Life Partnerships" 315; Mochela and Smith 2020 *TSAR* 684; Smith 2020 *TSAR* 579, 585.
427 *Jacobs v Road Accident Fund* para 19; Scott 2019 *TSAR* 810; Smith 2020 *TSAR* 579.
428 *Jacobs v Road Accident Fund* para 20; Mochela and Smith 2020 *TSAR* 684; Scott 2019 *TSAR* 801.

the man and the second woman constituted a life partnership in terms of which the partners had undertaken reciprocal duties of support. Therefore, the relationship was worthy of protection in consideration of public policy.[429]

The court accordingly extended the action for loss of support upon the death of a breadwinner to a female life partner despite her partner being married to someone else prior to entering into a life partnership with her.[430]

Criticism levelled against the *Jacobs v Road Accident Fund* case is that a common law marriage has always been considered monogamous.[431] Contracts closely associated with illegal contracts and contracts undermining marriage are not legal.[432] A duty to maintain a third party by a married person is therefore illegal.[433] In the *Paixão* case, the court was satisfied that the man had been divorced in terms of South African law.[434] Freed from South African marriage, he would be free to enter a duty of support with another.[435] The bar in the *Jacobs v Road Accident Fund* case preventing the man from entering into another relationship, was of his own making.[436] It is therefore not to be likened to the same kind of prohibitions same-sex partners used to face in attaining legal obligations normally attributed to marriages.[437] In the *Paixão* case, the man was unmarried in terms of South African law, unlike in the *Jacobs v Road Accident Fund* case, where the man was still married under South African law at the time the life partnership came into existence.[438] It is submitted that the *Jacobs v Road Accident Fund* is incorrect and should not be followed. It is illegal to enter into an agreement of reciprocal duties of support with a third party while a valid marriage exists.[439]

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429 *Jacobs v Road Accident Fund* para 21; Clark and Van Heerden 2023 *SALJ* 626; Scott 2019 *TSAR* 801.
430 *Jacobs v Road Accident Fund* para 15; Clark and Van Heerden 2023 *SALJ* 623; Osman 2021 *PELJ* 7.
431 Scott 2019 *TSAR* 801; Smith 2020 *TSAR* 585.
432 Smith 2020 *TSAR* 585.
433 Smith 2020 *TSAR* 585.
434 Smith 2020 *TSAR* 586.
435 Smith 2020 *TSAR* 587.
436 Scott 2019 *TSAR* 811; Smith 2020 *TSAR* 592.
437 Smith 2020 *TSAR* 592.
438 Smith 2020 *TSAR* 578.
439 See para 5.3 below.

Therefore a "family unit" cannot be formed between a married person and a life partner. The question whether the law should be reformed to recognise such relationships is addressed in paragraph 5.3.

5.3 Persons outside the scope of the term "spouse" in the ISA in life partnerships

In consideration of the persistent reliance on the courts to extend relief to life partners, it is recommended that life partnerships should be comprehensively recognised by legislation.[440] The possibility of recognising such legislation is comprehensively discussed in paragraph 6.3.

The question that emerges is whether polygamous life partnerships should be recognised and protected under the *ISA*.[441] As argued previously, women may enter into a relationship with a man whilst he, unbeknown to the woman, is in another relationship or marriage with another woman.[442] Where a man has established a relationship with reciprocal duties of support between himself and more than one woman, without marrying either, it is recommended that both women be recognised and protected as life partners of the man, irrespective of whether one or more of the women knew of the existence of the other relationship.

As argued above, women are regarded as a vulnerable segment of society. Therefore, where it has been proved that a person entered into a tacit or express contract promising a reciprocal duty of support to more than one person, both contracts should be regarded as worthy of protection.[443] It is therefore recommended that polygynous life partnerships be recognised and afforded legal protection by means of legislation. Such protection should specifically include partners in polygynous life partnerships in the term "spouse" under the *ISA*.

Recognising polygynous life partnerships but excluding polyandrous life partnerships will constitute unfair discrimination based on equality against women. Polyandrous life

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440 See para 5.2.2 of this study.
441 Bonthuys 2018 *PELJ* 13; Smith 2011 *SALJ* 587-588.
442 Bonthuys 2018 *PELJ* 13; Smith 2011 *SALJ* 587-588.
443 See also Barratt 2020 *PELJ* 20.

partnerships where a reciprocal duty of support can be proved between a woman and more than one man, should therefore also be granted full legal protection, including recognition of life partners as "spouses" in terms of the *ISA*.

Therefore, it is submitted that partners in polygamous life partnerships who owe each other a reciprocal duty of support can establish a "family unit" worthy of a legal protection in terms of the *ISA*.

Another consideration regarding polygamous relationships is where a life partnership is entered into and exists concurrently with a valid marriage.[444] As indicated previously, common law marriages and civil unions are strictly monogamous and the conclusion of another marriage or civil union while a common law marriage or civil union is in place is strictly prohibited.[445] Also, contracts closely associated with marriage, such as a contract undertaking reciprocal duties of support with a third party, are invalid.[446]

Therefore, if current legislation remains unedited but life partnerships are recognised, it is difficult to imagine that a person will be able to enter a life partnership while also in a valid marriage or civil union.[447] Additionally, to conclude polygynous relationships in terms of customary law or religious law systems, certain requirements must be met. Any life partnership entered into that does not meet the requirements demanded by custom or religion, would be regarded as invalid. Consequently, no legal protection can be afforded to life partners in life partnerships where the other partner is in a valid marriage, irrespective of whether that marriage is monogamous, polygynous or potentially polygynous.

An important consideration regarding the co-existence of life partnerships and valid marriages include that a life partnership may have been in existence for some time before one of the parties enter into a valid marriage with a third party. The valid marriage will automatically invalidate the life partnership. Another consideration is the conclusion of a customary law marriage or marriage in terms of Muslim or Hindu law

444 Osman 2021 *SALJ* 529.
445 Bonthuys 2018 *PELJ* 15, 18.
446 Bonthuys 2018 *PELJ* 15.
447 Bonthuys 2018 *PELJ* 18.

and subsequently registering the marriage under the *Marriage Act*.[448] It is doubtful whether a second or further marriage concluded in terms of either customary, Muslim or Hindu law will be valid alongside a marriage registered under the *Marriage Act*.[449] It is submitted that customary, Muslim and Hindu law should be amended by legislation to allow for the conclusion of a second or further marriage under customary, Muslim or Hindu law.

The question emerges whether legislation should be amended or enacted to comprehensively recognise the existence of life partnerships that is concluded while a person is in a valid common law, customary law or religious marriage. This question is outside the scope of this study. However, of relevance to this study is whether the simultaneous existence of life partnerships and marriages may be recognised as "family units" and afforded protection as "spouses" under the *ISA*.

It is possible that a person may enter into a life partnership while the other partner is in an existing marriage. Such a life partnership may establish a duty of support between the partners. The life partnership may be entered into with or without prior knowledge of the pre-existing marriage. Whether a life partnership with reciprocal duties of support has been established is a matter of fact, irrespective of whether prior knowledge existed of a pre-existing marriage. If the partner in the pre-existing marriage dies intestate, the other partner might be left destitute due to the invalidity of the life partnership.

As indicated in court cases, spouses in a marriage may be afforded more rights than persons in unformalised relationships. However, the courts do not provide examples of where this might occur.[450] Where partners enter into a marriage, a partner may reasonably expect, in the case of a common law marriage or civil union, that marriage or civil union will be monogamous, and where a potentially polygynous customary law marriage or religious marriage is entered into, the first wife may expect the man to follow certain rites before entering into a second or further marriage. The expectancy that partners respect the sanctity of marriage may be argued as an instance of where

448 Osman 2021 *SALJ* 529.
449 See also Osman 2021 *SALJ* 529.
450 See for example the *Bwanya* case para 55.

more rights may be afforded to spouses in valid marriages than to partners in life partnerships.

However, as continuously argued in this study, the *ISA* should be amended to protect vulnerable members of society as far as possible. It would therefore be remanence to argue that spouses in valid marriages should be protected to the exclusion of partners in life partnerships. However, there is a possibility to afford spouses in marriages greater intestate inheritance rights than partners in life partnerships.

It is recommended that partners in a life partnership should inherit as "descendants" instead of "spouses" where a marriage and a life partnership have been simultaneously entered into. The limitation of partners in life partnerships rights may be justifiably so limited due to the importance of marriage as an institution. However, where an estate is equal to or smaller than R250 000, a partner might be left destitute. To protect such a partner, the *MSSA* could be amended to protect the partner from destitution.[451]

5.4 Conclusion

Life partnerships do not enjoy comprehensive legal regulation.[452] Since the prominence of life partnerships has steadily increased, calls for legislation governing life partnerships have been made.[453] Since Parliament failed to enact legislation to recognise life partnerships, the courts were asked on various occasions to come to the aid of partners in life partnerships.[454]

In this chapter, the recognition of life partnerships as an institution worthy of legal recognition was discussed.[455] Reasons why persons enter into life partnerships instead of legal marriages were also presented in this chapter.[456] Legislation specifically recognising life partnerships and extending benefits historically only available to spouses in common law marriages, was also discussed.[457]

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451 The possible extension of the *MSSA* is beyond the scope of this study.
452 See para 5.1 of this study.
453 See para 5.2 of this study.
454 See paras 5.1-5.2 of this study.
455 See para 5.2 of this study.
456 See para 5.2 of this study.
457 See para 5.2 of this study.

Judgments extending certain benefits to life partners in permanent life partners are comprehensively discussed.[458] As discussed above, the courts initially focused on extending benefits to same-sex life partners in permanent life partnerships due to their inability to marry.[459] This chapter examined judgments recognising same-sex partners under the *Aliens Control Act*,[460] insurance policies,[461] medical aid schemes,[462] the *Judges Remuneration and Conditions of Employment Act*,[463] the action for the loss of support upon the death of the breadwinner[464] and the *ISA*.[465]

As discussed above, opposite-sex life partners were initially denied benefits under the *MSSA*.[466] Their eventual inclusion under the *MSSA* was comprehensively discussed in this chapter.[467] Judgments where the courts have come to the aid of opposite-sex life partners by extending them rights in terms of the action for loss of support upon the death of the breadwinner,[468] recognising opposite-sex partners under the *ISA*[469] and by recognising opposite-sex life partnerships as universal partnerships[470] were also discussed in this chapter.

Judgments recognising polygynous relationships where a life partnership was entered into alongside a common law marriage were also evaluated in this chapter.[471] Additionally, persons in life partnerships who has not been recognised under law was identified in this chapter, and suggestions for their inclusion is presented.[472]

It is suggested that legislation be enacted to grant greater rights to life partners.[473] Specifically lacking legal protection are polygynous and polygamous life

458 See paras 5.2.1-5.2.2 of this study.
459 See para 5.2.1 of this study.
460 96 of 1991. See para 5.2.1.1 of this study.
461 See para 5.2.1.1 of this study.
462 See para 5.2.1.1 of this study.
463 88 of 1989. See para 5.2.1.1 of this study.
464 See para 5.2.1.1 of this study.
465 See para 5.2.1.2 of this study.
466 See para 5.2.2.1 of this study.
467 See para 5.2.2.4 of this study.
468 See para 5.2.2.2 of this study.
469 See para 5.2.2.4 of this study.
470 See para 5.2.2.3 of this study.
471 See para 5.2.2.5 of this study.
472 See para 5.2.2.1 of this study.
473 See para 5.3 of this study.

partnerships.[474] It is submitted that where a reciprocal duty of support exists between partners in polygynous and polygamous life partnerships, such partners should have the right to inherit intestate from each other.[475] Additionally, partners in life partnerships concluded concurrently with a legal marriage should also be afforded the right to inherit intestate.[476]

"Family units" established in terms of life partnerships are therefore recognised for the purposes of intestate succession law. Chapter 6 discusses the potential for legislative recognition of Muslim and Hindu marriages and life partnerships.

474 See para 5.3 of this study.
475 See para 5.3 of this study.
476 See para 5.3 of this study.

Chapter 6 Legal developments under consideration

6.1 Introduction

Prior to the introduction of the *Constitution*, scholars have contemplated a single marriage regime for South Africa. For instance, as early as 1990, Sachs[1] put forward a single marriage concept that contained the essential characteristics which permits persons practising a variety of rites and traditions to legally solemnise a marriage. However, no comprehensive reform of the law of marriage of South Africa was forthcoming.[2] Consequently, the *ISA* also remained bound to the original common law definition of marriage, leaving it up to the courts to extend the protection of the *ISA* to persons other than spouses in a common law marriage, with legislation only being enacted in reaction to court decisions.[3]

Some attempts have been made to provide for comprehensive legislative recognition of Muslim marriages and life partnerships, the latest being the *Single Marriage Statute* followed by the *Marriage Bill*.[4] No proposals to recognise Hindu marriages have been suggested. In this chapter, attempts made to comprehensively recognise Muslim marriages and life partnerships by means of proposed legislation is discussed.[5]

Specifically, for the attempted recognition of Muslim marriages the discussion paper on Muslim marriages presented in 2003[6] and the bill proposed in the discussion paper are analysed in as far as it could have impacted the term "spouse" for the purposes of the *ISA*.[7] Also, the bill to recognise Muslim marriages proposed in 2011[8] is analysed in as far as it could have amended the term "spouse" for the purposes of the *ISA*.[9] Following the decision in *Women's Legal Centre Trust*,[10] the *Registration of Muslim*

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1 Sachs 1990 *Agenda* 48.
2 See for example the *Civil Union Act* and the *RCMA*. See paras 2.2 and 3.2 of this study.
3 See paras 1.1 and 2.2 of this study.
4 See paras 6.3.2 and 6.4 of this study.
5 See para 6.2 of this study.
6 The court in the *Women's Legal Centre Trust* case determined that Parliament's continued failure to recognise Muslim marriages was unconstitutional and legislation must be enacted. See para 4.2.4 of this study.
7 See para 6.2.1 of this study.
8 Gen Not 37 of GG 33946 of 21 January 2011.
9 See para 6.2.2 of this study.
10 See para 4.2.4 of this study.

Marriages Bill"[11] was proposed. The influence that the *Registration of Muslim Marriages Bill*"[12] could have had on the term "spouse" for the purposes of the *ISA* is also discussed.[13]

In relation to attempts made to provide comprehensive legislation for life partnerships, the *Domestic Partnerships Bill* (hereafter referred to as the *Domestic Partnerships Bill*)[14] and its possible effect on the term "spouse" is analysed.[15]

One bill has been proposed to recognise life partnerships, namely the *Domestic Partnerships Bill*.[16] Following the judgment in the *Women's Legal Centre Trust* case,[17] the South African Law Reform Commission proposed a *Single Marriage Statute*,[18] (hereafter the *Single Marriage Statute*) which, alongside proposing a reform of the marriage laws of South Africa, also proposed the recognition of life partnerships.

The *Single Marriage Statute* suggested two versions to comprehensively recognise marriages, namely the *Protected Relationships Bill*"[19] and the *Recognition and Registration of Marriages and Life Partnerships Bill*.[20] The *Single Marriage Statute* was followed by the publication of the *Marriage Bill*, which is also discussed.[21] Proposals for the recognition of life partnerships were not incorporated into the *Marriage Bill*.[22] The attempted legislation to recognise Musim marriages is discussed in paragraph 6.2.

6.2 Attempts to recognise Muslim marriages

As indicated previously,[23] legislation for the comprehensive recognition of Muslim marriages has been long overdue.[24] Although not enacted, legislation to recognise

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11 Hendricks *Registration of Muslim Marriages Bill*.
12 Hendricks *Registration of Muslim Marriages Bill*.
13 See para 6.2.3 of this study.
14 Gen Not 36 in GG 30663 of 14 January 2008.
15 See para 6.3.1 of this study.
16 Gen Not 36 in GG 30663 of 14 January 2008.
17 See paras 4.2 of this study.
18 SALRC *Single Marriage Statute*.
19 SALRC Commission *Single Marriage Statute* 135-152.
20 SALRC *Single Marriage Statute* 153-171.
21 See paras 6.2.3 and 6.4 of this study.
22 See para 6.2.3 of this study.
23 See paras 1.1 and 4.1 of this study.
24 The continued non-recognition of Muslim marriages has been described as a "travesty to justice". See for example Moosa and Abduroaf 2022 *Ahkam* 3.

Muslim marriages has been proposed. As early as 2003, the South African Law Reform Commission (hereafter referred to as the *SALRC*) investigated the potential recognition of Muslim marriages and proposed legislation to that effect.[25] In 2011, a bill, entitled the *Muslim Marriages Bill*,[26] and hereafter referred to as such, aimed at recognising Muslim marriages was published for public comment, but not enacted.[27] Resistance against the enactment of the bills proposed in 2003[28] and 2011[29] to recognise Muslim marriages was due to the bills' attempts to reconcile Muslim law with the *Constitution*.[30] The lack of enthusiasm for the 2011 bill[31] from Muslim communities resulted in Parliament removing the bill from its review lists.[32] In 2021, a private bill, entitled the *Registration of Muslim Marriages Bill,* aimed at recognising Muslim marriages was submitted, but this bill has been withdrawn in consideration of the proposed *Marriage Bill*.[33]

In paragraph 6.2.1, the discussion paper of 2003[34] is analysed, with specific focus on how, if enacted, the bill would have impacted the term "spouse" for the purposes of the *ISA*.

6.2.1 Project 59: Islamic Marriages and Related Matters

As indicated above,[35] in 2003 the *SALRC* investigated the possibility of recognising Muslim marriages and subsequently issued a discussion paper, which contained a

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25 SALRC *Project 59: Islamic Marriages and Related Matters*; Clark and Van Heerden 2023 *SALJ* 643; Diala and Rautenbach "Introduction" 7-8; Heaton "Religious Marriages" 291; Kruuse 2017 *The International Survey of Family Law* 355; Manjoo 2004 *International Journal of Legal Information* 275; Moosa and Abduroaf 2022 *Ahkam* 3; Rautenbach 2004 *PELJ* 4-5; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 108.

26 Gen Not 37 in GG 33946 of 21 January 2011.

27 Clark and Van Heerden 2023 *SALJ* 643; Heaton "Religious Marriages" 291; Kruuse 2017 *The International Survey of Family Law* 355; Manjoo 2004 *International Journal of Legal Information* 275; Moosa and Abduroaf 2022 *Ahkam* 3; Rautenbach 2004 *PELJ* 4-5; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 108. Diala and Rautenbach "Introduction" 7-8.

28 SALRC *Project 59: Islamic Marriages and Related Matters*.

29 Gen Not 37 in GG 33946 of 21 January 2011.

30 SALRC *Project 59: Islamic Marriages and Related Matters* 110-151; Heaton "Religious Marriages" 291; Manjoo 2004 *International Journal of Legal Information* 275, 278; Rautenbach 2004 *PELJ* 5; Vahed 2022 *Contemporary South Asia* 44.

31 Gen Not 37 in GG 33946 of 21 January 2011.

32 Vahed 2022 *Contemporary South Asia* 51.

33 Hendricks *Registration of Muslim Marriages Bill*.

34 SALRC *Project 59: Islamic Marriages and Related Matters*.

35 See para 6.2 of this study.

proposed bill (hereafter referred to as the 2003 bill) for the recognition of Muslim marriages.[36] The 2003 bill, if enacted, would have regulated and recognised Muslim marriages.[37] However, the 2003 bill was never enacted.[38]

The 2003 bill provided for the recognition of Muslim marriages, including polygynous Muslim marriages.[39] The proposed bill defined "Muslim marriage" as a marriage between a man and a woman contracted in accordance with Muslim law, excluding a concurrent common law marriage.[40] Spouses had the option to choose whether the consequences of the 2003 bill would be applicable to their marriage.[41]

The proposed legislation also attempted to reconcile Muslim law actions of divorce and the *Divorce Act*.[42] It also made proposals for regulating the dissolution of a common law marriage concluded alongside a Muslim marriage.[43] The proposed bill demanded that a court must ensure that a Muslim marriage was dissolved before a common law marriage should be dissolved.[44] The bill also proposed that the *ISA* and *MSSA* should be amended to include spouses to Muslim marriages.[45]

What is evident from the discussion of the 2003 bill is that Parliament envisioned that spouses in Muslim marriages, irrespective of whether they were monogamous or polygynous, formed part of the "family unit". In order to ensure that the right to equality demanded by the *Constitution* was upheld, the 2003 bill blended Muslim law and common law. For instance, the 2003 bill, if enacted, would have allowed Muslim marriages to be dissolved in terms of Muslim law actions of divorce and the *Divorce*

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36 SALRC *Project 59: Islamic Marriages and Related Matters*; Amien 2006 *Human Rights Quarterly* 742; Gabru 2004 *PELJ* 9.

37 SALRC *Project 59: Islamic Marriages and Related Matters* 110-151; Manjoo 2004 *International Journal of Legal Information* 278; Vahed 2022 *Contemporary South Asia* 44.

38 SALRC *Project 59: Islamic Marriages and Related Matters* 110-151; Manjoo 2004 *International Journal of Legal Information* 278; Vahed 2022 *Contemporary South Asia* 44.

39 Amien 2006 *Human Rights Quarterly* 742; Amien and Rajwani 2020 *The Journal of Legal Pluralism and Unofficial Law* 331; Bakker 2009 *THRHR* 400; Manjoo 2004 *International Journal of Legal Information* 279.

40 SALRC *Project 59: Islamic Marriages and Related Matters* 112, 136.

41 SALRC *Project 59: Islamic Marriages and Related Matters* 113, 136; Bakker 2009 *THRHR* 400; Rautenbach 2004 *PELJ* 5.

42 70 of 1979; SALRC *Project 59: Islamic Marriages and Related Matters* 121-123, 143-145.

43 SALRC *Project 59: Islamic Marriages and Related Matters* 128, 143.

44 SALRC *Project 59: Islamic Marriages and Related Matters* 128, 148.

45 SALRC *Project 59: Islamic Marriages and Related Matters* 112, 151.

Act.[46] The benefits of the *Divorce Act*[47] include that it is easily accessible for either spouse and allows for maintenance claims during divorce proceedings, not accessible in terms of Muslim Law.[48] Additionally, had the 2003 bill been enacted, the *ISA* would have replaced Muslim law of intestate succession.[49] The 2003 bill clearly envisioned spouses from Muslim marriages under the term "spouse" in the *ISA*.

The 2003 bill's proposal that spouses should opt into the consequences of the bill is problematic. As already stated, women might not be able to compel men to register marriages.[50] Therefore, spouses most in need of the protection of the 2003 bill, had it been enacted, would remain without legal recourse without resorting to expensive court procedures.

In 2011, the *Muslim Marriages Bill* was proposed. In para 6.2.2, the *Muslim Marriages Bill* is discussed.

6.2.2 Muslim Marriages Bill

As previously mentioned, in 2011, a bill was published for public comment, namely the *Muslim Marriages Bill* that amended the bill proposed in the 2003 discussion paper.[51] The *Muslim Marriages Bill* provided for the recognition and regulation of Muslim marriages.[52] It also recognised potentially polygynous Muslim marriages.[53] The *Muslim Marriages Bill*, like the 2003 bill, again defined a Muslim marriage as a marriage between a man and a woman concluded in terms of Muslim law only, excluding common law marriage.[54] The consequences would only apply if both partners agreed

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46 70 of 1979.
47 70 of 1979.
48 See para 4.2.4 of this study.
49 However, the courts in the *Daniels* case and *Hassam* case made the *ISA* available to spouses in Muslim marriages.
50 See para 5.2 of this study.
51 Amien 2014 *Acta Juridica* 193; Amien and Rajwani 2020 *The Journal of Legal Pluralism and Unofficial Law* 331; Osman 2021 *PELJ* 2; Rautenbach "Key Judgments on the Accommodation of Muslim Law in South Africa" 84, 113; Rautenbach "South Africa's Family Laws: A Potpourri of Some Sort?" 159. See para 6.2 of this study.
52 Amien and Leatt 2014 *Maryland Journal of International Law* 523; Clark and Van Heerden 2024 *SALJ* 470; Du Toit 2009 *SALJ* 479; Neels 2012 *TSAR* 487; Osman 2021 *PELJ* 2.
53 Amien and Leatt 2014 *Maryland Journal of International Law* 532.
54 Clause 1 of the *Muslim Marriages Bill*.

that it would apply to their marriage.[55] The *Muslim Marriages Bill* made the *Divorce Act*[56] applicable where a Muslim marriage was to be terminated.[57] It also recognised grounds of divorce in terms of Muslim law.[58]

Additionally, the bill would have made the *Maintenance Act* applicable as well as maintenance claims in terms of Muslim law.[59] The bill again confirmed that a common law marriage must first be dissolved prior to a court declaring a concurrent Muslim marriage dissolved.[60] The schedules to the bill also recommended that the *ISA* and *MSSA* be amended to include spouses from Muslim marriages.[61] Had the bill been enacted, there would have been no need for the courts to provide relief to spouses in Muslim marriages in terms of the *Marriage Act*, the *Divorce Act*, the *MSSA* and the *ISA*. There would have been no doubt that spouses in Muslim marriages form a "family unit" that is legally recognised. Spouses in Muslim marriages would have qualified as "spouses" in terms of the *ISA*.

The same concern as with the 2003 bill, namely that spouses must agree that the *Muslim Marriages Bill* should apply to their marriages, arises from the *Muslim Marriages Bill*. As explained in para 6.2.2, vulnerable persons who could most benefit from the *Muslim Marriages Bill*, had it been enacted, might have been excluded from it.

Following the *Women's Legal Centre Trust* case,[62] the *Registration of Muslim Marriages Bill*[63] was considered. In paragraph 6.2.3, the *Registration of Muslim Marriages Bill*[64] is discussed.

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55 Clause 2(4)(a) of the *Muslim Marriages Bill*; Amien and Leatt 2014 *Maryland Journal of International Law* 529; Neels 2012 *TSAR* 488.

56 The *Divorce Amendment Act* 1 of 2024 made the *Divorce Act* applicable to Muslim marriages, but not specifically divorce actions recognised by Muslim law.

57 Clause 9(1) of the *Muslim Marriages Bill*.

58 Clause 9 of the *Muslim Marriages Bill*; Amien 2006 *Human Rights Quarterly* 743.

59 Clause 11 of the *Muslim Marriages Bill*; Amien 2006 *Human Rights Quarterly* 743.

60 Clause 13(1) of the *Muslim Marriages Bill*.

61 *Muslim Marriages Bill*.

62 See para 4.2.4 of this study.

63 Hendricks *Registration of Muslim Marriages Bill*.

64 Hendricks *Registration of Muslim Marriages Bill*.

6.2.3 Registration of Muslim Marriages Bill[65]

Following the decision in the *Women's Legal Centre Trust* case, the *Registration of Muslim Marriages Bill* (hereafter the *Registration of Muslim Marriages Bill*)[66] sought to regulate Muslim marriages in South Africa in the interim while parliament prepared more comprehensive legislation.[67] The *Registration of* the *Muslim Marriages Bill* was withdrawn following the introduction of the *Marriage Bill*, on the agreement that the issues would be addressed in the *Marriage Bill*.[68] The *Registration of Muslim Marriages Bill*, if enacted, provided for the recognition and regulation of Muslim marriages.[69] Muslim marriages should have been concluded following a ceremony recognised by Islamic law.[70] Islamic law was defined as a body of law derived from traditional customs, the Quran and the Sunnah, and it utilises juristic tools developed by Muslim jurists.[71]

Persons who intend to enter into a marriage who wish that the bill should apply to their marriages should consent thereto.[72] The Bill allowed for polygynous marriages to be entered into, but whilst a marriage concluded in terms of the *Registration of Muslim Marriages Bill* exists, no marriage in terms of the *Marriage Act*, the *Civil Union Act* or the *RCMA* may be concluded.[73] As with the *Muslim Marriages Bill*, the *Registration of Muslim Marriages Bill* attempted to reconcile Muslim divorce law with the *Divorce Act*.[74]

The *Registration of Muslim Marriages Bill* specifically recognised a claim for a dowry that was binding and enforceable.[75] However, no other common law actions or legislation, such as the *ISA* or *MSSA,* were explicitly recognised by the *Registration of Muslim Marriages Bill*.

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65 Hendricks *Registration of Muslim Marriages Bill*.
66 Hendricks *Registration of Muslim Marriages Bill*.
67 Diala and Rautenbach "Introduction" 8.
68 Heaton "Religious Marriages" 292.
69 Hendricks *Registration of Muslim Marriages Bill*.
70 Clause 2(1) of the *Registration of Muslim Marriages Bill.*
71 Clause 1 of the *Registration of Muslim Marriages Bill*.
72 Clause 2(2) of the *Registration of Muslim Marriages Bill*.
73 Clause 5(a)-(b) of the *Registration of Muslim Marriages Bill*.
74 Clause (1) of the *Registration of Muslim Marriages Bill*.
75 Clause 4(2)(b) of the *Registration of Muslim Marriages Bill*.

Criticism that may be levelled against the proposed 2003 bill, the *Muslim Marriages Bill* and the *Registration of Muslim Marriages Bill* includes that none of the proposed bills aimed at recognising that Muslim marriages make provision for the recognition of the Muslim law of inheritance.[76] Instead, the estates of spouses in marriages concluded under the proposed bills (except for the *Registration of Muslim Marriages Bill*) and subsequently dissolved by death, would have fallen under the *ISA*. The *Registration of Muslim Marriages Bill* is silent on intestate succession.

With regard to same-sex partners, neither Muslim law nor the proposed bills allow same-sex partners to conclude a marriage.[77] As with the 2003 bill and the *Muslim Marriage Bill*, the *Registration of Muslim Marriages Bill* would also have been applicable only if the parties agreed thereto, again bringing into question whether the *Registration of Muslim Marriages Bill* would have provided protection to those who needed it most.[78] It is submitted that any legislation enacted to recognise a Muslim marriage should apply automatically, but allow partners to opt out of its application.[79] An opt-out clause would ensure better protection of vulnerable members of society.

As stated previously, no legislation has been proposed or enacted to recognise Hindu marriages.[80] As stated previously, Parliament's latest attempt at recognising Muslim marriages is the *Marriage Bill* that not only aims to recognise Muslim marriages, but to bring all marriage laws of South Africa under one act.[81] It will also recognise Hindu marriages. The *Marriage Bill* is discussed in paragraph 6.4. Before the *Marriage Bill* is discussed, the possibility of recognising life partnerships is addressed in paragraph 6.3.

6.3 Attempts to recognise life partnerships

As indicated above, the *Domestic Partnerships Bill* was published, and had it been enacted it would have comprehensively regulated life partnerships. Additionally, the

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76 Amien 2014 *Acta Juridica* 193. See Amien 2014 *Acta Juridica* 194-200 for a discussion of Muslim law of intestate inheritance; Neels 2012 *TSAR* 504.

77 Amien and Leatt 2014 *Maryland Journal of International Law* 524.

78 Bonthuys 2018 *PELJ* 13; Neels 2012 *TSAR* 488. See paras 6.2.1-6.2.2 of this study.

79 See also Clark and Van Heerden 2023 *SALJ* 644-645; Neels 2012 *TSAR* 488.

80 Rautenbach "South Africa's Family Laws: A Potpourri of Sort?" 160.

81 See 4.4 of this study.

Single Marriage Statute proposed two bills, namely the *Protected Relationships Bill*[82] and the *Recognition and Registration of Marriages and Life Partnerships Bill* [83] aimed at regulating life partnerships, neither of which were published in the *Marriage Bill*.[84] The *Domestic Partnerships Bill* is discussed in paragraph 6.3.1 and the *Protected Relationships Bill*[85] and the *Recognition and Registration of Marriages and Life Partnerships Bill* [86] are discussed in paragraph 6.3.2.

6.3.1 Domestic Partnerships Bill

The *Domestic Partnerships Bill*, that would have recognised life partnerships, has not been enacted.[87] The objectives of the *Domestic Partnerships Bill* included protecting the rights of equality and the dignity of life partners.[88] "Family" was specifically defined to include partners and their dependants in a domestic partnership.[89] The *Domestic Partnerships Bill,* therefore, had it been enacted, would have recognised life partners as members of the "family unit".

The *Domestic Partnerships Bill* provided for the conclusion of either a registered or an unregistered domestic partnership.[90] Partners in a relationship registered under the *Domestic Partnerships Bill* would have owed each other a duty of support.[91] The *Domestic Partnerships Bill* would have also regulated the termination of registered domestic partnerships.[92] The court would have been able to grant a maintenance order

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82 SALRC *Single Marriage Statute* 135-152.
83 SALRC *Single Marriage Statute* 153-171.
84 SALRC *Single Marriage Statute* 153-171.
85 SALRC *Single Marriage Statute* 135-152.
86 SALRC *Single Marriage Statute* 153-171.
87 Clause 2 of the *Domestic Partnerships Bill* ; Barratt 2015 *Stell LR* 111; Barratt and Denson "Domestic Partnerships" 342; Bonthuys 2018 *PELJ* 13; Clark and Van Heerden 2023 *SALJ* 643 Heaton "Life Parentships" 304; Kruuse 2017 *The International Survey of Family Law* 355-356; Madzika 2020 *De Jure* 397; Mochela and Smith 2020 *TSAR* 482; Osman 2021 *PELJ* 2; Sloth-Nielsen and Van Heerden 2014 *International Journal of Law, Policy and the Family* 103; Smith 2011 *SALJ* 563; Smith 2016 *SALJ* 289, 298; Smith 2016 *SAJHR* 132; Smith 2020 *TSAR* 577; Smith and Heaton 2012 *THRHR* 484; Zitzke 2018 *TSAR* 187.
88 Clause 2 of the *Domestic Partnerships Bill*.
89 Clause 1 of the *Domestic Partnerships Bill*.
90 Clauses 1, 6, 8 of the *Domestic Partnerships Bill*; Barratt 2015 *Stell LR* 119; Barratt and Denson "Domestic Partnerships" 342; Bonthuys 2018 *PELJ* 13; Du Toit 2009 *SALJ* 480; Heaton "Life Partnerships" 30; Smith 2010 *PELJ* 239, 274; Smith 2011 *SALJ* 563-564; Smith 2016 *SALJ* 297; Smith and Heaton 2012 *THRHR* 484.
91 Clause 9 of the *Domestic Partnerships Bill*.
92 Clauses 12-15 of the *Domestic Partnerships Bill*.

upon the dissolution of a registered domestic partnership.[93] The right to intestate succession in terms of the *ISA* would have been specifically recognised for registered domestic partnerships.[94]

Partners in an unregistered domestic partnership would have had to apply to the court for an order upon the termination of the life partnership.[95] No right to maintenance would have automatically been available to partners in unregistered partnerships, and partners would have had no right to intestate succession.[96] Maintenance and intestate succession rights would have had to be attained through a court order.[97]

The *Domestic Partnerships Bill* listed factors to take into account when determining a legal duty of support between partners in an unregistered domestic partnership.[98] Factors include the

> length of the relationship; the nature and extent of ordinary residence; the degree of financial dependence; arrangements for financial support between the partners; ownership, use and acquisition of property; the degree of mutual commitment to a shared life; care and support of children; performance of household duties; reputation of public aspects of the relationship; and the relationship status with third parties.[99]

The *Domestic Partnerships Bill* emphasised monogamy by prohibiting the registration of more than one domestic partnership and by prohibiting the registration of a domestic partnership alongside a marriage concluded in terms of the *Marriage Act, RCMA* or a civil union.[100] Additionally, the *Domestic Partnerships Bill* recognised that a child born to parents in a life partnership is a "descendant" of the parents. A child

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93 Clauses 18-19 of the *Domestic Partnerships Bill*; Barratt and Denson "Domestic Partnerships" 344; Bonthuys 2018 *PELJ* 13; Smith 2010 *PELJ* 274; Smith 2011 *SALJ* 564; Smith and Heaton 2012 *THRHR* 484.

94 Clause 20 of the *Domestic Partnerships Bill*; Barratt and Denson "Domestic Partnerships" 344; Bonthuys 2018 *PELJ* 13; Du Toit 2009 *SALJ* 480; Smith 2010 *PELJ* 274; Smith 2011 *SALJ* 564; Smith *SALJ* 297; Smith and Heaton 2012 *THRHR* 484.

95 Clause 26 of the *Domestic Partnerships Bill*; Du Toit 2009 *SALJ* 480.

96 Clauses 27, 31 of the *Domestic Partnerships Bill*; Bonthuys 2018 *PELJ* 13; Smith 2011 *SALJ* 582.

97 Clauses 28-31 of the *Domestic Partnerships Bill*; Barratt and Denson "Domestic Partnerships" 345-346; Bonthuys 2018 *PELJ* 13; Smith 2010 *PELJ* 288, 291; Smith 2016 *SALJ* 297-298.

98 Clause 26 of the *Domestic Partnerships Bill*; Barratt 2015 *Stell LR* 120, 130; Barratt and Denson "Domestic Partnerships" 342; Bonthuys 2018 *PELJ* 13-14; Mochela and Smith 2020 *TSAR* 494; Smith 2010 *PELJ* 287; Smith 2011 *SALJ* 564.

99 Clause 26 of the *Domestic Partnerships Bill*; Barratt 2015 *Stell LR* 120, 130; Barratt and Denson "Domestic Partnerships" 342; Bonthuys 2018 *PELJ* 13-14; Mochela and Smith 2020 *TSAR* 494; Smith 2010 *PELJ* 287; Smith 2011 *SALJ* 564.

100 Clause 4(1)-(2) of the *Domestic Partnerships Bill*; Barratt and Denson "Domestic Partnerships" 342; Bonthuys 2018 *PELJ* 13, 17; Smith 2010 *PELJ* 239, 275; Smith 2011 *SALJ* 564.

included the biological child of both partners or either one of the partners, a child adopted by the partners jointly or a child who was a dependant of the life partners.[101]

Concerns with the *Domestic Partnerships Bill* include that persons in unregistered domestic partnerships would have to access the courts to obtain any legal recognition for their relationships.[102] Women in vulnerable financial positions might not be able to do so. Women who are unable to convince their husbands to conclude marriages will also be unable to persuade them to register a domestic partnership.[103] Since unregistered domestic partnerships do not give rise to an automatic duty of support between the partners, vulnerable women would remain outside the protection of the law.[104] A system granting automatic rights to permanent relationships would better protect vulnerable members of society.[105] Automatic rights will subject persons to the law who may not wish to be subjected to it.[106] However, since partnership agreements are permissible, partners may opt out of undesirable consequences, where both parties agree.

The *Single Marriage Statute* also made proposals to recognise life partnerships. These proposals are discussed in paragraph 6.3.2.

6.3.2 Single Marriage Statute

As indicated above, the *Single Marriage Statute* provides for two possible bills to recognise and regulate marriages and life partnerships.[107] The *Protected Relationships Bill*[108] provides for the registration of "protected relationships".[109] A "protected relationship" is described as a marriage concluded in terms of the *Marriage Act*, a civil union in terms of the *Civil Unions Act*, any monogamous or polygynous marriage

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101 Clause 1 of the *Domestic Partnerships Bill*.
102 Clark and Van Heerden 2023 *SALJ* 643.
103 See paras 5.2, 6.2.1-6.2.3 of this study.
104 See also Barratt 2015 *Stell LR* 117.
105 Barratt 2015 *Stell LR* 116.
106 Barratt 2015 *Stell LR* 116.
107 SALRC *Single Marriage Statute* 135-152, 153-171; Clark and Van Heerden 2023 *SALJ* 643; Clark and Van Heerden 2024 *PELJ* 473; Heaton "Life Partnerships" 304; Osman 2021 *PELJ* 2; Ozoemena, Wara and Ramarumo "Balancing Customary Practices and Human Rights in the Proposed Single Marriage Bill" 95.
108 SALRC *Single Marriage Statute* 135-152. Clark and Van Heerden 2023 *SALJ* 643
109 SALRC *Single Marriage Statute* 139; Ozoemena, Wara and Ramarumo "Balancing Customary Practices and Human Rights in the Proposed Single Marriage Bill" 95.

concluded in terms of custom or religion and a life partnership where the partners owe reciprocal duties of support of each other.[110]

The *Recognition and Registration of Marriages and Life Partnerships Bill* is aimed at giving recognition to persons in relationships to protect their equality rights, their right to human dignity and religious and cultural rights.[111] The objects of the *Recognition and Registration of Marriages and Life Partnerships Bill* are to recognise or regulate marriages or life partnerships.[112] Partners in a marriage or life partnership will not be able to exclude the application of the *Recognition and Registration of Marriages and Life Partnerships Bill*, if enacted.[113] However, partners would be required to register the partnership.[114] Failure to register a relationship would not invalidate it.[115]

Neither the proposed *Protected Relationships Bill*[116] nor the *Recognition and Registration of Marriages and Life Partnerships Bill*[117] in the *Single Marriage Statute* provides for automatic rights to apply to unregistered life partnerships. As stated above, the vulnerability of persons in life partnerships lies in the fact that they may be unable to compel their partners to register a relationship. A system that allows individuals to opt out of undesirable consequences is preferable.

As indicated previously, the *Single Marriage Statute* made suggestions to recognise a marriage act comprehensively regulating all marriages in South Africa.

6.4 Proposals to recognise a single marriage act

The initial concept to recognise marriages in South Africa came in the form of the *Single Marriage Statute*.[118] The *Single Marriage Statute* aimed to consolidate all forms

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110 SALRC *Single Marriage Statute* 137. See the *Bwanya* case paras 47, 62 for a list of factors identified by the court to recognise a life partnership.
111 SALRC *Single Marriage Statute* 153. Clark and Van Heerden 2023 *SALJ* 643
112 SALRC *Single Marriage Statute* 156; Ozoemena, Wara and Ramarumo "Balancing Customary Practices and Human Rights in the Proposed Single Marriage Bill" 95.
113 SALRC *Single Marriage Statute* 156.
114 SALRC *Single Marriage Statute* 158.
115 SALRC *Single Marriage Statute* 159.
116 SALRC *Single Marriage Statute* 135-152.
117 SALRC *Single Marriage Statute* 153-171.
118 SALRC *Single Marriage Statute*.

of marriages in South Africa.[119] These would have included the *Civil Union Act*, the *RCMA* and any marriage in terms of a religion or culture, as well as permanent life partnerships where the partners had undertaken reciprocal duties of support. [120] Also, the *Single Marriage Statute* would have recognised both polyandry and polygyny.[121]

The *Marriage Bill* was published following the *Single Marriage Statute*. The *Marriage Bill*, if enacted, will not regulate life partnerships.[122] The *Marriage Bill* will repeal the *Marriage Act, RCMA* and the *Civil Union Act* and will regulate all marriages.[123] Both monogamous and polygynous marriages will be recognised if concluded in terms of religion or custom.[124] Both same- and opposite-sex couples will be able to conclude a monogamous marriage, while polygynous marriages will only be possible between opposite-sex partners.[125]

Clause 1 of the *Marriage Bill* describes marriage as any subsisting marriage concluded in terms of the *Marriage Act* before the commencement of this act; any subsisting civil union or civil partnership concluded in terms of the *Civil Union Act* before the commencement of this Act; any subsisting customary law marriage concluded in terms of the *RCMA* or any subsisting monogamous or polygamous marriage concluded before or after the *Marriage Bill* comes into operation.[126] A polygamous marriage is defined as a marriage in which a male spouse has more than one spouse at the same time, which is incorrect.[127] The definition provided by the *Marriage Bill* refers to polygynous unions.[128]

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119 Osman-Hyder 2022 *Stell LR* 267; Osman 2024 *PELJ* 3; Ozoemena, Wara and Ramarumo "Balancing Customary Practices and Human Rights in the Proposed Single Marriage Bill" 95. See para 6.1 of this study.

120 Osman 2021 *PELJ* 4.

121 Clark and Van Heerden 2024 *PELJ* 47, 481.

122 Clark and Van Heerden 2024 *PELJ* 477; Heaton "Religious Marriages" 291; Rautenbach "Families and Legal Pluralism in South Africa: Celebrating Diversity but at what Cost?" 91.

123 Heaton "The Legal Requirements for a Civil Marriage" 18, 249, 257, 262; Diala and Rautenbach "Introduction" 8; Osman 2024 *PELJ* 11.

124 Clause 4 (1) of the *Marriage Bill*; Heaton "Religious Marriages" 292; Heaton "The Legal Requirements for a Civil Marriage" 18, 30, 262.

125 Heaton "The Legal Requirements for a Civil Marriage" 18, 30.

126 Clause 8-9 of the *Marriage Bill*; Clark and Van Heerden 2024 *PELJ* 480.

127 Clause 1 if the *Marriage Bill*; Clark and Van Heerden 2024 *PELJ* 480.

128 See para 1.1 of this study.

The *Marriage Bill* does not provide for unrecognised customary law marriages,[129] woman-to-woman marriages, substitute wives and levirate marriages.[130] In terms of the *Marriage Bill*, the two parties may consent without considering their families, thereby excluding the negotiating procedures usually observed in terms of customary law.[131] The proposed *Single Marriage Bill* incorporates the requirement that a first wife must consent for a man to enter into a second or further marriage.[132]

Concerns with the *Marriage Bill* include that it does not fully address the issue of polygamy.[133] It allows for polygyny, but not polyandrous marriages.[134] It is submitted that legislation should be enacted to recognise polyandrous relationships as well.[135] Additionally, the *Marriage Bill* provides recognition only to marriages, and not life partnerships.[136] The vulnerability of partners in life partnerships has been illustrated. It is submitted that life partnerships must be regulated by legislation.

Polygynous relationships outside of custom or religion are not recognised by the *Marriage Bill*.[137] Questions regarding the constitutionality of polygyny have been raised.[138] Since polygyny has been recognised by both the *RCMA* and *RCLSA* and by proposed legislation,[139] polygyny is not contrary to public policy. Any legislation dealing with customary law marriages and religious marriages should allow for the conclusion of potentially polygynous relationships.

Polyandry is not recognised in terms of the *Marriage Bill*, supposedly because it does not seem to be practised widely enough.[140] Not recognising polyandry constitutes discrimination on the grounds of sex and gender and infringes the right to equality of

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129 Ozoemena, Wara and Ramarumo "Balancing Customary Practices and Human Rights in the Proposed Single Marriage Bill" 97.
130 Ozoemena, Wara and Ramarumo "Balancing Customary Practices and Human Rights in the Proposed Single Marriage Bill" 98.
131 Clause 6(1) of the *Marriage Bill*; Ozoemena, Wara and Ramarumo "Balancing Customary Practices and Human Rights in the Proposed Single Marriage Bill" 108.
132 Clause 9(2)(a) of the *Marriage Bill*; Ozoemena, Wara and Ramarumo "Balancing Customary Practices and Human Rights in the Proposed Single Marriage Bill" 106.
133 Clark and Van Heerden 2024 *PELJ* 474.
134 Clark and Van Heerden 2024 *PELJ* 474.
135 See para 5.4 of this study.
136 See para 6.3.2 of this study
137 Osman 2021 *PELJ* 6.
138 See paras 3.2 and 4.2 of this study.
139 See para 6.2 of this study.
140 Clark and Van Heerden 2024 *PELJ* 481.

women.[141] The mere assertion that polyandry is not practised widely is no justification for limiting women's rights.[142] Since polyandrous relationships are not recognised by custom or religion, such relationships should not be recognised by legislation specifically regulating customary law or religious marriages. It is suggested that polyandrous relationships be recognised by its own act, or an act such as proposed in terms of the *Marriage Bill*.

6.5 Conclusion

Religious marriages and life partnerships remain without formal legislative recognition.[143] Some attempts have been made to provide for comprehensive legislative recognition of Muslim marriages and life partnerships.[144] No proposals to recognise Hindu marriages have been suggested. In this chapter, attempts made to comprehensively recognise Muslim marriages and life partnerships by means of proposed legislation were discussed.[145]

Specifically, the attempted recognition of Muslim marriages proposed in the discussion paper on Muslim marriages presented in 2003[146] and the bill proposed in the discussion paper as analysed in as far as it could have impacted the term "spouse" for the purposes of the *ISA* is discussed.[147] Also, the bill to recognise Muslim marriages proposed in 2011[148] was analysed in as far as it could have amended the term "spouse" for the purposes of the *ISA*.[149] The influence that the *Registration of Muslim Marriages*

141 Clark and Van Heerden 2024 *PELJ* 481.
142 See also Clark and Van Heerden 2024 *PELJ* 481.
143 See paras 4.2, 5.1 and 6.1 of this study.
144 See paras 6.2-6.4 of this study.
145 See para 6.2 of this study.
146 The court in the *Women's Legal Centre Trust* case determined that Parliament's continued failure to recognise Muslim marriages was unconstitutional and legislation must be enacted. See para 4.2.4 of this study.
147 See para 6.2.1 of this study.
148 Gen Not 37 of GG 33946 of 21 January 2011.
149 See para 6.2.2 of this study.

Bill"[150] could have had on the term "spouse" for the purposes of the *ISA* was also discussed.[151]

In relation to attempts made to provide comprehensive legislation for life partnerships, the *Domestic Partnerships Bill* (hereafter referred to as the *Domestic Partnerships Bill*)[152] and its possible effect on the term "spouse" was analysed.[153]

The *Single Marriage Statute* suggested two versions to comprehensively recognise marriages, namely the *Protected Relationships Bill*"[154] and the *Recognition and Registration of Marriages and Life Partnerships Bill*.[155] The *Single Marriage Statute* was followed by the publication of the *Marriage Bill*, which was also discussed in this chapter.[156]

Final recommendations for further extension of the terms "spouse", "descendant" and "parent" is made in Chapter 7 of this study.

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150 Hendricks *Registration of Muslim Marriages Bill*.
151 See para 6.2.3 of this study.
152 Gen Not 36 in GG 30663 of 14 January 2008.
153 See para 6.3.1 of this study.
154 SALRC *Single Marriage Statute* 135-152.
155 SALRC *Single Marriage Statute* 153-171.
156 See paras 6.2.3 and 6.4 of this study.

Chapter 7: Conclusion and recommendations

7.1 The aim and objectives of this study

As stated in Chapter 1,[1] South African families are diverse, and not all family forms enjoy comprehensive protection from the law. Of particular importance to this study is that intestate succession law does not grant the right of intestate succession to all family members.[2] The rights to inherit under the *ISA* of spouses,[3] descendants[4] and parents[5] were discussed in this study.[6]

Accordingly, the primary objective was to assess the impact on the law of intestate succession of the evolution of the concept of the "family unit" in response to constitutional developments.[7] To achieve the main objective, the development of the terms "spouse", "descendant" and "parent" in terms of the common law,[8] customary law,[9] Muslim and Hindu law were analysed.[10] The development of the term "spouse" to include life partnerships was also discussed.[11]

Legal developments, particularly legislation relating to the recognition of Muslim marriages and life partnerships, were also discussed.[12] Exclusions from the terms "spouse", "descendant" and "parent" were continuously identified, and suggestions for their inclusion were analysed.[13]

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1 See para 1.1 of this study.
2 See para 1.1 of this study.
3 See paras 2.2, 3.2, 4.2 and 5.2 of this study.
4 See paras 2.3, 3.3 and 4.3 of this study.
5 See paras 2.3, 3.3 and 4.3 of this study.
6 See Chapters 2-5 of this study.
7 See para 1.2 of this study.
8 See Chapter 2 of this study.
9 See Chapter 3 of this study.
10 See Chapter 4 of this study.
11 See Chapter 5 of this study.
12 See Chapters 2-6 of this study.
13 See Chapters 2-5 of this study.

7.2 Development of the term "spouse" in terms of the ISA

7.2.1 Common law developments

In terms of the common law, marriage was limited to one man and one woman in a valid marriage.[14] Initially, there was no right of intestate succession for spouses unless there were no other relatives alive prior to the enactment of the *ISA*.[15] In terms of the *ISA*, initially only spouses in a valid marriage were allowed to inherit.[16]

In terms of the common law, "spouse" was extended to include same-sex couples and persons who underwent a sex-change operation.[17] The eventual recognition of same-sex couples under the *ISA* was preceded by the decriminalisation of same-sex conduct and the eventual recognition of the right of same-sex couples to marry.[18] The *Civil Union Act* made all legislation applicable to married couples applicable to same-sex couples in a valid civil union, including the *ISA*.[19] However, it was only after the court ordered Parliament to enact legislation that legislation recognising same-sex marriages or civil unions appeared.[20] With same-sex relationships no longer being contrary to public policy, persons who underwent sex-change operations remain in valid marriages, despite such marriages becoming same-sex marriages, and remain eligible to inherit as a "spouse" in terms of the *ISA*.[21]

7.2.2 Customary law developments

Initially, customary law was only partially recognised.[22] Particularly relevant to this study was the *BAA*'s recognition of customary law of succession, specifically the rule of male primogeniture.[23] The rule of male primogeniture was declared unconstitutional and the *RCLSA* was enacted.[24] The *RCLSA* modified the *ISA* to provide for polygynous

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14 See para 1.1 of this study.
15 See para 2.2.1 of this study.
16 See para 2.2 of this study.
17 See para 2.2.2 of this study.
18 See para 2.2.2 of this study.
19 See para 2.2.2 of this study.
20 See para 2.2.2 of this study.
21 See para 2.2.3 of this study. Paragraph 7.2.4 discusses common law developments pertaining to life partnerships.
22 See para 3.2 of this study.
23 See paras 3.2.1 and 3.3.1 of this study.
24 See para 3.2.1 of this study.

relationships.[25] The *RCMA* recognised marriages in terms of common law.[26] The *RCLSA* granted rights of intestate succession to spouses in valid marriages concluded in terms of the *RCMA*.[27] Additionally, women who concluded seed-raiser agreements and women in woman-to-woman marriages were also recognised as "spouses" by the *RCLSA*.[28]

7.2.3 Developments in consideration of Muslim and Hindu law

Before the introduction of the *Constitution*, Muslim and Hindu marriages were regarded as contrary to public policy due to potential polygyny.[29] Following the introduction of the *Constitution*, polygyny is no longer contrary to public policy.[30] Currently, there is no comprehensive legislation that recognises religious marriages in South Africa.[31] Certain rights were extended by legislation on a piecemeal basis.[32] Due to persistent non-recognition in terms of legislation of religious marriages, certain rights for spouses in Muslim and Hindu marriages had to be obtained from the courts, including the right to inherit intestate in terms of the *ISA*.[33]

Rights extended to Muslim and Hindu spouses discussed in this study include, apart from the right to inherit intestate in terms of the *ISA*, rights to claim maintenance based on a Muslim marriage contract,[34] the action for the loss of support upon the death of the breadwinner,[35] the *MSSA*,[36] the *Wills Act*,[37] the *Maintenance Act*,[38] the *Divorce Act*,[39] the *Marriage Act*[40] and Rule 43 of the Uniform Rules of the Court.[41]

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25 See para 3.2.1 of this study.
26 See para 3.2.2 of this study.
27 See para 3.2.2 of this study.
28 See paras 3.2.3-3.2.4 of this study.
29 See para 4.2 of this study.
30 See para 4.2 of this study.
31 See para 4.2 of this study.
32 See para 4.2.3 of this study.
33 See para 4.2.3 of this study.
34 See para 4.2.1 of this study.
35 See para 4.2.2 of this study.
36 See para 4.2.3 of this study.
37 7 of 1983. See para 4.2.3 of this study.
38 99 of 1998. See para 4.2.3 of this study
39 70 of 1979. See para 4.2.4 of this study
40 See para 4.2.4 of this study.
41 See para 4.2.4 of this study.

7.2.4 Developments in consideration of life partnerships

As stated previously, only spouses in valid marriages could initially inherit from each other in terms of the *ISA*.[42] As with religious marriages, there is no comprehensive legislation to govern life partnerships.[43] Piecemeal recognition to life partners in permanent life partnerships were granted in terms of certain legislation.[44] Other rights of partners in life partnerships had to be obtained from the courts, including the right to inherit intestate in terms of the *ISA*.[45]

Initially, rights to life partners were granted to same-sex partners due to their inability to marry.[46] Opposite-sex partners were initially denied the right to claim in terms of the *MSSA*, which was believed to be a bar to claiming rights ordinarily only available to married spouses.[47] However, the courts continued to grant piecemeal rights to partners, of both the opposite and same sexes, including the right to inherit intestate from each other in terms of the *ISA*.[48]

Other rights extended to life partners by the courts include benefits under the *Aliens Control Act*,[49] insurance policies,[50] medical aid schemes,[51] the *Judges Remuneration and Conditions of Employment Act*,[52] *MSSA*,[53] the action for the loss of support upon the death of the breadwinner[54] and the recognition of life partnerships as universal partnerships.[55]

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42 See para 1.1 of this study.
43 See paras 5.2-5.3 of this study.
44 See paras 5.2 of this study.
45 See paras 5.2-5.3 of this study. Following the decision in the *Bwanya* case, legislation recognised life partners under the *ISA*.
46 See para 5.2 of this study.
47 See para 5.3 of this study.
48 See paras 5.2-5.3 of this study.
49 96 of 1991. See para 5.2.1 of this study.
50 See para 5.1.2.1 of this study.
51 See para 5.1.2.1 of this study.
52 88 of 1989. See para 5.1.2.1 of this study
53 See para 5.2.2.4 of this study.
54 See paras 5.1.2.2 and 5.2.2.2 of this study.
55 See para 5.2.2.3 of this study.

7.3 Development of the terms "descendant" and "parent" in terms of the ISA

7.3.1 Common law developments

Initially, only biological children born to spouses in a valid marriage and their biological parents could inherit as "descendants" and "parents".[56] In terms of common law, the concepts of "descendant" and "parent" were extended before the introduction of the *Constitution* to include unmarried persons and their biological children.[57] The *Children's Act* regulated the recognition of unmarried couples.[58] Also included in the terms "descendant" and "parent" before the introduction of the *Constitution*, were adopted children and adoptive parents.[59] Presently, adoption procedures are regulated by the *Children's Act*.[60] Only children adopted in terms of the *Children's Act* are regarded as "descendants".

Initially, commissioning parents in surrogacy agreements were not included in the term "spouse" due to surrogacy agreements being contrary to public policy.[61] The *Children's Act* currently regulates surrogacy agreements, bringing surrogate parents under the term "parent."[62] Surrogate mothers do not have any claim from the children born from a surrogacy agreement under the *ISA* and *vice versa*.[63] Artificial insemination was also initially contrary to public policy.[64] Once artificial insemination was recognised by the *Children's Act*, children born from artificial insemination were regarded as "descendants" of the mother and, if she is married or in a permanent life partnership, her spouse or partner.[65] The donor for the purpose of artificial insemination gains no intestate succession rights from the child born as a result of artificial insemination and

56 See para 1.1 of this study.
57 See para 2.3.2 of this study.
58 See para 2.3.2 of this study.
59 See para 2.3.3 of this study.
60 See para 2.3.3 of this study.
61 See para 2.3.4 of this study.
62 See para 2.3.4 of this study.
63 See para 2.3.4 of this study.
64 See para 2.3.5 of this study.
65 See para 2.3.5 of this study.

vice versa.[66] Same-sex parents were also recognised as "parents" for the *ISA* after the introduction of the *Constitution*.[67]

The term "parent" was expanded by the court in the *Wilsnach* case to include individuals who have gained parental rights and responsibilities under the *Children's Act*.[68] Persons who failed to act as a parent to their children are excluded as unworthy persons.[69]

7.3.2 Customary law developments

As indicated previously, the rule of male primogeniture excluded all descendants from inheriting intestate from their fathers.[70] The rule of male primogeniture was declared unconstitutional, and all children of a deceased who lived in terms of customary law may inherit from him.[71] Additionally, customary law adoption is also recognised, and children adopted in accordance with customary law procedures were considered "descendants" of their adoptive parents and *vice versa*.[72]

7.3.3 Developments in consideration of Muslim and Hindu law

Due to the lack of legislative recognition of Muslim and Hindu marriages, parents of children born from such marriages were and still are in the same position as unmarried parents subject to the common law.[73] As stated previously, unmarried parents were recognised as "parents" of their biological children and *vice versa* under the *ISA*.[74]

7.4 Developments under consideration

Some attempts have been made to recognise Muslim marriages and life partnerships.[75] However, none of these attempts resulted in enacted legislation.[76] Currently under

66 See para 2.3.5 of this study.
67 See para 2.3.6 of this study.
68 See para 2.3.7 of this study.
69 See para 2.3.2 of this study.
70 See para 3.3.1 of this study.
71 See para 3.3.1 of this study.
72 See para 3.3.3 of this study.
73 See para 4.3 of this study.
74 See para 2.3.2 of this study.
75 See paras 6.2-6.4 of this study.
76 See paras 6.2-6.4 of this study.

consideration is the *Marriage Bill*.[77] The *Marriage Bill* will recognise all marriages, including common law marriages, customary law marriages and religious marriages.[78] Such recognition will also recognise spouses covered by the *Marriage Bill* under the *ISA*.[79] The *Marriage Bill* does not cover life partnerships and it appears that Parliament has no immediate plans to recognise life partnerships.[80]

7.5 Final recommendations

This study has argued that when the terms "spouse", "descendant" and "parent" are extended, it should be done following a qualitative consideration of the right to equality and human dignity.[81] In particular, this study has identified that women and children constitute a vulnerable segment of society.[82] Due to the vulnerability of women, the development of the term "spouse" must follow an approach highlighting substantive gender equality and assessing the actual conditions of women's lives.[83]

As illustrated by the court cases discussed in this study, women are predominantly in the caretaking position and are economically dependent on men.[84] Most often, it is women who seek the extension of the term "spouse" to alleviate hardships faced by them due to exclusion from the term "spouse".[85] It is women rather than men who suffer disadvantage because of their status of being married or not married.[86] Choice is not a justifiable limitation on the rights of women, since not all women have the choice to enter into marriage.[87] The contract-based approach advanced in the *Bwanya* case would mean that the court would use the facts of the case to determine whether a contract was establish.[88] No attention should be paid as to whether a legal marriage

77 See para 6.4 of this study.
78 See para 4.2 of this study.
79 See para 4.2 of this study.
80 See para 4.2 of this study.
81 See para 1.1.3, Chapters 2-5 of this study.
82 See para 5.2.2.4 of this study.
83 See also Bonthuys 2018 *PELJ* 4.
84 See para 5.2 of this study.
85 See also Bonthuys 2018 *PELJ* 4.
86 See also Bonthuys 2018 *PELJ* 6.
87 See also Bonthuys 2018 *PELJ* 7.
88 See para 5.2.4 of this study. See also Barratt 2022 *PELJ* 17.

was entered into.[89] Family members are entitled to protection, regardless of the form and shape the family unit displays.[90]

7.5.1 Recommendations for the development of the terms "spouse", "descendant" and "parent" in terms of the common law

In relation to the term "spouse", developments regarding life partnerships concluded while a common law marriage is in existence should be considered. This is further discussed in paragraph 7.5.4.

The terms "descendant" and "parent" must further be developed to recognise parents and children involved in informal adoptions in terms of which a parent-child relationship have been established for the purposes of the *ISA*.[91] Where persons failed to act as a parent, they must in all cases be regarded as an unworthy heir.

In order to include children and parents involved in informal adoptions where a parent-child relationship have been established in the terms "descendant" and "parent", the *ISA* must be amended. It is recommended that the terms "descendant" and "parent" be amended to include a person with whom the deceased has been in a parent-child relationship.[92] Factors as identified in paragraph 2.4 of this study should be included in the *ISA* to determine a parent-child relationship but should not be regarded as a closed list. The *ISA* should further be amended to include a provision specifically excluding a person who failed to establish a parent-child relationship with the deceased, even if they are biologically related to the deceased.

7.5.2 Recommendations for the development of the terms "spouse", "descendant" and "parent" in terms of the customary law

Further clarity is needed with regard to the requirement from the *RCMA* that a marriage must adhere to customary law to be valid. The *RCMA* should be amended to allow for the recognition of valid customary marriages if there was a clear intention to enter into

89 See para 5.2.4 of this study. See also Barratt 2022 *PELJ* 17.
90 Bwanya case para 32; Barratt 2022 *PELJ* 18.
91 See para 2.4 of this study.
92 See para 2.4 of this study.

a customary law marriage.[93] Where a customary law marriage is declared invalid, the question remains as to whether a life partnership may be recognised. This is further discussed in paragraph 7.5.4.

Additionally, adoptions in terms of customary law must be governed by legislation to remove the burden from the courts to identify valid adoptions under customary law.[94] The *RCLSA* should be amended to include persons involved in informal adoptions in the terms "descendant" and "parent", similarly to the recommendations made in paragraph 7.5.2 of this study for the amendment of the *ISA*.

7.5.3 Recommendations for the development of the terms "spouse", "descendant" and "parent" in terms of Muslim and Hindu law

Comprehensive legislative regulation of Muslim and Hindu marriages would give surety as to who qualifies as spouses under the *ISA* and which religious marriages ought to be recognised.[95] Legislation should clarify whether intestate succession laws of religions ought to be recognised and applied as opposed to the *ISA*.[96]

It is recommended that legislation should be automatically applicable to Muslim and Hindu marriages.[97] An opt-out clause should be available to parties who do not wish to have legislation apply to their marriages.[98] Legislation should also provide persons who wish to conclude a religious marriage the option to have either the *ISA* or a system of intestate succession prescribed by their religion apply to their estates upon their death. It is suggested that the *ISA* grants spouses, especially wives, the greatest protection. It is recommended that the *ISA* should be automatically applicable where persons have entered into a religious marriage, with the option to have a system of succession made applicable by written agreement between the parties to the marriage.

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93 See para 3.4 of this study.
94 See para 3.4 of this study.
95 See para 4.4 of this study.
96 See para 4.4 of this study.
97 See para 6.2 of this study.
98 See para 6.2 of this study.

7.5.4 Recommendations for the development of the terms "spouse", "descendant" and "parent" in terms of life partnerships

Life partnerships, like religious marriages, should be comprehensively recognised by legislation in order to indicate what factors should be taken into consideration to identify life partnerships and which life partnerships should be recognised for the purposes of the *ISA*. Additionally, considering polygamous life partnerships, legislation should be enacted to direct whether South African law should recognise such life partnerships.[99] Considering the vulnerability of women, it is suggested that such relationships should be recognised for the purposes of the *ISA*.[100] It is recommended that the *ISA* be amended to include partners in polygamous life partnerships in the term "spouse" where the partners have established a reciprocal duty of support.

Where a valid marriage, either a common law, customary law, or, if enacted, marriages concluded in terms of the *Marriage Bill* is in place, and a life partnership has also been entered into, the partners in the life partnership are not allowed to inherit from each other as spouses.[101] Legislation must be enacted to provide relief to vulnerable partners where one partner is in a valid marriage with another.[102] It is recommended that the *ISA* and the *RCLSA* be amended to include partners in life partnerships where their partner is in a concurrent legal marriage, either in terms of common law, customary law or religious law under the term "descendant".[103]

7.6 Concluding remarks

The development of the concept of the "family unit" in South African intestate succession law closely reflects the commitment to human dignity and equality, extending beyond the traditional common law understanding of the family. This evolution, driven by constitutional developments, seeks to protect and recognise a broad spectrum of constitutional rights and values. Nevertheless, certain gaps remain

99 See para 5.3 of this study.
100 See para 5.3 of this study.
101 See para 5.3 of this study.
102 See para 5.3 of this study.
103 See para 5.3 of this study.

that require legislative intervention to ensure the protection of vulnerable family members, particularly in the context of intestate succession.

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