

The impact of a broadened spousal concept on succession legislation, administration of deceased estates and related tax matters

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Mini dissertation accepted in partial fulfilment of the requirements for the degree *Magister of Laws* in *Estate Law* at the Faculty of Law of the North-West University

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Graduation: April 2024

ABSTRACT

This study gauges the impact of the broadened spousal concept (as ordered in *inter alia Bwanya v The Master of the High Court* 2022 3 SA 250 (CC) (hereafter the *Bwanya* judgment)) on succession legislation, administration of estates and related tax matters. Specific emphasis is placed on the *Maintenance of Surviving Spouse Act* 27 of 1990 (hereafter the *MOSSA*), the *Administration of Estates Act* 66 of 1965 (hereafter the *AEA*), the *Wills Act* 7 of 1953, the *Income Tax Act* 58 of 1962 (hereafter the *ITA*), the *Estate Duty Act* 45 of 1955 (hereafter the *EDA*) and the *Transfer Duty Act* 40 of 1949 (hereafter the *TDA*).

The Constitutional Court's argument in the *Bwanya* judgment may also apply to the *AEA* as it may amount to unfair, unjustifiable discrimination not to afford the same rights currently awarded to surviving spouses to surviving life partners who have undertaken reciprocal duties of support. These rights refer to the appointment (under certain circumstances) of the surviving spouse as executor, the exemption of a surviving spouse to provide security, and a section 38 take-over by a surviving spouse. The *AEA*, the *ISA* and the *MOSSA* are used in conjunction with one another in the administration of deceased estates. It would be illogical for the Master to recognise a surviving permanent life partner as a "spouse" in the winding up of a deceased estate in terms of the *ISA* and *MOSSA* but not recognise that same partner as a spouse in terms of the *AEA*.

Regarding the *Wills Act* and, more specifically, with reference to the statutory disqualification of an ex-spouse in terms of section 2B the legislature would have to provide guidance as to when a life partnership would be regarded as terminated and from what date the three-month period stipulated in section 2B will commence. Although some of the provisions of the *Wills Act* limit a spouse's capability to inherit, it would be flawed to argue that permanent life partners should only enjoy the advantages provided to surviving spouses in terms of the *Wills Act* and not also the limitations.

The broader spousal concept has been incorporated in various tax laws since 2001 when the definition of “spouse” was amended to include permanent life partners in terms of section 5(j) of the *Taxation Laws Amendment Act 5 of 2001*. There is, however, a requirement under the *EDA* and *TDA* that the Commissioner of the South African Revenue Services must be satisfied that the relationship was indeed intended to be permanent. Permanent life partners who have undertaken reciprocal duties of support would most likely be able to convince the Commissioner of their intention, as the factors that the Commissioner should consider are similar to the requirements to establish a reciprocal duty of support. However, if partners did not undertake reciprocal duties of support, it may be argued that they will also not be regarded as spouses for the purposes of the various tax laws as the *Constitution of the Republic of South Africa, 1996* cannot impose obligations on partners where those partners themselves did not undertake such obligations (*Satchwell v the President of the Republic of South Africa* 2002 6 SA 1 (CC) para 24).

Keywords: Spouse; inheritance; life partner; cohabitation; duty of support; and maintenance

ACKNOWLEDGEMENT

I firstly and most importantly want to thank my Heavenly Father, who makes everything possible in His perfect timing.

To my mentor, Prof Anél Gildenhuys: thank you for all your patience, support, and invaluable guidance during this journey.

To my dear husband and family, thank you for all your love, support, encouragement, and prayers during these past two years. You were my pillars of strength when I needed it the most.

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LIST OF ABBREVIATIONS

AEA	Administration of Estates Act 66 of 1965
AHRLJ	African Human Rights Law Journal
AYOR	African Yearbook of Rhetoric
CUA	Civil Union Act 17 of 2006
EDA	Estate Duty Act 45 of 1955
ISA	Intestate Succession Act 81 of 1987
ITA	Income Tax Act 58 of 1962
JCLA	Journal of Comparative Law in Africa
JCLS	Journal of Civil Law Studies
JLSD	Journal of Law, Society and Development
MA	Marriage Act 25 of 1961
MOSSA	Maintenance of Surviving Spouse Act 27 of 1990
PER	Potchefstroomse Elektroniese Regsjoernaal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SAPL	Southern African Public Law
SARS	South African Revenue Service
SLR	Stellenbosch Law Review
TDA	Transfer Duty Act 40 of 1949
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

1 Introduction

1.1 Background

The reciprocal duty of support is an unavoidable consequence of marriage.¹ The duty of support can be extended after a marriage has ended by a divorce court order² or to the estate of a deceased spouse in terms of the *Maintenance of Surviving Spouse Act*.³

The *MOSSA* was enacted to “provide the surviving spouse in certain circumstances with a claim for maintenance against the estate of the deceased spouse; and to provide for incidental matters”.⁴ Even though the word “spouse” is not defined in the *MOSSA*, it was traditionally inferred that a spouse is a person married to another in terms of the *Marriage Act*.⁵ The *MOSSA* was therefore exclusively applicable to married couples. However, in *Daniels v Campbell*⁶ the Constitutional Court confirmed that monogamous Muslim marriages⁷ fall within the ambit of the *MOSSA* and that surviving spouses in such marriages have rights to maintenance.⁸ In subsequent cases, it was found that the duty to support also extends to polygynous marriages⁹ and maintenance after an Islamic divorce.¹⁰ The *Civil Union Act*¹¹ was enacted in December 2006 and provides for the solemnisation of same-sex marriages and partnerships. The legal consequences of a marriage contemplated in the *MA* also

¹ Bonthuys 2018 *PER* 2.

² Section 7 of the *Divorce Act* 70 of 1979.

³ 27 of 1990 (hereafter the *MOSSA*). See section 2 of the *MOSSA*. Bonthuys 2018 *PER* 2.

⁴ Preamble to the *MOSSA*.

⁵ 25 of 1961 (hereafter the *MA*). Section 1 of the *MOSSA* defines “survivor” as the surviving spouse in a marriage dissolved by death; The *MA* does not define the word “spouse” nor “marriage”, but it is clear from the wording of the Act that it regards marriage as a solemnised union between a husband and wife.

⁶ 2004 5 SA 331 (CC) para 40 (hereafter the *Daniels* judgment).

⁷ The issue with regard to Muslim marriages was that the marriages were concluded by Muslim rites and not in terms of the *MA*, which meant that the partners were not regarded as “spouses” in terms of the *MOSSA*.

⁸ Bonthuys 2018 *PER* 10.

⁹ The issue with regard to polygynous Muslim marriage was that in terms of the *Daniels* judgment, only partners in monogamous Muslim marriages were regarded as “spouses” in terms of the *MOSSA*.

¹⁰ See, for example, *Hassam v Jacobs* 2009 5 SA 572 (CC); *Rose v Rose* (WCHC) (unreported) case number 14770/2011 of 13 August 2014. Also see Bonthuys 2018 *PER* 10.

¹¹ 17 of 2006 (hereafter the *CUA*).

apply to civil unions.¹² The *CUA* confirms that any reference to marriage in any other law includes a civil union and any reference to husband, wife or spouse, includes a civil union partner.¹³ The duty of support accordingly currently extends to marriages concluded in terms of the *MA*, customary law marriages, Muslim marriages, and civil unions.¹⁴

Contrary to popular belief, our legal system does not recognise “common law marriages” where the assumption is that when a couple live together for a certain amount of time, their relationship automatically translates to a “default marriage”.¹⁵ Unfortunately for cohabitating or permanent life partners, this also means that very few of the laws that protect parties in marital relationships also protect individuals who are merely cohabitating or in permanent life partnerships.¹⁶ Many factors¹⁷ may contribute to people having permanent life partnerships.

In 2006 the South African Law Reform Commission¹⁸ recommended that a Domestic Partnership Act be formulated to afford rights to unmarried same-sex and opposite-sex partners. The *Draft Domestic Partnerships Bill*¹⁹ was published for commentary in 2008 but was never enacted.²⁰

In 2021 the SALRC released a Discussion Paper²¹ that proposed a single marriage statute. Two possible bills were proposed in the Discussion Paper, namely the *Protected Relationships Bill*²² and the *Recognition and Registration of Marriages and*

¹² Section 13(1) of the *CUA*.

¹³ Section 13(2)(a) and s 13(2)(b) of the *CUA*.

¹⁴ *Wormald v Kambule* 2006 3 SA 562 (SCA), *Daniels v Campbell* 2004 5 SA 331 (CC); *TM v ZJ* 2016 1 SA 71 (KZD); *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 SA 1319 (SCA); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC); *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA). Also see Bonthuys 2018 *PER* 1-32; Osman-Hyder 2011 *SLR* 233-246; Denson and Van der Walt 2009 *Obiter* 188-196; Goldblatt 2003 *SAJHR* 118-123; Ntlama 2010 *PER* 191-234.

¹⁵ Harrington-Johnson 2015 *Without Prejudice* 64.

¹⁶ Harrington-Johnson 2015 *Without Prejudice* 64.

¹⁷ Mantwa lists various factors that may contribute to people not having permanent life partnerships, including poverty, unemployment, the migrant labour system or simply the choice not to get married. Mantwa *Recognition of domestic partnerships in South African law* 5.

¹⁸ Hereafter the SALRC.

¹⁹ Gen Not 36 in *GG 30663* of 14 January 2008; Bonthuys 2018 *PER* 12.

²⁰ Bonthuys 2018 *PER* 13.

²¹ SALRC *Discussion Paper* 152.

²² SALRC *Discussion Paper* 152 Annexure B1.

Life Partnership Bill.²³ Both these bills afford the same protection to life partners as married couples.²⁴ The bills define a “life partnership” as a relationship “where the parties cohabit and have assumed permanent responsibility for supporting each other”.²⁵ It is clear from the definition that both bills require cohabitation between the parties to qualify as a life partnership.²⁶ The SALRC’s report containing the final recommendations for the single marriage statute has not been published yet.

On 7 July 2023, Parliament published the *Draft Marriage Bill*,²⁷ which endeavours to provide for recognition of marriages regardless of the spouses’ religion, culture, sex, gender, sexual orientation or any other belief.²⁸ The *Draft Marriage Bill* does, however, not include permanent life partnerships in the definition of spouse.²⁹

There have been numerous judgments on the recognition of permanent life partnerships, and specifically the partners’ constitutional right not to be discriminated against.³⁰ The majority of these cases concerned the rights and recognition of permanent same-sex life partnerships and was held before the commencement of the *CUA*. Over the years, same-sex permanent life partnerships were accordingly recognised, but heterosexual permanent life partnerships (until recently) were not.

The Court’s justification in *Volks v Robinson*³¹ for not granting the same rights to heterosexual permanent life partners in terms of the *MOSSA*, was that unmarried heterosexual couples have the choice to get married and if they do not exercise that choice, they should not be afforded the same rights as married couples.

²³ SALRC *Discussion Paper* 152 Annexure B2; Osman 2021 *PER* 2.

²⁴ See respectively s 1(xvi) of the *Protected Relationships Bill* and s 1(xi) of the *Recognition and Registration of Marriages and Life Partnership Bill*.

²⁵ See respectively s 1(xvi)(cc) of the *Protected Relationships Bill* and s 1(xi)(cc) of the *Recognition and Registration of Marriages and Life Partnership Bill*.

²⁶ Osman 2021 *PER* 8.

²⁷ Gen Not 3648 in *GG* 48914 of 7 July 2023.

²⁸ Preamble to the *Draft Marriage Bill*.

²⁹ The *Draft Marriage Bill* defines a spouse as “a person’s partner in marriage”.

³⁰ See Chapter 2 of this study for a discussion of the relevant case law.

³¹ 2005 5 BCLR 44 (CC) para 92 (hereafter the *Volks* judgment).

Although the Court's argument in the *Volks* judgment has been criticised widely by academics,³² the Constitutional Court's argument has been utilized to deny unmarried heterosexual couples the right to claim for loss of support in terms of the *MOSSA*.³³ In a recent case, the Constitutional Court, however, found that heterosexual permanent life partners should also be afforded the same protection as homosexual permanent life partners.

In *Bwanya v The Master of the High Court*,³⁴ the Constitutional Court found that the definition of "spouse" and "marriage" in section 1 of the *MOSSA* and section 1(1) of the *Intestate Succession Act*³⁵ must be amended to include a person in a "permanent life partnership in which the partners have undertaken reciprocal duties of support".³⁶ This ground-breaking judgment can have far-reaching implications on other pieces of legislation since the concepts of "spouse" and "marriage" have never included heterosexual life partners. Seeing that the *MOSSA* and *ISA* form part of succession legislation and are vital in the administration of deceased estates, it will have to be established to which extent this broader spousal definition will affect other legislation dealing with succession, the administration of deceased estates and related tax matters.

1.2 Motivation

From the *Bwanya* judgment, it is clear that we are in an era where societal norms are rapidly changing, and it can no longer be justified to not afford the same rights to permanent life partners because of their choice of not wanting to get married.³⁷ Statistics show that there are approximately 3,2 million South Africans who cohabit without being married.³⁸ The percentage of cohabiting parties has increased from

³² See Kruuse 2009 *SAJHR* 384; Smith 2010 *PER* 238-299; Bonthuys 2015 *SALJ* 76-78; Smith 2016 *SALJ* 284-315; Madzika 2020 *De Jure* 401-402.

³³ See *Meyer v Road Accident Fund* (TPD) (unreported) case number 29950/2004 of 28 March 2006. Also see Bonthuys 2018 *PER* 16.

³⁴ 2022 3 SA 250 (CC) (hereafter the *Bwanya* judgment).

³⁵ 81 of 1987 (hereafter the *ISA*).

³⁶ *Bwanya* judgment para 95.

³⁷ Madzika 2020 *De Jure* 395.

³⁸ Stats SA 2016 <http://www.statssa.gov.za/publications/03-01-25/03-01-252016.pdf>.

5,0% in 1996 to 8,3% in 2016, and this number is steadily increasing every year.³⁹ In the *Bwanyana* judgment it was established that for maintenance and intestate succession purposes, permanent life partners with reciprocal duty of support are also regarded as “spouses” and must enjoy the same rights and protection under the *ISA* and *MOSSA* that their married counterparts have.⁴⁰

There are numerous pieces of South African legislation where certain sections are exclusively applicable to a “spouse” in the traditional sense, i.e., a person who is in a marital relationship. Taking the *Bwanyana* and preceding judgments in respect of life partnerships into account, an investigation into the need for a broader spousal concept in legislation is justified. For the purpose of this study, the scope of legislation is limited to legislation applicable to succession, the administration of deceased estates and related tax matters. Specific emphasis is placed on the *MOSSA*, the *Administration of Estates Act*,⁴¹ the *Wills Act*,⁴² the *Estate Duty Act*,⁴³ the *Transfer Duty Act*⁴⁴ and the *Income Tax Act*.⁴⁵ It is important to note that for purposes of this study, the focus is on monogamous life partnership relationships and there is no reference to polygynous relationships.

1.3 Research question

The research question that guides the study is: To what extent can the broadened concept of spouse include life partners who have undertaken reciprocal duties of support as ordered in the *Bwanyana* judgment affect legislation dealing with succession, the administration of deceased estates and related tax matters?

1.4 Research aim and objectives

The primary aim of this study is to establish the effect of the broadened spousal concept as ordered in *inter alia* the *Bwanyana* judgment on succession legislation,

³⁹ Stats SA 2016 <http://www.statssa.gov.za/publications/03-01-25/03-01-252016.pdf>.

⁴⁰ *Bwanyana* judgment para 95.

⁴¹ 66 of 1965 (hereafter the *AEA*).

⁴² 7 of 1953.

⁴³ 45 of 1955 (hereafter the *EDA*).

⁴⁴ 40 of 1949 (hereafter the *TDA*).

⁴⁵ 58 of 1962 (hereafter the *ITA*).

administration of estates and related tax matters. The objectives that support this aim are to: (a) discuss judgments where permanent life partners were recognised; (b) establish what the requirement of the reciprocal duty of support in terms of these judgments entails; (c) discuss the relevant sections of the *AEA* that pertain to the concept of a "spouse"; (d) establish whether the broader spousal concept may also be applicable to the *AEA*; (e) discuss the relevant sections of the *Wills Act*, which specifically pertains to the concept of "spouse"; (f) discuss *Moosa v Minister of Justice and Correctional Services*⁴⁶ where the concept of "spouse" in terms of the *Wills Act* was broadened; (g) establish whether the broader spousal concept should be applicable to the *Wills Act*; (h) discuss the definition of "spouse" as determined in the relevant tax legislation; and (i) with specific reference to the applicable tax laws, discuss whether permanent life partners who have undertaken a reciprocal duty of support will enjoy the same rights as their married counterparts.

1.5 Research method

The study was conducted using a literature study with the inclusion of primary sources (primarily the referred case law, legislation, and official reports) as well as secondary sources (including academic journal articles, books and electronic sources).

1.6 Framework

In addressing the objectives set out above, it is necessary to determine the meaning and scope of the broader spousal concept, specifically with reference to the reciprocal duty of support. The purpose of the second chapter of this study is to provide an outline of case law dealing with the recognition of permanent life partnerships and the requirements for the reciprocal duty of support. In the third chapter, the possible effect of the broadened spousal concept on the *AEA* is identified and discussed. The possible effect of the broadened spousal concept on the *Wills Act* is identified and discussed in Chapter 4 and the possible influence on

⁴⁶ *Moosa v Minister of Justice and Correctional Services* 2018 5 SA 13 (CC) (hereafter the *Moosa* judgment).

tax-related matters follows in Chapter 5. The sixth chapter concludes the study on the possible effect of a broadened spousal concept on succession legislation, administration of deceased estates, and tax-related matters.

2 Case law dealing with the recognition of permanent life partnerships

2.1 Introduction

This chapter discusses numerous judgments on the recognition of permanent life partnerships. It is prudent to mention that the majority of these cases were held before the enactment of the *CUA* and that the law at that time only recognised marriages consisting of two people of the opposite sex. The majority of these cases pertained to the recognition of same-sex partnerships and their right to be acknowledged in the same manner as heterosexual married couples. The *Bwanya* judgment was the first case where heterosexual permanent life partnerships were ordered to be included in the definition of “spouse” and “marriage” for purposes of the *ISA* and the *MOSSA*.⁴⁷

The objectives of this chapter are to: (a) discuss judgments that recognise permanent life partners; and (b) establish what the requirement of the reciprocal duty of support in terms of these judgments entails.

2.2 *National Coalition for Gay and Lesbian Equality v the Minister of Home Affairs*⁴⁸

The *National Coalition* judgment scrutinised the legal entitlement of spousal rights in the context of permanent homosexual life partnerships.⁴⁹ The constitutional validity of section 25(5) of the *Aliens Control Act*⁵⁰ was challenged. Section 25(5) made it possible for the spouses of permanent South African residents to immigrate into South Africa, but did not afford the same benefits to same-sex permanent life partners.⁵¹

⁴⁷ *Bwanya* judgment para 95.

⁴⁸ 2000 2 SA 1 (CC) (hereafter the *National Coalition* judgment).

⁴⁹ *Bwanya* judgment para 20.

⁵⁰ 96 of 1991.

⁵¹ *National Coalition* judgment para 1.

The Court stated that although there are romantic relationships between people of the same sex, these partnerships are not recognised as marriages by law.⁵² Ackermann J,⁵³ however, noted that the societal legal norms for the family relationship have transformed over the years.

The Court found that excluding homosexual life partners from the benefits afforded by section 25(5) unjustifiably limits the rights to dignity⁵⁴ and not to be discriminated against unfairly on the grounds of sexual orientation and marital status.⁵⁵ The Constitutional Court ordered that the words "or partner in a permanent same-sex life partnership" be read in after the word "spouse" in section 25(5) of the *Aliens Control Act*.⁵⁶

The Court held that the word "permanent" means an "established intention of the parties to cohabit with one another permanently".⁵⁷ The Court confirmed that the facts of each matter would have to be considered to establish whether the partnership should be regarded as permanent.⁵⁸ These facts would include the age of the partners, the duration of the partnership, how their family and friends view the partnership, whether the partners share a household, whether they share the responsibility of living expenses and whether the parties have made provision for each other in their respective wills.⁵⁹

The *Aliens Control Act* was repealed by the *Immigration Act*,⁶⁰ which includes permanent heterosexual and permanent homosexual relationships, which "calls for

⁵² *National Coalition* judgment para 36. As mentioned under par 2.1, some cases (including the *National Coalition* judgment) were heard prior to the enactment of the *CUA*.

⁵³ *National Coalition* judgment para 47.

⁵⁴ As contained in s 10 of the *Constitution*.

⁵⁵ As provided for in s 9 of the *Constitution*. See *National Coalition* judgment paras 58-60.

⁵⁶ *National Coalition* judgment para 98.

⁵⁷ *National Coalition* judgment para 86.

⁵⁸ *National Coalition* judgment para 88.

⁵⁹ *National Coalition* judgment para 88. For in-depth discussions of the *National Coalition* judgment, see Louw 2000 *SAJHR* 313- 324; Motara 2000 *SAJHR* 344-350; De Vos 2000 *SALJ* 17-25.

⁶⁰ 13 of 2002.

cohabitation and mutual financial and emotional support and is proven by a prescribed affidavit substantiated by a notarial contract” in the definition of spouse.⁶¹

2.3 *Satchwell v President of the Republic of South Africa*⁶²

The *Satchwell* judgment contended the validity of the provisions of sections 8 and 9 of the *Judges’ Remuneration and Conditions of Employment Act*⁶³ (hereafter the *Judges’ Act*) and Regulations 9(2)(b) and 9(3)(a) of the Act.⁶⁴ Section 8 of the *Judges’ Act* provides for the payment of two-thirds of the salary that would have been payable to the judge to the surviving spouse of a deceased judge until such spouse's death.⁶⁵ Section 9 of the *Judges’ Act* provides for the payment of certain funds to the surviving spouse of a deceased judge or the deceased estate if the judge is not survived by a spouse.⁶⁶ The applicant contended in the court *a quo* that these sections of the *Judges’ Act* were discriminatory to the extent that it excluded same-sex permanent life partners from claiming the benefits enjoyed by heterosexual spouses.⁶⁷ The applicant further argued that the challenged provisions violated her right to equality⁶⁸ because the provisions did not afford the same rights to homosexual couples as are afforded to their heterosexual counterparts.⁶⁹

The High Court⁷⁰ declared the challenged provisions unconstitutional to the extent that it excluded permanent same-sex life partners, and the case was subsequently referred to the Constitutional Court for confirmation of the High Court’s order.⁷¹

The applicant, a judge, stated that she has been involved in an intimate, committed and exclusive same-sex permanent partnership for numerous years.⁷² The applicant further stated that although same-sex couples were unable to enter into a legally

⁶¹ Section 1(1)(xxxvi) of the *Immigration Act* 13 of 2002.

⁶² 2002 6 SA 1 (CC) (hereafter the *Satchwell* judgment).

⁶³ 88 of 1989.

⁶⁴ *Satchwell* judgment para 3.

⁶⁵ Section 8 of the *Judges Act*; *Satchwell* judgment para 7.

⁶⁶ Section 9 of the *Judges Act*; *Satchwell* judgment para 7.

⁶⁷ *Satchwell* judgment para 8.

⁶⁸ In terms of section 9 of the *Constitution*.

⁶⁹ *Satchwell* judgment para 14.

⁷⁰ *Satchwell v President of the Republic of South Africa* 2001 12 BCLR 1284 (T).

⁷¹ *Satchwell* judgment para 1.

⁷² *Satchwell* judgment para 4.

binding marriage at the time of the court case, the applicant and her partner lived in every respect as a married couple and were also acknowledged as such by their respective families and friends.⁷³

Madlanga J⁷⁴ held that seeing as the word “spouse” is not defined under the *Judges’ Act*, the “ordinary wording of the provisions must be taken to refer to a party to a marriage that is recognised as valid in law and not beyond that”. Accordingly, all relationships other than heterosexual marriages are excluded from the benefits that the legislation accords to spouses.⁷⁵ The applicant contended that the concept of family underlying the legislation was inconsistent with values enshrined in the *Constitution*.⁷⁶ The applicant referred to the judgment in the Canadian Supreme Court of *Miron v Trudel*⁷⁷ where L’Heureux-Dubé held that:⁷⁸

Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons – all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law.

The Court referred to the *National Coalition* judgment in which a permanent same-sex life partnership was recognised by the Court.⁷⁹ The Court stated that permanent same-sex partners should be able to have relationships in accordance with their sexual orientation without being subject to unfair discrimination.⁸⁰ The Court held that it is clear from the *Constitution* that the achievement of equality for all South Africans and the advancement of human rights are of cardinal importance.⁸¹

The Court reiterated that “in terms of our common law, marriage creates a physical and moral community of law which imposes reciprocal duties of cohabitation and

⁷³ *Satchwell* judgment para 4. As mentioned under par 2.1, some cases (including the *Satchwell* judgment) were heard prior to the enactment of the *CUA*.

⁷⁴ *Satchwell* judgment para 9.

⁷⁵ *Satchwell* judgment paras 9-10.

⁷⁶ *Satchwell* judgment para 11.

⁷⁷ 1995 124 DLR 693.

⁷⁸ *Miron v Trudel* 1995 124 DLR 693 para 102.

⁷⁹ See *National Coalition* judgment para 36; *Satchwell* judgment para 12. See also par 2.2 of this study.

⁸⁰ *Satchwell* judgment para 15.

⁸¹ *Satchwell* judgment para 17.

support”.⁸² The Court further confirmed that the law attaches a duty of support to a variety of family relationships, which may also include homosexual permanent relationships.⁸³ The facts of each situation will determine whether such a duty of support exists.⁸⁴

The Constitutional Court confirmed that the impugned provisions unfairly and unjustifiably discriminate against permanent same-sex partners and are accordingly inconsistent with the *Constitution*.⁸⁵ The Court ordered that sections 8 and 9 and regulations 9(2)(b) and 9(3)(a) of the *Judges’ Act* are to be read as though the words “or partner in a permanent same-sex partnership in which the partners have undertaken reciprocal duties of support” appear after the word “spouse”.

2.4 *Du Toit v Minister of Welfare and Population Development*⁸⁶

In the *Du Toit* judgment, the constitutional validity of sections 17(a), 17(c) and 20(1) of the *Child Care Act*⁸⁷ and section 1(2) of the *Guardianship Act*,⁸⁸ which provides for the joint adoption and guardianship of children by “a husband and his wife” was challenged.⁸⁹

The applicants, partners in a same-sex relationship, lived together as life partners for numerous years, shared all financial resources and also formalised their relationship with a commitment ceremony.⁹⁰ They also had a joint will according to which the surviving partner will inherit the other’s estate.⁹¹ The applicants were screened and accepted as adoptive parents by the Cotlands Baby Centre, and the centre placed two children temporarily in their care.⁹² The applicants applied to the children’s court to adopt the two children jointly but constrained by the current

⁸² *Satchwell* judgment para 22.

⁸³ *Satchwell* judgment para 25.

⁸⁴ *Satchwell* judgment para 25.

⁸⁵ *Satchwell* judgment paras 26-33. For in-depth discussions of the *Satchwell* judgment, see Goldblatt 2003 *SAJHR* 118-123.

⁸⁶ 2003 2 SA 198 (CC) (hereafter the *Du Toit* judgment).

⁸⁷ 74 of 1983.

⁸⁸ 192 of 1993.

⁸⁹ *Du Toit* judgment para 1.

⁹⁰ *Du Toit* judgment para 4.

⁹¹ *Du Toit* judgment para 4.

⁹² *Du Toit* judgment para 6.

adoption legislation, the children's court only awarded custody and guardianship to the second applicant, even though both applicants were recommended as suitable parents.⁹³

The applicants challenged the relevant provision of the *Child Care Act* and *Guardianship Act* on the grounds that it violated their right to equality⁹⁴ and dignity⁹⁵ and did not give paramountcy to the best interest of the child as required by section 28(8) of the *Constitution*.⁹⁶ The High Court⁹⁷ found that the challenged provisions violated the *Constitution* and ordered the reading in of certain words into the challenged provisions to facilitate the joint adoption and guardianship of children by homosexual life partners.⁹⁸ The matter was then referred to the Constitutional Court for a confirmatory order.

Skweyiya J⁹⁹ held that the institutions of marriage and family are important social pillars in our society, and that the concept of family may evolve as social practices and traditions change. The Court held that the applicants' status as unmarried persons were directly linked to their inability to get married due to their sexual orientation.¹⁰⁰ If not for their sexual orientation, which prohibits them from getting married, they would have been eligible to jointly adopt children as contemplated in the impugned provisions.¹⁰¹ The Constitutional Court confirmed the order made by the High Court and declared that the impugned provisions be altered to allow for joint adoption and guardianship of children by two members of a permanent same-sex life partnership.¹⁰²

⁹³ *Du Toit* judgment para 7.

⁹⁴ Section 9 of the *Constitution*.

⁹⁵ Section 10 of the *Constitution*.

⁹⁶ *Du Toit* judgment para 2.

⁹⁷ *Du Toit v Minister of Welfare and Population Development* 2001 12 BCLR 1225 (T).

⁹⁸ *Du Toit* judgment para 2.

⁹⁹ *Du Toit* judgment para 19.

¹⁰⁰ *Du Toit* judgment para 26.

¹⁰¹ *Du Toit* judgment para 26.

¹⁰² *Du Toit* judgment para 44. For in-depth discussions of the *Du Toit* judgment, see Ferreira 2002 *Codicillus* 83-84.

2.5 *Volks v Robinson*¹⁰³

The *Volks* judgment questioned the interpretation and constitutionality of section 2(1), read with section 1 of the *MOSSA*.¹⁰⁴ These sections, in essence, confer on surviving spouses the right to claim maintenance from the estates of their deceased spouse if they are not able to support themselves.¹⁰⁵ The applicant in the court *a quo*,¹⁰⁶ Ms Robinson, was in a permanent heterosexual life partnership with the late Mr Shandling for numerous years, but the parties were never married, nor were any children born from their relationship.¹⁰⁷ Ms Robinson contended that although she and her late partner never married, they lived a life similar to a married couple and, therefore, should be afforded the same benefits as a surviving spouse under section 2(1) of the *MOSSA*.¹⁰⁸

The High Court (in *Robinson v Volks*¹⁰⁹) held that the exclusion of the surviving partner in a permanent life partnership from the ambit of *MOSSA* is unconstitutional as it discriminated unfairly based on human dignity and equality.¹¹⁰ This decision was referred to the Constitutional Court for confirmation.¹¹¹ However, the Constitutional Court¹¹² held that the differentiation between married couples and permanent life partners should not be regarded as unfair because marriage comes with rights and obligations that do not exist in permanent life partnerships. It was held that the purpose of the *MOSSA* was to provide for the maintenance of the surviving spouse and to extend the invariable effect of marriage beyond the death of one of the parties.¹¹³ The Constitutional Court's judgment was based on the

¹⁰³ 2005 5 BCLR 44(CC) (hereafter the *Volks* judgment).

¹⁰⁴ *Volks v Robinson* 2005 5 BCLR 44(CC) para 1 (hereafter the *Volks* judgment).

¹⁰⁵ *Volks* judgment para 1.

¹⁰⁶ 2004 6 SA 288 (C).

¹⁰⁷ *Volks* judgment para 3.

¹⁰⁸ *Volks* judgment para 1.

¹⁰⁹ 2004 6 SA 288 (C).

¹¹⁰ *Robinson v Volks* 2004 6 SA 288 (C) para 399J; Smith 2010 *PER* 241.

¹¹¹ Smith 2010 *PER* 242.

¹¹² *Volks* judgment para 154.

¹¹³ *Volks* judgment para 39.

argument that unmarried couples have the choice to get married, as formulated by Skewyia J:¹¹⁴

The law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify their acceptance of those consequences by entering into a marriage relationship. Those who do not wish such consequences to flow from their relationship remain free to enter into some other form of relationship and decide what consequences should flow from their relationships.

From the judgment, it was clear that marriage as an institution is recognised in the *Constitution* and that the institution of marriage automatically leads to *ex lege* rights and obligations, which is not the case in unmarried cohabitant relationships.¹¹⁵ The Constitutional Court accepted that the *MOSSA* discriminated based on marital status but, as quoted above, confirmed that the discrimination should not be regarded as unfair because unmarried couples have the choice to get married, and by not entering into a marriage, they decide not to exercise that choice.¹¹⁶

2.6 *Gory v Kolver*¹¹⁷

In the *Gory* judgment, the constitutional validity of section 1(1) of the *ISA* was scrutinised to the extent that it accords rights on heterosexual spouses but not on permanent homosexual partners. The case originated in the High Court where the applicant, Mr Gory, claimed that he and the late Mr Brooks were partners in a permanent homosexual life partnership in which they undertook reciprocal duties of support.¹¹⁸ Mr Brooks died intestate without any children and his parents accordingly claimed to be the deceased's intestate heirs¹¹⁹ and entitled to his

¹¹⁴ *Volks* judgment para 92. For in-depth discussions of the *Volks* judgment, see Smith 2010 *PER* 238-299; Smith 2016 *SALJ* 284-315; Davis 2019 *AYOR* 73-85.

¹¹⁵ Smith 2010 *PER* 242.

¹¹⁶ Bonthuys 2018 *PER* 15.

¹¹⁷ 2007 4 SA 97 (CC) (hereafter the *Gory* judgment).

¹¹⁸ *Gory v Kolver* 2006 5 SA 145 (T) para 1.

¹¹⁹ Section 1(1)(1)(d)(i) of the *ISA* provides that "If after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and - (d) is not survived by a spouse or descendant, but is survived(i) by both his parents, his parents shall inherit the intestate estate in equal shares; or (ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate".

estate.¹²⁰ The executor of the late estate declined to consider Mr Gory's claim against the estate and maintained that under section 1 of the *ISA*, the deceased's parents were the heirs of the estate.¹²¹

The respondents (the deceased's parents) in the matter denied that the parties were permanent homosexual partners because they could not get married legally and did not go through a marriage ceremony.¹²² The respondents further contended that had the partners been in a permanent relationship, they would have entered into a written partnership agreement or at least appointed each other as heirs in their wills.¹²³ The applicant, on the other hand, maintained that he and the deceased were permanent life partners and further averred that they shared common household expenses.¹²⁴

The High Court¹²⁵ held that it was evident that the parties had assumed reciprocal duties of support and that if it were legally possible for them to get married, they would have gotten married. Hartzenberg J¹²⁶ referred to previous judgments¹²⁷ in various courts that interpreted the constitutional right to equality¹²⁸ and the right not to be discriminated against.¹²⁹ Hartzenberg J¹³⁰ confirmed that it has been held numerous times in our courts that same-sex life partnerships deserve the same considerations as heterosexual marriages. The High Court¹³¹ accordingly declared that section 1(1) of the *ISA* is inconsistent with the *Constitution* "to the extent that

¹²⁰ *Gory* judgment para 3.

¹²¹ *Gory v Kolver* 2006 5 SA 145 (T) para 16.

¹²² *Gory v Kolver* 2006 5 SA 145 (T) para 17.

¹²³ *Gory v Kolver* 2006 5 SA 145 (T) para 17.

¹²⁴ *Gory v Kolver* 2006 5 SA 145 (T) paras 5-6.

¹²⁵ *Gory v Kolver* 2006 5 SA 145 (T) para 18.

¹²⁶ *Gory v Kolver* 2006 5 SA 145 (T) para 19.

¹²⁷ *Gory v Kolver* 2006 5 SA 145 (T) para 19. See *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T); *National Coalition* judgment; *Satchwell* judgment; *Du Toit* judgment; *J v Director General, Department of Home Affairs* 2003 5 SA 621 (CC); *Farr v Mutual and Federal Insurance Co Ltd* 2000 3 SA 684 (C); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA); *Daniels v Campbell* 2004 5 SA 331 (CC).

¹²⁸ Section 9(1) of the *Constitution*.

¹²⁹ Section 9(3) and section 9(5) of the *Constitution*.

¹³⁰ *Gory v Kolver* 2006 5 SA 145 (T) para 22.

¹³¹ *Gory v Kolver* 2006 5 SA 145 (T) para 30.

it confers rights of intestate succession on heterosexual spouses but not on permanent same-sex partners”.

The case was referred to the Constitutional Court where it was confirmed that the exclusion of parties in a permanent same-sex life partnership in which they have undertaken reciprocal duties of support from section 1(1) of the *ISA* is unconstitutional and invalid.¹³² The Constitutional Court further held that Mr Gory and the deceased were at the time of his death partners in a permanent same-sex partnership in which they had undertaken reciprocal duties of support and accordingly declared that Mr Gory is the sole intestate heir of the deceased estate.¹³³

2.7 *Paixão v Road Accident Fund*³⁴

The *Paixão* judgment dealt with a claim for maintenance and loss of support against the Road Accident Fund by the deceased’s fiancé (Ms Paixão) and her daughter. In this case, the deceased (Mr Gomes) cohabitated with Ms Paixão and her two daughters and undertook to support them financially as he was the sole income earner and paid for everything in the household.¹³⁵

The Court confirmed that cohabitation outside of marriage is now “widely practised and accepted by many communities universally”.¹³⁶ The Court held that in any case where a plaintiff asserts that he or she was in a life partnership, the existence of such relationship must be proven.¹³⁷ Proving the existence of a life partnership will entail more than merely showing that the parties cohabitated and jointly contributed to the upkeep of the common home, it would have to be shown that the partnership

¹³² *Gory* judgment para 66.

¹³³ *Gory* judgment para 66. For in-depth discussions of the *Gory* judgment, see Picarra 2007 *SAJHR* 563-569; Wood-Bodley 2008 *SALJ* 259-273.

¹³⁴ 2012 SA 377(SCA) (hereafter the *Paixão* judgment).

¹³⁵ *Paixão* judgment para 8.

¹³⁶ *Paixão* judgment para 35; See also the *Volks* judgment para 119.

¹³⁷ *Paixão* judgment para 29.

was “akin to and hand similar characteristics – particularly a reciprocal duty of support - to a marriage”.¹³⁸

Cachalia JA noted that:¹³⁹

Our courts have emphasised the importance of marriage and the nuclear family as important social institutions of society, which gives rise to important legal obligations, particularly the reciprocal duty of support placed upon spouses. The fact is, however, that the nuclear family has, for a long time, not been the norm in South Africa. South Africans have lower rates of marriage and higher rates of extra-marital child-bearing than found in most countries.

The Court found that Mr Gomes undertook a duty to maintain and support his “family” out of a “deep, profound and loving sense of duty and did so”.¹⁴⁰ The Court found that a tacit legally enforceable duty of support existed between the parties and held that “the dependants’ action is to be extended to unmarried persons in heterosexual relationships who have established a contractual reciprocal duty of support”.¹⁴¹

2.8 *Laubscher v Duplan*¹⁴²

The *Laubscher* judgment considered the question of whether permanent same-sex life partners who have not solemnised or registered their relationship in terms of the *CUA* were entitled to inherit from each other’s intestate deceased estates.¹⁴³ In this case, the applicant, Mr Duplan, and the deceased, Mr Labuschagne, were in a permanent same-sex relationship in which they undertook reciprocal duties of support.¹⁴⁴ The partnership was, however, not registered nor solemnised in terms of the *CUA*. The deceased passed away intestate without any descendants or

¹³⁸ *Paixão* judgment para 29.

¹³⁹ *Paixão* judgment para 31; See also the *Bwanya* judgment para 29.

¹⁴⁰ *Paixão* judgment para 36; See also the *Bwanya* judgment para 30.

¹⁴¹ *Paixão* judgment para 40. For in-depth discussions of the *Paixão* judgment, see Calvino and Iyer 2014 *Obiter* 162-171; Scott 2013 *TSAR* 777-793.

¹⁴² 2016 ZACC 44 (CC) (hereafter the *Laubscher* judgment).

¹⁴³ *Laubscher* judgment para 1.

¹⁴⁴ *Laubscher* judgment para 3.

adopted children. His parents had predeceased him and his brother (who was appointed as executor of the estate) was his only surviving sibling.¹⁴⁵

The applicant relied on the *Gory* judgment and contended that although the civil partnership was not registered or solemnised in terms of the *CUA*, he was still entitled to inherit from the deceased's estate.¹⁴⁶ The respondent (the executor of the estate), on the other hand, argued that notwithstanding the *Gory* judgment, the *CUA*'s commencement implied that only same-sex partners who have solemnised and registered a civil union in terms of the *CUA* qualify to inherit from the estate of a deceased partner.¹⁴⁷

The Court took the *Gory* judgment and the *CUA* into account and found that the enactment of the *CUA* did not specifically amend section 1(1) of the *ISA* as was required in the *Gory* judgment.¹⁴⁸ Mbha JA¹⁴⁹ held that civil unions concluded under the *CUA* constitute a "new category of beneficiary for purposes of the *ISA* and are thus distinguishable from same-sex permanent life partnerships". This means that homosexual permanent life partnerships will be entitled to intestate succession rights under section 1(1) of the *ISA* until such time that the Legislature specifically amends the section.¹⁵⁰ The Court accordingly ordered that Mr Duplan was the only intestate heir to the deceased estate.¹⁵¹

2.9 *Bwanya v The Master of the High Court*

The *Bwanya* judgment originated in the Western Cape Division of the High Court.¹⁵² The applicant, Ms Jane Bwanya, sought an order to declare certain provisions of *ISA* and *MOSSA* unconstitutional. The applicant's case was based on the fact that her claim for a share of the estate of the late Mr Anthony Ruch (her permanent life

¹⁴⁵ *Laubscher* judgment para 3.

¹⁴⁶ *Laubscher* judgment para 5.

¹⁴⁷ *Laubscher* judgment para 6.

¹⁴⁸ *Laubscher* judgment para 55.

¹⁴⁹ *Laubscher* judgment para 55.

¹⁵⁰ *Laubscher* judgment para 55.

¹⁵¹ *Laubscher* judgment para 57. For in-depth discussions of the *Laubscher* judgment, see Wood-Bodley 2018 *Obiter* 276-287; Mofokeng *The legal differentiation* 13-17.

¹⁵² Under *Bwanya v The Master of the High Court* 2021 1 SA 138 (WCC).

partner) and/or maintenance from his estate is not recognised nor provided for under these acts.

The *Bwanya* judgment concerned two issues, the first being whether a surviving partner in a permanent heterosexual life partnership in which the parties have undertaken reciprocal duties of support is entitled to claim maintenance under the *MOSSA*.¹⁵³ The second issue was whether a surviving partner in a permanent heterosexual life partnership in which the parties have undertaken reciprocal duties of support is entitled to inherit from the estate of the deceased life partner under the *ISA*.¹⁵⁴

The uncontroverted facts of the case reveal that the applicant and the deceased were involved in a relationship that comprised “most, if not all”¹⁵⁵ characteristics of a marriage.¹⁵⁶ The applicant resided permanently with the deceased and they were engaged to be married in November 2015.¹⁵⁷ The couple planned to travel to the applicant’s family in Zimbabwe in June 2016 to commence lobola negotiations and to get married after the trip.¹⁵⁸ The deceased, however, passed away two months before the scheduled journey.¹⁵⁹ The deceased nominated his mother as the sole heir to his estate in his last will and testament, but his mother predeceased him as she passed away in 2013.¹⁶⁰ The deceased’s estate therefore had to be wound up in accordance with the *ISA*.

The applicant (Ms Bwanya) lodged two claims against the deceased’s estate in terms of the *AEA*. The claims were for maintenance in terms of the *MOSSA* and inheritance in terms of the *ISA*.¹⁶¹ Her claims were based on the fact that she and the deceased were involved in a permanent life partnership, with characteristics similar to a

¹⁵³ *Bwanya* judgment para 1.

¹⁵⁴ *Bwanya* judgment para 1.

¹⁵⁵ *Bwanya* judgment para 3.

¹⁵⁶ *Bwanya* judgment para 3.

¹⁵⁷ *Bwanya* judgment para 4-6.

¹⁵⁸ *Bwanya* judgment para 6.

¹⁵⁹ *Bwanya* judgment para 7.

¹⁶⁰ *Bwanya* judgment para 7.

¹⁶¹ *Bwanya* judgment para 8.

marriage, and they had undertaken reciprocal duties of support towards each other.¹⁶²

The second respondent, the executor of the deceased's estate, rejected both claims on the basis that the applicant did not qualify for the claimed benefits under the *MOSSA* or the *ISA*.¹⁶³ The Applicant subsequently challenged the constitutionality of section 2(1) of the *MOSSA* and section 1(1) of *ISA* in the High Court.¹⁶⁴ Section 2(1) of the *MOSSA* reads as follows:

If a *marriage* is dissolved by death after the commencement of this Act the *survivor* shall have a claim against the estate of the deceased *spouse* for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.¹⁶⁵

The *MOSSA* does not provide for definitions of "marriage" or "spouse". It does, however, define "survivor". The definition of "survivor" in terms of the *MOSSA* reads as follows:

'survivor' means the surviving spouse in a marriage dissolved by death, and includes a spouse of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929.

Ms Bwanya argued that the *MOSSA* and the *ISA* were unconstitutional to the extent that they prohibited surviving heterosexual life partners from claiming maintenance and benefits from their deceased partners' estates.¹⁶⁶ The basis of her claim was that the exclusion under the two acts violated her constitutional rights to equality¹⁶⁷ and dignity.¹⁶⁸

Before the matter was finalised in the High Court, the applicant and the executor, together with the deceased's intestate heirs, entered into a settlement agreement, which was made an order of the Court.¹⁶⁹ Ms Bwanya was awarded a settlement

¹⁶² *Bwanya* judgment para 8.

¹⁶³ *Bwanya* judgment para 9.

¹⁶⁴ *Bwanya* judgment para 9.

¹⁶⁵ Own emphasis added.

¹⁶⁶ *Bwanya* judgment para 9.

¹⁶⁷ Section 9 of the *Constitution*.

¹⁶⁸ Section 10 of the *Constitution*. See *Bwanya* judgment para 9.

¹⁶⁹ *Bwanya* judgment para 10.

figure of R3 million.¹⁷⁰ Despite the settlement, Ms Bwanya still sought an order declaring section 2(1) of the *MOSSA* and section 1(1) of the *ISA* unconstitutional. The High Court dismissed the challenge of the constitutionality of the *MOSSA* but found section 1(1) of the *ISA* to be inconsistent with the *Constitution*. The High Court further declared section 1(1) of the *ISA* invalid to the extent that it excludes parties in a permanent life partnership in which they have undertaken reciprocal duties of support.¹⁷¹

The case was referred to the Constitutional Court for confirmation of the order of constitutional invalidity granted by the High Court, and Ms Bwanya sought leave to appeal against the High Court's dismissal of the unconstitutionality of section 2(1) of the *MOSSA*. The Constitutional Court granted the leave to appeal.¹⁷²

The Constitutional Court emphasised that there has been significant development in the common law since the *Volks* judgment.¹⁷³ Madlanga J¹⁷⁴ stated that there can no longer be a distinction between the duty of support that arises by operation of law and the duty of support that arises by agreement. The Court further confirmed that it would be unfair discrimination to allow same-sex permanent life partners to have certain rights but exclude heterosexual life partners.¹⁷⁵

The Court found that the relationship between Ms Bwanya and her deceased life partner was "akin to a marriage and that they had undertaken reciprocal duties of support towards each other".¹⁷⁶ The Court further concluded that "permanent life partnerships must be accorded the necessary respect as they are one of life's realities"¹⁷⁷ and is therefore also deserving of constitutional and legal protection.¹⁷⁸ The Court held that the unfair discrimination of section 2(1) of the *MOSSA* cannot

¹⁷⁰ *Bwanya* judgment para 10.

¹⁷¹ *Bwanya v The Master of the High Court* 2021 1 SA 138 (WCC) para 233.

¹⁷² *Bwanya* judgment para 18.

¹⁷³ *Bwanya* judgment para 71. See par 2.5 of this study for an outline of the *Volks* judgment.

¹⁷⁴ *Bwanya* judgment para 71.

¹⁷⁵ *Bwanya* judgment para 71.

¹⁷⁶ *Bwanya* judgment para 56.

¹⁷⁷ *Bwanya* judgment para 67.

¹⁷⁸ *Bwanya* judgment para 70.

be justified and is therefore unconstitutional.¹⁷⁹ The Court ordered that the definition of “spouse” and “marriage” in section 1 of the *MOSSA* is to be read as though it includes a person in a “permanent life partnership in which the partners have undertaken reciprocal duties of support”.¹⁸⁰ The Court further held that the *ISA* must be read to include “a partner in a permanent life partnership in which the partners had undertaken reciprocal duties of support”.¹⁸¹

The Court suspended the order for a period of 18 months to enable Parliament to take steps to rectify the constitutional defects the judgment identified.¹⁸² The order was handed down on 31 December 2021, meaning that Parliament had until 30 June 2023 to enact legislation addressing the constitutional defects, which was not done. As mentioned in Chapter 1, Parliament did publish the *Draft Marriage Bill*¹⁸³ on 7 July 2023, but it did not address permanent life partnerships.¹⁸⁴

2.10 *EW v VH*¹⁸⁵

The primary issue in the *EW* judgment was whether the parties have entered into a permanent life partnership in which they have undertaken reciprocal duties of support.¹⁸⁶ Their relationship ended in April 2022 when the respondent moved out of the common home.¹⁸⁷ The applicant and respondent entered into their relationship while they were still involved with other parties, and the respondent remained married to his previous partner until 2019.¹⁸⁸ The applicant and respondent in the case had previously been involved in a romantic relationship for

¹⁷⁹ *Bwanya* judgment paras 80-83.

¹⁸⁰ *Bwanya* judgment para 95.

¹⁸¹ *Bwanya* judgment para 95. For in-depth discussions of the *Bwanya* judgment, see Barratt 2022 *PER* 2-28; Osman 2021 *SALJ* 521-534.

¹⁸² *Bwanya* judgment para 95.

¹⁸³ Gen Not 3648 in *GG* 48914 of 7 July 2023.

¹⁸⁴ As mentioned in par 1.1 of this study, the *Draft Domestic Bill* was published for commentary in 2008 but was never enacted.

¹⁸⁵ 2023 4 SA 123 (WCC) (hereafter the *EW* judgment).

¹⁸⁶ *EW* judgment para 3.

¹⁸⁷ *EW* judgment para 1.

¹⁸⁸ *EW* judgment para 1.

a period of eight to nine years and three children were born from their relationship.¹⁸⁹

On 25 July 2022, the applicant instituted action proceedings seeking an order of maintenance and confirmation that the parties were partners in a permanent heterosexual life partnership in which they had undertaken reciprocal duties of support.¹⁹⁰

On 27 October 2022, the applicant instituted an application for a hearing on an expedited basis in the High Court. In the interlocutory proceedings, the applicant sought an order to:¹⁹¹ (a) develop the common law; and (b) declare that partners in permanent life partnerships in which they had undertaken a reciprocal duty of support are entitled to claim maintenance from one another after the relationship has been terminated. It was submitted that the court should in its determination of the extent and duration of the maintenance consider the following factors:¹⁹² (a) the duration of the life partnership; (b) the financial means and needs of each of the partners and their earning capacities; (c) their respective ages; (d) the standard of living that the partners have come accustomed to; (e) whether the relationship ended as result of one of the partners' conduct; and (f) any other factor which the court may regard as relevant.

The Court confirmed that all married spouses have reciprocal duties of support that arises by automatic operation of law when a marriage is concluded.¹⁹³ Furthermore, it was held that in light of recent legal developments, a reciprocal duty of support may also arise between parties in a permanent life partnership.¹⁹⁴ The court specifically referred to the *Paixão* judgment¹⁹⁵ and the *Bwanya* judgment¹⁹⁶ where it was held that the facts of each case should be considered to establish whether the

¹⁸⁹ *EW* judgment para 1.

¹⁹⁰ *EW* judgment para 2.

¹⁹¹ *EW* judgment para 10.

¹⁹² *EW* judgment para 10.

¹⁹³ *EW* judgment para 35.

¹⁹⁴ *EW* judgment para 35.

¹⁹⁵ See par 2.7 of this study for an outline of the *Paixão* judgment.

¹⁹⁶ See par 2.9 of this study for an outline of the *Bwanya* judgment.

parties' relationship is similar to that of a marriage and whether a legally enforceable duty of support existed between the parties.¹⁹⁷

The Court held that in terms of the *Bwanya* judgment, there is already a common law remedy that the applicant may rely on to claim maintenance.¹⁹⁸ If the applicant is able to prove that the duty of support existed, she would have a claim for maintenance.¹⁹⁹ The applicant's argument of developing the common law on which the application was based, was thus flawed, as the common law (after the *Bwanya* judgment) had already been developed to afford permanent life partners who have undertaken reciprocal duties of support the right to claim maintenance. The application was dismissed on the grounds that the applicant already had a common law remedy to claim maintenance. The Court further confirmed that the "fundamental dispute between the parties" (whether or not a permanent life partnership existed) should be heard in a trial court which would enable that court to make factual findings.²⁰⁰

2.11 *Lindeni v The Master of the High Court*²⁰¹

In the *Lindeni* judgment, the applicant sought an order to confirm that she and the late Mr Kekana (the "deceased") were partners in a permanent life partnership in which they had undertaken reciprocal duties of support.²⁰² The applicant further sought an order that the winding up of the deceased estate of Mr Kekana be interdicted pending the lapsing of the suspension of the orders made in the *Bwanya* judgment, which orders were suspended for a period not exceeding 18 months from 31 December 2021.²⁰³ The applicant averred that she and the deceased entered a romantic relationship in 2017, that they agreed to a committed relationship and started living together in 2018.²⁰⁴ In 2018 they entered into lobolo negotiations and

¹⁹⁷ *EW* judgment para 35.

¹⁹⁸ *EW* judgment para 41.

¹⁹⁹ *EW* judgment para 41.

²⁰⁰ *EW* judgment para 41.

²⁰¹ 2023 JDR 2599 (GJ) (hereafter the *Lindeni* judgment).

²⁰² *Lindeni* judgment para 1.

²⁰³ *Lindeni* judgment para 1.

²⁰⁴ *Lindeni* judgment para 5.

a celebration was held at the applicant and the deceased's family homes.²⁰⁵ After the lobola payment, they regarded themselves as husband and wife.²⁰⁶ In 2019 they acquired a family home, which was financed by the deceased. Between 2019 and 2020 the parties transferred monies into each other's accounts to purchase household items and mutually support each other.²⁰⁷ The parties took out funeral cover in which the applicant was listed as the plan owner and the deceased as the life partner.²⁰⁸

The deceased was, however, married to another woman until March 2020 and passed away intestate on 1 January 2021.²⁰⁹ The respondent (the deceased's ex-wife's daughter) averred that her mother was still married to the deceased when the lobolo negotiations were concluded and therefore, the applicant cannot claim to be the deceased's surviving spouse.²¹⁰

The applicant, however, relied on the *Bwanya* judgment by arguing that she was entitled to the deceased's estate as, at the time of his passing, they were in a permanent life partnership and had undertaken reciprocal duties of support.²¹¹

The factors presented to the court by the applicant in demonstrating the existence of the permanent life partnership were the following:²¹² (a) when the parties became involved in the romantic relationship in 2017, they were 49 and 50 years of age respectively; (b) at the time of the deceased's demise, they had been in a relationship for about three years; (c) they lived together from March 2017 until his death in 2021; (d) they shared responsibility for their financial support, living expenses and the upkeep of their shared home; (e) in May 2018, the deceased paid lobolo and a celebration ceremony was attended by friends and family; (f) the deceased's mother confirmed in an affidavit that she regarded the applicant as her

²⁰⁵ *Lindeni* judgment para 5-6.

²⁰⁶ *Lindeni* judgment para 6.

²⁰⁷ *Lindeni* judgment para 7.

²⁰⁸ *Lindeni* judgment para 8.

²⁰⁹ *Lindeni* judgment para 8.

²¹⁰ *Lindeni* judgment para 10.

²¹¹ *Lindeni* judgment para 14.

²¹² *Lindeni* judgment para 14.

daughter-in-law; (g) the applicant and the deceased presented themselves as husband and wife and were regarded as such; and (h) the parties shared a funeral cover that listed the deceased as a life partner. The Court confirmed that seeing as the deceased was married to another woman until March 2021, it was essential to establish whether the applicant and the deceased were competent to enter a marriage or a permanent life partnership.²¹³ The Court reiterated that “all marriages, including permanent life partnerships, are now equal in the eyes of the law and enjoy recognition and acceptance by the public”.²¹⁴ Section 10(1) of the *Recognition of Customary Marriages Act*²¹⁵ provides that spouses to a customary marriage are competent to enter a marriage with each other under the *MA* provided that neither of them is a spouse in a subsisting customary marriage with any other person.²¹⁶

The Court referred to the case of *Monyepao v Ledwaba*²¹⁷ where the appellant (the second wife) was married to the deceased in terms of customary law. The deceased was however still married to his first wife in terms of customary law.²¹⁸ The deceased and his first wife did not get divorced and were merely separated when he married his second wife.²¹⁹ The court concluded that the deceased’s first marriage was still valid and that the first wife was entitled to patrimonial benefits.²²⁰

In the *Linden* judgment, the Court considered the evidence that the deceased was married to his erstwhile wife from 1994 until March 2020. The applicant’s case relied on the fact that she had been in a relationship with the deceased since November 2017 and that all the celebrations of the lobolo took place between May 2018 and November 2018 and not after March 2020, at which time the divorce was granted.²²¹

²¹³ *Linden* judgment para 15.

²¹⁴ *Linden* judgment para 16.

²¹⁵ 120 of 1998.

²¹⁶ Section 10(1) of the *Recognition of Customary Marriages Act*; *Linden* judgment para 16.

²¹⁷ (SCA) (unreported) case number 1368/2018 of 27 May 2020 (hereafter the *Monyepao* judgment).

²¹⁸ *Monyepao* judgment para 21; *Linden* judgment para 18.

²¹⁹ *Monyepao* judgment para 21; *Linden* judgment para 18.

²²⁰ *Monyepao* judgment para 21; *Linden* judgment para 18.

²²¹ *Linden* judgment para 18.

It was confirmed that their relationship began while the valid marriage between the deceased and his erstwhile wife was still ongoing.²²²

The Court held that the mere fact that the public, friends, and family regarded and accepted them as married or permanent life partners and that they conducted themselves as permanent life partners, did not make their relationship equal to a marriage or a permanent life partnership in which they undertook reciprocal duties of support.²²³ The Court further held that the divorce decree in 2020 did not automatically validate their relationship but merely made the deceased eligible and competent for any form of marriage.²²⁴ Ten months after the divorce, the deceased passed away intestate.

The Court ordered that the deceased was not competent to conclude any marriage or familial relationship, including a permanent life partnership, before his divorce in March 2020 and therefore the applicant could not be regarded as a surviving permanent life partner in a permanent life partnership in which she and the deceased undertook reciprocal duties of support.²²⁵ The Court accordingly found that the applicant did not have any claim against the deceased estate, nor did she have any right to inherit.²²⁶

2.12 Reciprocal duty of support

As mentioned in paragraph 1.1 of the study, the reciprocal duty of support is an invariable consequence of marriage. It is, however, apparent from the discussed judgments that a marriage is not the only relationship in which a reciprocal duty of support can exist. In most of the above-discussed cases, the courts referred to the duty of support that existed between the life partners, and based on this duty of support the partners were entitled to certain protection and rights. It would be

²²² *Linden* judgment para 19.

²²³ *Linden* judgment para 19.

²²⁴ *Linden* judgment para 21.

²²⁵ *Linden* judgment para 21.

²²⁶ *Linden* judgment para 23.

prudent to reiterate what the statement “undertook reciprocal duties of support” as used in these judgments means.

Barratt²²⁷ confirms that the word “undertake” is inherently ambiguous. According to the *Concise Oxford English Dictionary*, “undertake” means to “bind oneself to perform”, which suggests a contractual commitment or undertaking.²²⁸ The word is further defined as “enter upon”, which suggests that a person merely performs activities without binding himself thereto.²²⁹ The courts have, however, used the word to mean “performance” in some cases, and “contractual commitment” in others.²³⁰

In the *Satchwell* judgment, the Court held that the argument that the duty of support only exists in the context of conventional marriages is flawed.²³¹ The Court found that “whether a duty of support exists or not will depend on the circumstances of each case”.²³² The Court considered the facts that (a) the parties lived together in a stable permanent relationship for years; (b) their family and friends regarded them as a family; (c) they shared family responsibilities; and (d) they made financial provision for one another in the event of death as evidence that a reciprocal duty of support existed between the parties.²³³ In the *Gory* judgment, the court found that a reciprocal duty of support existed between the parties based on the evidence that the parties shared a common home and joint household and both contributed financially to the household.²³⁴

In the *Paixão* judgment, the Court held that in any case where a plaintiff asserts that he or she was in a life partnership, the existence of such relationship must be proven.²³⁵ The Court further confirmed that establishing the existence of a life partnership will entail more than merely showing that the parties cohabitated and

²²⁷ Barratt 2022 *PER* 9.

²²⁸ Barratt 2022 *PER* 9.

²²⁹ Barratt 2022 *PER* 9.

²³⁰ Barratt 2022 *PER* 9.

²³¹ *Satchwell* judgment par 22; Barratt 2022 *PER* 10.

²³² *Satchwell* judgment para 25.

²³³ *Satchwell* judgment para 25.

²³⁴ *Gory* judgment para 52.

²³⁵ *Paixão* judgment para 29.

jointly contributed to the upkeep of the common home; it would have to be shown that the partnership was “akin to and had similar characteristics – particularly a reciprocal duty of support - to a marriage”.²³⁶ The implied conclusion from the facts must be that the parties expressly or tacitly agreed that their relationship included a reciprocal duty of support to each other.²³⁷

The Constitutional Court in the *Bwanya* judgment concurred with the Court’s reasoning in the *Paixão* judgment that where a life partnership with characteristics akin to marriage exists (be it a heterosexual or homosexual relationship), the parties would have undertaken reciprocal duties of support.²³⁸ This was also confirmed in the *EW* judgment.²³⁹ It is thus clear that our Courts will consider the facts of each case but that a relationship akin to marriage would most likely be regarded as a relationship in which the parties have undertaken reciprocal duties of support.

2.13 Conclusion

Taking the above judgments into account, it is clear that societal norms are rapidly changing, and the justification for a lack of protection based on the choice of not wanting to get married is no longer sustainable.²⁴⁰ It is further clear that permanent life partnerships where parties undertake reciprocal duties of support should be afforded the same rights as their married counterparts.

In the following chapters, the effect of the broadened spousal concept on succession legislation, administration of deceased estates and related tax matters are discussed. The next chapter discusses the possible effect of the broader spousal concept on the *AEA*.

²³⁶ *Paixão* judgment para 29.

²³⁷ *Paixão* judgment para 29.

²³⁸ *Bwanya* judgment par 71-72.

²³⁹ *EW* judgment para 35.

²⁴⁰ Madzika 2020 *De Jure* 395.

3 Administration of Estates Act²⁴¹

3.1 Introduction

All deceased estates are dealt with in terms of the *Wills Act* or the *ISA* and administered under the supervision of the Master of the High Court.²⁴² The administration of deceased estates is governed by the *AEA*. Chapter 2 of the *AEA* deals with the administration of deceased estates and sets out the administration process. The administration process is designed to conclude the financial affairs and administration of an estate in an orderly, and practical manner.²⁴³ It is important to note that certain sections of the *AEA* are specifically applicable to spouses.

The objectives of this chapter are accordingly to (a) discuss the relevant sections of the *AEA* that pertain to the concept of a "spouse"; and (b) establish whether the broader spousal concept may also apply to the *AEA*.

3.2 Appointment of a "spouse" as executor

The *AEA* stipulates that the Master of the High Court must issue letters of executorship before the estate of a deceased person may be liquidated or distributed.²⁴⁴ The letters of executorship set out the details of the appointed executor who will act as the personal representative of the deceased estate.²⁴⁵ The appointment of an executor is thus crucial in the administration process as only the executor can wind up the deceased estate, and the estate remains unrepresented until an executor is appointed.²⁴⁶ One must distinguish between a testamentary executor and an executor dative.²⁴⁷

A testamentary executor is appointed by the Master after having been nominated as executor in the deceased's will.²⁴⁸ It has become common practice for a testator

²⁴¹ 66 of 1965 (Previously abbreviated to the *AEA*).

²⁴² Abrie *et al Bestorwe Boedels* 3.

²⁴³ Shapiro and Burdette *Wills and Estates* 2016 45.

²⁴⁴ Section 13 of the *AEA*.

²⁴⁵ See the definition of "executor" and "letters of executorship" in s 1 of the *AEA*.

²⁴⁶ Williams *Maintenance of the Surviving Spouse in South Africa* 22.

²⁴⁷ Shapiro and Burdette *Wills and Estates* 2016 56.

²⁴⁸ Shapiro and Burdette *Wills and Estates* 2016 56.

to nominate his executor in his last will and testament and to further stipulate in the will that the nominated executor is freed from the obligation of furnishing security to the Master.²⁴⁹ It is, however, a requirement that the will in which the executor is nominated is registered and accepted by the Master.²⁵⁰ As previously mentioned, the nominated person does not have any authority to act on behalf of the estate until the Master has authorised him²⁵¹ to act as executor by issuing letters of executorship.²⁵²

If the deceased dies without having nominated a person to be the executor in his will, or if such nominated person is incapable of acting as the executor, the Master will appoint and grant letters of executorship to such person that he deems fit and proper to be the executor of the deceased estate.²⁵³ Regulation R910²⁵⁴ was promulgated in 1968 in terms of the *Attorneys, Notaries and Conveyancers Admissions Act*²⁵⁵ and stipulates who will be qualified to act as an executor dative.²⁵⁶ The regulations state that in the instances where an executor is not nominated by will, only a practising attorney, conveyancer, notary, accountant, broker, a representative of a board of executors, a representative of a trust company, a representative of a banking institution, a surviving spouse or a family member related by blood within the second degree to the deceased, may be appointed as executor to liquidate and distribute a deceased estate.²⁵⁷ In the recent case of *Koch v Weiland*,²⁵⁸ the relevance of Regulation R910 was questioned as the *Notaries and Conveyancers Admissions Act* was repealed by the *Attorneys Act*²⁵⁹ in 1979. The Court held that the *Attorneys Act* catered for the continuance of the regulations,

²⁴⁹ Pace and van der Westhuizen *Wills and Trusts* 52.3.

²⁵⁰ Section 14 of the *AEA*.

²⁵¹ Note that any reference in this study to the masculine form will include the female form, unless otherwise indicated.

²⁵² Section 13 of the *AEA*; Williams *Maintenance of the surviving spouse in South Africa* 24.

²⁵³ Section 18 of the *AEA*.

²⁵⁴ R910 in *GG* 2080 of 22 May 1968 as amended by R1030 in *GG* 2439 of 20 June 1969 and R1376 in *GG* 3227 of 13 August 1971.

²⁵⁵ 23 of 1934 (hereafter the *Attorneys, Notaries and Conveyancers Admissions Act*).

²⁵⁶ *Koch v Weiland* 2022 ZAWCHC 96 para 10.

²⁵⁷ *Koch v Weiland* 2022 ZAWCHC 96 paras 10-14; Abrie *et al Bestorwe Boedels* 91.

²⁵⁸ *Koch v Weiland* 2022 ZAWCHC 96 (hereafter the *Koch* judgment).

²⁵⁹ 53 of 1979.

and Regulation R910²⁶⁰ therefore remained in force and effect.²⁶¹ The *Attorneys Act* has been repealed by section 119 of the *Legal Practice Act*²⁶² with effect from 1 November 2018. The Regulations promulgated under the *Notaries and Conveyancers Admissions Act* remain in force in terms of section 119(2) of the *Legal Practice Act*.

In the instance where a deceased did not nominate an executor by will, more than one person may be nominated for recommendation to the Master. The *AEA* stipulates that if more than one person is nominated for recommendation to the Master, the Master shall give preference to the “surviving spouse or his nominee”.²⁶³ This means that the spouse or his nominee would most likely be appointed as executor and enjoy preference over any other nominations. However, the *AEA* does not define the word “spouse” but does use the words “spouse” and “surviving spouse” in numerous sections of the *AEA*.²⁶⁴

In the *National Coalition* judgment,²⁶⁵ it was held that although the words “marriage” and “spouse” are not defined in the *Aliens Control Act*, the ordinary meaning of the words would be applicable and that the words extend no further than “marriages that are ordinarily recognised by our law”.²⁶⁶ In the *Volks* judgment,²⁶⁷ Skweyiya J²⁶⁸ held that when provisions of an act are interpreted, it must not be “unduly strained” and further referred to the *Hyundai Motor Distributors v Smit*²⁶⁹ case where Langa DP stated that:²⁷⁰

On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A

²⁶⁰ R910 in GG2080 of 22 May 1968 as amended by R1030 in GG2439 of 20 June 1969 and R1376 in GG3227 of 13 August 1971.

²⁶¹ *Koch* judgment para 21.

²⁶² 28 of 2014.

²⁶³ Section 19 of the *AEA*.

²⁶⁴ See ss 7, 9, 18-19, 23, 38, 49, 81 and 105 of the *AEA*.

²⁶⁵ See par 2.2 of this study for an outline of the *National Coalition* judgment.

²⁶⁶ *National Coalition* judgment para 25; *Satchwell* judgment para 32; *Bwanya* judgment para 35.

²⁶⁷ See par 2.5 of this study for an outline of the *Volks* judgment.

²⁶⁸ *Volks* judgment paras 44-45.

²⁶⁹ *Hyundai Motor Distributors v Smit* 2000 BCLR 1079 (CC) (hereafter the *Hyundai* judgment).

²⁷⁰ *Hyundai* judgment para 24.

balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read "in conformity with the Constitution". Such an interpretation should not, however, be unduly strained.

In the *Bwanya* judgment, it was held that the exclusion of permanent life partners who have undertaken reciprocal duties of support from the impugned definitions of the *MOSSA* and the *ISA* surmounted to unfair discrimination on the grounds of section 9(3) of the *Constitution* and is therefore unconstitutional.²⁷¹ As previously mentioned, section 9(3) of the *Constitution* states that no person may be unfairly discriminated against on one or more grounds, including race, gender, sex, marital status or sexual orientation.²⁷² It is clear from the discussion in Chapter 2 of this study that our courts have now accepted that permanent life partners who have undertaken reciprocal duties of support must enjoy the same rights as their married counterparts and may not be unfairly discriminated against on the grounds of their sexual orientation or marital status.²⁷³

Since the *AEA* does not define the word "spouse", it may be argued – taking the *Hyundai* principle and the broadened concept of a spouse as ordered in the *Laubscher* judgment²⁷⁴ and the *Bwanya* judgment into account – that the word "spouse" in the *AEA* also refers to permanent life partners who have undertaken reciprocal duties of support.²⁷⁵ This would mean that the Master should regard the surviving permanent life partner as the "spouse" of the deceased when the executor is appointed.

3.3 Exemption from providing security for a surviving spouse

Section 23(1) and 23(2) of the *AEA* stipulates that every person who has not been nominated by a will and applies to be an executor of a deceased estate may be required by the Master to furnish security before letters of executorship will be

²⁷¹ *Bwanya* judgment para 95. See par 2.9 of this study for an outline of the *Bwanya* judgment.

²⁷² Section 9(3) of the *Constitution*.

²⁷³ See the judgments of *National Coalition* judgment, *Satchwell* judgment, *Du Toit* judgment, *Gory v Kolver*, *Paixão* judgment, *Laubscher* judgment, *Bwanya* judgment.

²⁷⁴ See par 2.8 of this study for an outline of the *Laubscher* judgment.

²⁷⁵ *Hyundai* judgment para 24; *Bwanya* judgment para 95.

granted. *The AEA* further stipulates that “if such person is a parent, spouse or child of the deceased, he shall not be required to furnish security”.²⁷⁶ This means that in the instance where a person dies intestate or fails to nominate an executor in his will, his parent, spouse or child may apply to the Master of the High Court to be appointed as executor of the deceased estate without having to furnish security to the Master.

Security is furnished to the Master by means of a bond of security, which may be seen as an agreement by which the surety binds itself to the Master for the executor’s performance while in office.²⁷⁷ The bond of security is obtainable by the nominated executor from certain financial and insurance institutions.²⁷⁸ The deceased estate is liable for the payment of an annual premium to the institution until the deceased estate has been wound up and the bond subsequently cancelled.²⁷⁹ The amount of security is determined in accordance with the gross value of the deceased’s estate.²⁸⁰ Should the executor default and the surety have to make good any loss arising from such default, the surety will have recourse against the executor for the amount paid to the Master.²⁸¹

The process of obtaining and furnishing security to the Master can thus be expensive and cumbersome.²⁸² It would therefore be beneficial for a parent, spouse, or child of the deceased to be appointed as executor (if an executor has not been nominated by will), seeing as they are exempt from furnishing security to the Master.²⁸³

It is clear from the wording of section 23(1) of the *AEA* that the legislature intended to indemnify the next of kin of the deceased from furnishing security to the Master. As previously discussed, the definition of “spouse” in the *ISA* and *MOSSA* have now been amended to include permanent life partners who have undertaken reciprocal

²⁷⁶ Section 23(1) of the *AEA*.

²⁷⁷ Anon date unknown <https://www.shackletonrisk.co.za/surety-bonds/executor-bond/>.

²⁷⁸ Abrie *et al Bestorwe Boedels* 96.

²⁷⁹ Abrie *et al Bestorwe Boedels* 96.

²⁸⁰ Abrie *et al Bestorwe Boedels* 96.

²⁸¹ Section 23(5) of the *AEA*.

²⁸² Padaychee date unknown <https://denisepadayacheeattorneys.co.za/intestate-succession-security-and-wills/>.

²⁸³ Section 23(1) of the *AEA*.

duties of support in the definition of “spouse”. If it is found that the broader spousal concept applies to the *AEA*, the surviving life partner of the deceased would also be exempt from providing security to the Master, both where the deceased nominated the surviving life partner as the executor in his will and when the surviving life partner is appointed as an executor dative.

3.4 Taking over by a surviving spouse

In terms of section 38 of *AEA*, a testator’s surviving spouse may under certain circumstances “take over” the estate or a portion of the estate of their deceased.²⁸⁴

Section 38 of the *AEA* reads as follows:

- (1) The Master may, if-
 - (a) one of two spouses, whether they were married in or out of community of property, has died; and
 - (b) the deceased has made no provision to the contrary in any will; and
 - (c) the major heirs and any claimants against the estate consent; and
 - (d) it appears to him that no person interested would be prejudiced thereby, authorize the executor, subject to security being given *mutatis mutandis* as provided in subsection (2) of section forty-three for the payment of any minor's share, and to such conditions as the Master may determine, to make over any property or all the property of the deceased, or the whole or any part of that portion of his property in respect of which he has made no testamentary provision to the contrary, to the surviving spouse at a valuation to be made by an appraiser or any other person approved by the Master, and to frame his distribution account on the basis of such valuation.
- (2) Subsections (3), (4) and (5) of section forty-three shall *mutatis mutandis* apply in respect of any security given under subsection (1).

This means that a surviving spouse may “buy out” the heirs of the estate by taking over the estate property at an amount determined by the appraiser or other person appointed by the Master.²⁸⁵ The proceeds instead of the property are then distributed among the heirs.²⁸⁶ It is important to note that it is not a sale of assets but rather an administrative process and method of liquidation used when minors are involved.²⁸⁷

²⁸⁴ Wiechers and Vorster *Boedelbereddering* 49.

²⁸⁵ Wiechers and Vorster *Boedelbereddering* 49.

²⁸⁶ Wiechers and Vorster *Boedelbereddering* 49.

²⁸⁷ Wiechers and Vorster *Boedelbereddering* 49.

This method of liquidation may be considered in the following scenario: Jack and Jill are married out of community of property and have two minor children. Jack dies intestate, with an estate to the value of R1 500 000,00 consisting of only an immovable property. In terms of the *ISA*, Jane will inherit a child's portion (which will in this case be R500 000,00) or R250 000,00, whichever is the larger.²⁸⁸ This means that Jane and the two children will each inherit R500 000,00. Since the alternative would be to sell the immovable property and pay the two children's inheritance into the guardian fund, it would be more beneficial for all the parties involved to do a section 38 take-over by the surviving spouse.²⁸⁹ If the take-over is done, Jane will receive the house and a mortgage bond will be registered over the property to ensure the inheritance of the two children.²⁹⁰

A surviving spouse who wishes to take over the estate or a portion of the estate of a deceased spouse in terms of section 38 must provide the Master with a signed affidavit containing the request for take-over.²⁹¹ The affidavit must contain the following information; (a) the full names of the deceased; (b) the Master's estate reference number; (c) the full name and address of the surviving spouse; (d) confirmation that the estate is solvent; (e) a concise list of all the estate assets and liabilities; (f) an express request for taking over the estate with specific reference to section 38 of the *AEA*; (g) the reason for the request for taking over; (h) how the rights of persons with claims against the estate will be protected; (i) a list of the names of all beneficiaries of the estate, indicating whether they are minors or majors and their relationship to the deceased; and (j) if it is an intestate estate, a next-of-kin statement in the prescribed form must be lodged with the application for take-over.²⁹² The affidavit must also be endorsed by the executor of the deceased estate.²⁹³

²⁸⁸ Section 1(1)(c) of the *ISA*.

²⁸⁹ Wiechers and Vorster *Boedelbereddering* 50.

²⁹⁰ Wiechers and Vorster *Boedelbereddering* 50.

²⁹¹ Wiechers and Vorster *Boedelbereddering* 49.

²⁹² Wiechers and Vorster *Boedelbereddering* 49.

²⁹³ Wiechers and Vorster *Boedelbereddering* 49.

If there are minor beneficiaries to the estate, further mention must be made as to (a) why the proposed take-over will be to the personal advantage of the minors; (b) whether the surviving spouse intends to provide a home for the minor and whether the residence is part of the fixed property of the estate to be taken over; (c) whether the minor children's inheritance will be paid into the guardian's fund and whether security will be provided to this end.²⁹⁴ If the inheritance will not be paid into the guardian's fund in cash but will be secured instead, full details of the security must be provided.²⁹⁵

Before the Master will issue a certificate for approval for taking over, the following requirements must also be met: (a) the liquidation and distribution account must have lain open for inspection free of objections; (b) all the major heirs must consent to the take-over in writing; (c) sworn appraisals of all the assets to be taken over must be submitted to the Master; (d) the minor's inheritance must be paid into the guardian's fund or properly secured; (e) proof must be furnished that all estate debts have been settled; (f) all the Master's fees must be paid.²⁹⁶

This method of liquidation is applied only in exceptional circumstances, since only a surviving spouse may perform such a take-over.²⁹⁷ It may, however, be argued that the surviving partner of a permanent life partnership in which the parties undertook reciprocal duties of support must also be afforded the right to take over the estate of his deceased life partner.

3.5 Conclusion

It is important to reiterate that the very basis of the principle of equality as provided for in section 9 of the *Constitution*, requires that all people who are in similar situations be granted the same treatment and should not be prejudiced because of

²⁹⁴ Wiechers and Vorster *Boedelbereddering* 49.

²⁹⁵ Wiechers and Vorster *Boedelbereddering* 49.

²⁹⁶ Wiechers and Vorster *Boedelbereddering* 49.

²⁹⁷ Wiechers and Vorster *Boedelbereddering* 49.

their race, religion, gender or marital status.²⁹⁸ In *Harksen v Lane*²⁹⁹ the Constitutional Court laid down a test to ascertain whether an impugned provision violates a person's right to equality.³⁰⁰ The Court will first determine whether the legislative provision differentiates between people or categories of people.³⁰¹ If not, there is no violation of section 9 of the *Constitution*. If there is a differentiation, the Court will determine whether the differentiation has a rational connection to a legitimate governmental objective.³⁰² If there isn't a rational objective, the legislative provision will be unconstitutional.³⁰³ If there is a rational objective, the Court will determine whether the differentiation amounts to unfair discrimination. This requires a two-stage analysis.³⁰⁴

Firstly, the Court will have to determine whether the discrimination is based on a specified ground that is listed in section 9 of the *Constitution*.³⁰⁵ Discrimination will automatically be established if the differentiation is based on a specified ground.³⁰⁶ If the differentiation is not on a specified ground, then it would have to objectively be determined whether the differentiation has the potential to affect the fundamental human dignity of the person.³⁰⁷

Secondly, if the differentiation amounts to discrimination, it will have to be established whether the discrimination is unfair.³⁰⁸ If the differentiation is based on one of the specified grounds listed in section 9 of the *Constitution*, unfairness will be presumed.³⁰⁹ If the discrimination is found to be unfair, then a determination will

²⁹⁸ Smith 2014 *AHRLJ* 611.

²⁹⁹ 1998 1 SA 300 (CC) (hereafter the *Harksen* judgment). For an in-depth discussion of the *Harksen* judgment, see van der Walt and Botha 1998 *SAPL* 17-41.

³⁰⁰ *Harksen* judgment para 54; Smith 2014 *AHRLJ* 616.

³⁰¹ *Harksen* judgment para 54; Smith 2014 *AHRLJ* 616.

³⁰² *Harksen* judgment para 54; Smith 2014 *AHRLJ* 616.

³⁰³ *Harksen* judgment para 54; Smith 2014 *AHRLJ* 616.

³⁰⁴ *Harksen* judgment para 54; Smith 2014 *AHRLJ* 616.

³⁰⁵ Section 9(3) and s 9(4) of the *Constitution* state that no person may be unfairly discriminated against on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth. See also *Harksen* judgment para 54; Smith 2014 *AHRLJ* 616.

³⁰⁶ *Harksen* judgment para 54; Smith 2014 *AHRLJ* 616.

³⁰⁷ *Harksen* judgment para 54; Smith 2014 *AHRLJ* 616.

³⁰⁸ *Harksen* judgment para 54; Smith 2014 *AHRLJ* 616.

³⁰⁹ *Harksen* judgment para 54; Smith 2014 *AHRLJ* 616.

have to be made as to whether the discrimination can be justified under the limitation clause as contained in section 36 of the *Constitution*.³¹⁰ If the differentiation is on an unspecified ground, unfairness will have to be established by the complainant.³¹¹ The impact of the discrimination on the complainant and others in his situation will be scrutinised when establishing whether the discrimination is in fact unfair.³¹² If the discrimination is found to be unfair, it will be in violation of section 9 of the *Constitution*.³¹³

Since marital status is a listed ground in terms of section 9 of the *Constitution*, discrimination based on such grounds will be presumed unfair, unless proven otherwise. In the *Bwanya* judgment, the court emphasised that “we should be wary not to emphasise the importance of the institution of marriage as to devalue other institutions that are also foundational to the creation of other categories of families”.³¹⁴ The Court further confirmed that all categories of families are deserving of legal protection.³¹⁵ The question is, however, to which extent each category of family must be legally protected.³¹⁶ Permanent life partnerships are intimate relationships that are meant to last until the death of one or both of the partners.³¹⁷ These relationships, similar to a marriage, are the foundation of a family life.³¹⁸ Madlanga J³¹⁹ reiterated that the proscription of unfair discrimination on the grounds of marital status exists for a reason and that families that are established outside of civilly recognised marriages should not be subjected to unfair discrimination. The court accordingly found that the exclusion of permanent life partners who have

³¹⁰ Section 36 of the *Constitution* reads as follows: “ The rights in the Bill of Rights may be limited only in terms of law of general application to the extent 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”. See *Harksen* judgment para 54; Smith 2014 *AHRLJ* 616.

³¹¹ *Harksen* judgment para 54; Smith 2014 *AHRLJ* 617.

³¹² *Harksen* judgment para 54; Smith 2014 *AHRLJ* 617.

³¹³ *Harksen* judgment para 54; Smith 2014 *AHRLJ* 617.

³¹⁴ *Bwanya* judgment para 52.

³¹⁵ *Bwanya* judgment para 53.

³¹⁶ *Bwanya* judgment para 53.

³¹⁷ *Bwanya* judgment para 55.

³¹⁸ *Bwanya* judgment para 55.

³¹⁹ *Bwanya* judgment para 57.

undertaken reciprocal duties of support from the impugned provisions of the *ISA* and *MOSSA* amounts to unfair discrimination as the unfairness cannot be justified.³²⁰

It is important to note that the *AEA*, the *ISA* and the *MOSSA* are used in conjunction with one another in the administration and winding up of a deceased estate. As previously discussed, parliament had until 30 June 2023 to enact legislation addressing the constitutional defects of the *ISA* and the *MOSSA*.³²¹ This was not done. Therefore, the Constitutional Court's reading in of permanent life partners who have undertaken reciprocal duties of support is now included in the definition of spouse in the *ISA* and the *MOSSA*.³²² Since the *AEA* does not define the word "spouse", it may be argued – taking the *Hyundai* principle and the broadened concept of a spouse as ordered in the *Laubscher* judgment³²³ and the *Bwanya* judgment into account – that the word "spouse" in the *AEA* also refers to permanent life partners who have undertaken reciprocal duties of support.³²⁴

Since the *AEA*, the *ISA* and the *MOSSA* are used in conjunction with one another in the administration of deceased estates, it would be impractical for the Master to (a) recognise a surviving permanent life partner as a "spouse" in the distribution of a deceased estate in terms of the *ISA* and *MOSSA*, but not recognise that same partner as a spouse for the appointment of an executor in terms of the *AEA*; (b) recognise a surviving permanent life partner as a "spouse" in the distribution of a deceased estate in terms of the *ISA* and *MOSSA*, but still require the surviving partner to furnish security in terms of the *AEA*; and (c) recognise a surviving permanent life partner as a "spouse" in the distribution of a deceased estate in terms of the *ISA* and *MOSSA*, but not recognise that same partner as a spouse for taking over of assets as set out in section 38 of the *AEA*.

It may further be argued that the Court's reasoning in the *Bwanya* judgment will also apply to the *AEA* as the impugned provisions as discussed in this chapter also

³²⁰ *Bwanya* judgment para 81, 92.

³²¹ *Bwanya* judgment para 95.

³²² *Bwanya* judgment para 95.

³²³ See par 2.8 of this study for an outline of the *Laubscher* judgment.

³²⁴ *Hyundai* judgment para 24; *Bwanya* judgment para 95.

surmount to unfair discrimination based on marital status that cannot be reasonably justified.

In the next chapter, the relevant sections on the concept of “spouse” in the *Wills Act*³²⁵ are discussed, after which the question is asked whether the broader spousal concept may apply to the provisions of the *Wills Act*.

³²⁵ 7 of 1953.

4 Wills Act

4.1 Introduction

Freedom of testation is regarded as one of the founding principles of the South African law of testate succession.³²⁶ Testators have the freedom to choose how their estates and assets should be distributed after their death.³²⁷ Even though a testator has freedom of testation, the *Wills Act* sets out certain criteria relating to the execution and validity of wills.³²⁸

The objectives of this chapter are to (a) discuss the relevant sections of the *Wills Act* that pertain to the concept of "spouse"; (b) discuss *Moosa v Minister of Justice and Correctional Services*³²⁹ where the concept of "spouse" in terms of the *Wills Act* was broadened; (c) establish whether the broader spousal concept should apply to the *Wills Act*.

4.2 Section 2B of the Wills Act

Section 2B of the *Wills Act* provides that if a testator dies within three months of the dissolution of their marriage, any will which they executed before the dissolution must be given effect to as if the former spouse has died before such dissolution, unless it appears from the will that the testator intended to benefit their previous spouse, notwithstanding the dissolution of the marriage. In *Louw v Kock*,³³⁰ the Court held that it must be clear from the will that the testator intended to bequeath his estate to the ex-spouse notwithstanding the dissolution of their marriage, or words to that effect.³³¹

³²⁶ Matsemela 2015 *JLSD* 93.

³²⁷ Matsemela 2015 *JLSD* 93.

³²⁸ See the preface of the *Wills Act*.

³²⁹ *Moosa v Minister of Justice and Correctional Services* 2018 5 SA 13 (CC) (hereafter the *Moosa* judgment).

³³⁰ 2017 3 SA 62 (WCC) (hereafter the *Louw* judgment).

³³¹ *Louw* judgment para 24. For an in-depth discussion of the *Louw* judgment see Wood-Bodley 2018 *SALJ* 418-432.

Section 2B was introduced into the *Wills Act* following the final recommendation made by the (then) South African Law Commission in June 1991.³³² The Court in the *JW* judgment gave a summary of the South African Law Commission's report as to the purpose of Section 2B. The Commission's justification for section 2B was firstly that with the emotional turmoil that a divorce usually causes, a testator might not realise that a will they made in the past would still be regarded as valid, notwithstanding the divorce.³³³ The Commission was of the opinion that most spouses who got divorced would not want their former spouse to benefit from their deceased estate.³³⁴ Secondly, the Commission argued that in the majority of divorces, the parties usually agree about how their assets should be divided among themselves.³³⁵ The Commission further argued that, given the ever-increasing divorce rate and simplified divorce procedures, more and more people opt to get divorced without the benefit of legal advice from lawyers.³³⁶ This means that the majority of such people would most likely not realise that unless they alter their wills on divorce, their former spouse would continue to inherit in terms thereof.³³⁷ The Commission thus concluded that it was essential to provide for a legislative provision that affected an automatic, statutory revocation of a will that benefits a previous spouse.³³⁸

The Commission did, however, envisage that there might be instances where a testator would still want their former spouse to benefit from their deceased estate.³³⁹ It proposed that the statutory revocation should make provision for those instances where it is clear from the wording of a will that the testator intended to benefit their previous spouse, notwithstanding their divorce.³⁴⁰ The Commission concluded that a period of three months would be sufficient time for the testator to amend or revoke an earlier will that benefited their former spouse, and if they had not done

³³² *JW v Williams-Ashman* 2020 4 SA 567 (WCC) para 27 (hereafter the *JW* judgment).

³³³ *JW* judgment para 37.

³³⁴ *JW* judgment para 37.

³³⁵ *JW* judgment para 38.

³³⁶ *JW* judgment para 39.

³³⁷ *JW* judgment para 39.

³³⁸ *JW* judgment para 40.

³³⁹ *JW* judgment para 41.

³⁴⁰ *JW* judgment para 41.

so within the three month time frame, it could be assumed that they intended to benefit their former spouse, notwithstanding the divorce.³⁴¹

In the *JW* judgment, the constitutionality of section 2B was questioned primarily on the grounds that it conflicts with section 25(1)³⁴² of the *Constitution* and is contrary to public policy.³⁴³ The Court reiterated that “no one has a fundamental right to inherit and a potential beneficiary who is nominated in a will has no more than a *spes* or hope of inheriting”.³⁴⁴

The Court confirmed that section 2B in essence “disinherits the former spouse and results in their inheritance devolving by way of intestate succession on the testator’s heirs” in terms of any disposition that was made in their favour in the will.³⁴⁵ The Court further held that section 2B “serves a legitimate and compelling social purpose and the deprivation it affects is not arbitrary in terms of section 25(1)” of the *Constitution*.³⁴⁶

It is clear from the above that the will would have to explicitly state that the testator intends that his ex-spouse inherits from his estate after the divorce, otherwise, the exclusion as stipulated in section 2B of the *Wills Act* will be applicable.³⁴⁷ It is further clear that section 2B does not affect the law of intestate succession as an ex-spouse will automatically not be entitled to inherit under the *ISA*.³⁴⁸ The ex-spouse of a deceased is thus effectively disqualified from inheriting from his estate should he pass away within three months of the dissolution of their marriage, unless it appears from the will that he intended to benefit his previous spouse.

Taking the broader spousal concept into account, it may be argued that section 2B will also apply to permanent life partners who have undertaken reciprocal duties of

³⁴¹ *JW* judgment para 50.

³⁴² Section 25(1) of the *Constitution* states that “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”.

³⁴³ *JW* judgment para 4.

³⁴⁴ *JW* judgment para 72.

³⁴⁵ *JW* judgment para 2.

³⁴⁶ *JW* judgment para 159.

³⁴⁷ *Louw* judgment para 25.

³⁴⁸ *Sonnekus* 2017 *TSAR* 653.

support. As previously discussed, the surviving permanent life partner of a deceased is entitled to inherit in terms of the *ISA* and falls within the definition of spouse for both the *ISA* and *MOSSA*.³⁴⁹ It is also clear from the *Bwanya* judgment that permanent life partners who have undertaken reciprocal duties of support must be afforded the same rights as their married counterparts.³⁵⁰

Similar to a civil marriage or civil union, a life partnership terminates on the death of either or both of the partners or by the separation of the parties.³⁵¹ Whereas the termination of a civil marriage or civil union must be done based on the grounds of divorce as prescribed in the *Divorce Act*,³⁵² life partners may terminate their life partnership at any time and on any grounds.³⁵³ Unlike a marriage or civil union, a life partnership is terminated by the mere separation of the partners.³⁵⁴ This may, however, prove to be a challenge with regard to the three months as stipulated in section 2B. In the case of a civil marriage or a civil union, the three month period will start on the date that the divorce is granted by the court. Confusion may arise regarding the commencement date of the three months in the instance of a life partnership as there is no official procedure that should be concluded before the relationship may be regarded as dissolved or terminated. This could potentially cause a problem that the Legislature would need to address. The Legislature would have to give guidelines as to what would be regarded as sufficient proof to establish that the relationship has ended, and from what date or event the relationship would be regarded as terminated.

If for instance, a testator in a permanent life partnership bequeathed his estate to his life partner and their relationship ended before the testator's death, it may be argued that the testator would not want his ex-life partner to inherit from his estate.³⁵⁵ It may further be argued that if life partners should be afforded the same

³⁴⁹ *Bwanya* judgment para 95.

³⁵⁰ *Bwanya* judgment para 95.

³⁵¹ Smith "The Dissolution of a Life or Domestic Partnership" 427.

³⁵² 70 of 1979.

³⁵³ Smith "The Dissolution of a Life or Domestic Partnership" 427.

³⁵⁴ Smith "The Dissolution of a Life or Domestic Partnership" 428.

³⁵⁵ Wood-Bodley 2018 *SALJ* 418.

rights as their married counterparts (as found in the *Bwanya* judgment), they should also be subject to the same limitation of rights as their married counterparts. Therefore, it may be argued that similar to their married counterparts, section 2B of the *Wills Act* must also apply to permanent life partners who have undertaken reciprocal duties of support. As stated above, it is currently unclear what would be regarded as the “termination date” of a life partnership, i.e., the date from when the three months would be calculated.

4.3 Section 2C(1) of the Wills Act

It happens now and again that a beneficiary under a will chooses not to accept his inheritance.³⁵⁶ Section 2C(1) of the *Wills Act* states that:

if any descendant of a testator, excluding a minor or mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse.

This section of the *Wills Act* thus effectively means that should a testator nominate his spouse together with one of his descendants as heirs of his estate, and the descendant renounces his right to inherit, such inheritance will vest in the surviving spouse.

In the *Moosa* judgment, the meaning of the term “spouse” in the context of testate succession, and specifically section 2C(1) of the *Wills Act*, was challenged.³⁵⁷ The case concerned the proper distribution of the estate of the late Mr Harneker (the deceased) who was survived by two wives, both of the marriages were solemnised in accordance with Islamic law.³⁵⁸ In 1982, the deceased applied for a bank loan to finance a property but was advised by the bank that he had to formalise his marriage to his first wife under South African law before the bank loan could be approved.³⁵⁹ The deceased and his first wife subsequently formalised their marriage under the

³⁵⁶ Wood-Bodley 2020 *Obiter* 461.

³⁵⁷ Wood-Bodley 2020 *Obiter* 462.

³⁵⁸ *Moosa* judgment para 4. For an in-depth discussion of the *Moosa* judgment, see Amien 2019 *JCLA* 115-130.

³⁵⁹ *Moosa* judgment para 5.

Marriage Act with the consent of his second wife, and the property was registered in the names of the deceased and his first wife.³⁶⁰ The deceased, together with both his wives and some of their children, lived on the property until his death in 2014. The deceased referred in his will to both marriages and held that his estate must be distributed under Islamic Law.³⁶¹ The Muslim Judicial Council subsequently certified that the estate must be divided into 1/16 shares to each of his wives, 7/52 shares to each of his sons and 7/104 shares to his daughters.³⁶²

The executor of the deceased estate confirmed that all the children renounced the benefits due to them under the will and specified that their shares must be equally distributed to the deceased's two surviving spouses.³⁶³ The executor based this conclusion on section 2C(1) of the *Wills Act*, which entitles a "surviving spouse" to benefit from a will if the testator's descendants renounce their rights to the deceased estate.³⁶⁴ The executor lodged a liquidation and distribution account with the Master of the High Court in terms of which both spouses would receive an equal share of the renounced benefits.³⁶⁵ The Master accepted the executor's calculations and approved the liquidation and distribution account.³⁶⁶

The executor then sought to register the deceased's half-share in the family property in the names of the two surviving spouses.³⁶⁷ The Registrar of Deeds, however, rejected the documents on the basis that the term "surviving spouse" in section 2C(1) of the *Wills Act* should be interpreted strictly to include spouses recognised formally under the country's laws and therefore only the first wife should be entitled to the renounced benefits.³⁶⁸ The applicants (the two wives and the executor of the deceased estate) in the case took issue with the Registrar of Deeds'

³⁶⁰ *Moosa* judgment para 5.

³⁶¹ *Moosa* judgment para 6.

³⁶² *Moosa* judgment para 6.

³⁶³ *Moosa* judgment para 7.

³⁶⁴ *Moosa* judgment para 7.

³⁶⁵ *Moosa* judgment para 8.

³⁶⁶ *Moosa* judgment para 8.

³⁶⁷ *Moosa* judgment para 9.

³⁶⁸ *Moosa* judgment para 9.

interpretation of section 2C(1) of the *Wills Act* and held that it violated the second wife's constitutional right to equality and dignity.³⁶⁹

The Court found that the phrase "surviving spouse" in section 2C(1) of the *Wills Act* "dates back to a pre-constitutional era when it plainly contemplated a partner in a common law monogamous union".³⁷⁰ It was further held that section 2C(1) differentiates between spouses married in terms of the *Marriage Act* and those married under Islamic Law and further discriminates between surviving spouses in monogamous civil marriages and those in polygamous Muslim marriages.³⁷¹ The Court held that the differentiation does not bear a rational connection to a legitimate governmental purpose and therefore constitutes unfair discrimination.³⁷² It was further held that section 2C(1) of the *Wills Act* unfairly discriminated against the second wife by recognising the first wife as a "surviving spouse" by virtue of her civil union with the deceased, but excludes the second wife by virtue of her Islamic marriage to the deceased.³⁷³ It is thus clear that the unfair discrimination is based on the second wife's religion and marital status.³⁷⁴

The Constitutional Court subsequently ordered that section 2C(1) of the *Wills Act* must be read as "the phrase surviving spouse includes every husband and wife of a monogamous and polygamous Muslim marriage solemnised under the religion of Islam".³⁷⁵ It is clear from the *Moosa* judgment that the definition of "surviving spouse" as stipulated in section 2C(1) of the *Wills Act* must be broadened to not unfairly discriminate on the grounds of religion and marital status.³⁷⁶ As previously discussed, it was held in the *Bwanya* judgment that it amounts to unfair discrimination when permanent life partners who have undertaken reciprocal duties of support are not afforded the same rights as their married counterparts.³⁷⁷ Similar

³⁶⁹ *Moosa* judgment para 10.

³⁷⁰ *Moosa* judgment para 10.

³⁷¹ *Moosa* judgment para 10.

³⁷² *Moosa* judgment para 10.

³⁷³ *Moosa* judgment para 10.

³⁷⁴ *Moosa* judgment para 10.

³⁷⁵ *Moosa* judgment para 21.

³⁷⁶ *Moosa* judgment para 21.

³⁷⁷ *Bwanya* judgment para 95.

to the discrimination in the *Moosa* judgment, section 2C(1) of the *Wills Act* discriminates against permanent life partners who have undertaken reciprocal duties of support by not affording them the same rights as it does their married counterparts. It may thus be argued that a surviving life partner who undertook reciprocal duties of support must also be included in the definition of surviving spouse for the purposes of section 2C(1) of the *Wills Act*.³⁷⁸

Consider the following scenario: Jane and Peter are in a permanent life partnership in which they undertake reciprocal duties of support. Peter has two major children from a previous marriage. Peter has nominated Jane and his two descendants as the heirs of his estate. Peter has since the drafting of his will passed away and the descendants decided to repudiate their claim in the deceased estate.

Had Jane and Peter been married, section 2C(1) of the *Wills Act* would have automatically been applicable and Jane would be the sole heir of Peter's estate. Jane and Peter's relationship falls within the parameters of the broader spousal concept and it may therefore be argued that Jane must enjoy the same rights that she would have enjoyed had they formalised their relationship in terms of the *Marriage Act*. Should the broader spousal concept not be accepted in this instance, it would surmount to unfair discrimination based on Jane's marital status.³⁷⁹ It may thus be argued that the broadened spousal concept will also apply to section 2C(1) of the *Wills Act*.

4.4 Section 4A of the Wills Act

Section 4A(1) of the *Wills Act* stipulates that any person who attests and signs a will as a witness, or who writes out any part of the will in his own handwriting shall together with his spouse at the time of execution of the will be disqualified from receiving any benefit from that will. Section 4A(2) of the *Wills Act* states that notwithstanding the provisions of section 4A(1), a court may declare a person or his spouse to be competent to receive benefits from a will if the court is satisfied that

³⁷⁸ *Moosa* judgment para 10.

³⁷⁹ See the court's reasoning in the *Bwany* judgment para 95.

they did not unduly influence or defraud the testator in the execution of the will.³⁸⁰ It must be established whether “spouse” as referred to in section 4A of the *Wills Act* includes life partners who have undertaken reciprocal duties of support.

Consider the following scenario: Lebo executes a will and has Trudy and Jane attest as witnesses thereto. In the will, Lebo bequeaths a portion of her estate to her best friend Peter. Jane, who signed the will as a witness is married to Peter. In terms of section 4A(1) of the *Wills Act*, Jane and her spouse will be disqualified from inheriting from Lebo’s estate. This means that Peter is also disqualified from inheriting from Lebo’s estate unless Lebo can satisfy the court that she did not defraud or unduly influence Jane in executing her will.³⁸¹ If the facts of the scenario were different and Jane and Peter were not married but rather life partners who undertook reciprocal duties of support, it may be argued that Peter is not disqualified from inheriting from Lebo’s estate as he is not Jane’s “spouse”. It is submitted that this argument may be faulty as it would be in contradiction with the argument that permanent life partners should enjoy the same rights as their married counterparts.³⁸² The argument that permanent life partners should be afforded the same rights as their married counterparts is based on the principle of equality as enshrined in section 9 of the *Constitution*. Should permanent life partners who undertake reciprocal duties of support thus be included in the definition of “spouse” in terms of the *Wills Act*, section 4A will therefore limit their legal capacity to inherit in the same manner as it limits the capacity of married couples.³⁸³

4.5 Conclusion

From the above discussion, it is clear that certain provisions of the *Wills Act* are specifically applicable to spouses. It is further clear that permanent life partners who undertake reciprocal duties of support must also be regarded as spouses for the purposes of the *Wills Act*. There is, however, uncertainty regarding the practical application of section 2B as discussed in paragraph 4.1 above. The Legislature would

³⁸⁰ Section 4A(2) of the *Wills Act*.

³⁸¹ Section 4A(2)(a) of the *Wills Act*.

³⁸² As found in the *Bwanya* judgment.

³⁸³ Abduroaf 2022 *Obiter* 371.

have to provide guidelines as to when the three-month period would commence in the instance of the dissolution of permanent life partnerships. It was also established that it would surmount to unfair discrimination based on marital status if section 2C(1) of the *Wills Act* were found not to apply to the surviving partner of a permanent life partnership where the parties undertake reciprocal duties of support. Even though section 4A of the *Wills Act* limits the spouse's legal capacity to inherit, it may be argued that if permanent life partners who undertake reciprocal duties of support are afforded the same rights as their married counterparts, they should also be subject to the same limitations as their married counterparts. In the following chapter, the impact of the broadened spousal concept on related tax matters is discussed.

5 Related tax laws

5.1 Introduction

In every country, there is a relationship between the government and its citizens that is referred to as the “social compact”.³⁸⁴ This social compact entails that all citizens have the responsibility to pay taxes, and in return, the government has the responsibility to provide certain services to the citizens.³⁸⁵ In South Africa, different types of taxes are levied based on an individual’s income, wealth and consumption.³⁸⁶ The South African Revenue Service (hereafter SARS) is the government department that deals with South African tax administration.³⁸⁷ SARS was founded in terms of the *South African Revenue Services Act*³⁸⁸ and is in charge of managing the South African tax system.³⁸⁹ SARS interprets tax laws while carrying out its function of collecting taxes and ensuring compliance with tax laws.³⁹⁰

Historically, based on its administration of the various tax laws,³⁹¹ SARS unfairly discriminated against people involved in relationships other than heterosexual, monogamous marriages.³⁹² In 2001 the definition of “spouse” in tax law was amended by section 5(j) of the *Taxation Laws Amendment Act*³⁹³ to provide for a broader spousal concept that aligns with the *Constitution*, and more specifically the right to equality.³⁹⁴

For the purposes of this study, the emphasis is on the applicable tax laws that are used in the administration of deceased estates. Although a deceased person ceases to be a taxpayer on the date of his death, there will be various tax issues that have to be addressed by the executor regarding the deceased person and his deceased

³⁸⁴ Stiglingh *et al* *SILKE: South African Income Tax* 1.

³⁸⁵ Stiglingh *et al* *SILKE: South African Income Tax* 1.

³⁸⁶ Stiglingh *et al* *SILKE: South African Income Tax* 11.

³⁸⁷ Stiglingh *et al* *SILKE: South African Income Tax* 17.

³⁸⁸ 34 of 1997.

³⁸⁹ Stiglingh *et al* *SILKE: South African Income Tax* 17.

³⁹⁰ Stiglingh *et al* *SILKE: South African Income Tax* 17.

³⁹¹ With specific reference to the *ITA*, *EDA* and the *TDA*.

³⁹² Galt *An analysis of the South African Revenue Services* 14.

³⁹³ 5 of 2001.

³⁹⁴ Section 5(j) of the *Tax Laws Amendment Act* 5 of 2001; Galt *An analysis of the South African Revenue Services* 1.

estate.³⁹⁵ Income tax and estate duty are two separate taxes that must be calculated when a deceased estate is administered.³⁹⁶ Certain benefits and deductions are allowed in terms of these tax laws that are exclusively applicable to spouses.

It is thus crucial to firstly determine what these tax laws consider as a “spouse”, and secondly whether permanent life partners who undertake reciprocal duties of support will be regarded as “spouses” in terms thereof. The objectives of this chapter are accordingly to (a) discuss the definition of “spouse” as determined in the relevant tax legislation; and (b) with specific reference to the applicable tax laws, discuss whether permanent life partners who undertake a reciprocal duty of support will enjoy the same rights as their married counterparts.

5.2 Estate Duty Act³⁹⁷

Regulation 5(1)(h) of the *AEA* states that the liquidation and distribution account of a deceased estate must contain a subsection titled “Estate duty”. The regulation further prescribes that calculations to determine whether estate duty is payable and the amount of estate duty payable, must be specified under this heading.³⁹⁸ Estate duty is levied in terms of the *EDA* and is administered by the Commissioner of SARS, whose office is responsible for the collection of estate duty.³⁹⁹ It is important to note that the executor of a deceased estate will not receive his discharge from the Master before estate duty has been paid, and he may not pay out inheritances or legacies to beneficiaries unless the estate duty has been paid or guaranteed to the satisfaction of SARS.⁴⁰⁰

The *EDA* determines that for persons who ordinarily resided in the Republic of South Africa at the date of their death, estate duty is imposed on all their property, wherever in the world it may be situated.⁴⁰¹ The *EDA* further determines that in the

³⁹⁵ Stiglingh *et al SILKE: South African Income Tax* 1002.

³⁹⁶ Stiglingh *et al SILKE: South African Income Tax* 1002.

³⁹⁷ 45 of 1955 (previously abbreviated to the *EDA*).

³⁹⁸ Reg 5(1)(h) of the *AEA*; Wiechers and Vorster *Boedelbereddering* 81.

³⁹⁹ Wiechers and Vorster *Boedelbereddering* 82.

⁴⁰⁰ Wiechers and Vorster *Boedelbereddering* 82.

⁴⁰¹ Section 3 of the *EDA*; Wiechers and Vorster *Boedelbereddering* 84.

case of persons who normally resided outside the Republic of South Africa at the date of their death, estate duty is imposed on all their property situated within the Republic.⁴⁰²

Certain deductions are allowed in terms of the *EDA*, but the most significant allowable deduction is section 4(q), which applies to the surviving spouse of the deceased.⁴⁰³ Section 4(q) of the *EDA* reads as follows:

The net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say—

(q) so much of the value of any property included in the estate which has not been allowed as a deduction under the foregoing provisions of this section, as accrues to the surviving spouse of the deceased: Provided that—

(i) the deduction allowable under the provisions of this paragraph shall be reduced by so much of any amount as the surviving spouse is required in terms of the will of the deceased to dispose of to any other person or trust;

(ii) no deduction shall be allowed under the provisions of this paragraph in respect of any property which accrues to a trust established by the deceased for the benefit of the surviving spouse, if the trustee of such trust has a discretion to allocate such property or any income therefrom to any person other than the surviving spouse.

It is thus clear that any amount or asset that accrues to the surviving spouse will not be subject to estate duty.

Also, section 4A of the *EDA* determines that an abatement of R3 500 000,00 is applicable to all estates, which means that estate duty will only be payable if the net value of an estate exceeds R3 500 000,00.⁴⁰⁴ Estate duty is calculated at the rate of 20% on the dutiable amount of an estate that does not exceed R30 million and 25% on the dutiable amount that exceeds R30 million.⁴⁰⁵ Section 4A(2) of the *EDA* states that if the deceased person is a surviving spouse, the estate of the surviving spouse could benefit from a double abatement at the time of his death.⁴⁰⁶ The abatement will be R7 000 000,00 less the amount of the abatement used by

⁴⁰² Section 3 of the *EDA*; Wiechers and Vorster *Boedelbereddering* 84.

⁴⁰³ For purposes of this study only section 4(q) of the *EDA* will be discussed, see section 4 of the *EDA* for a list of the allowable deductions.

⁴⁰⁴ Section 4A of the *EDA*; Stiglingh *et al SILKE: South African Income Tax* 1030.

⁴⁰⁵ Stiglingh *et al SILKE: South African Income Tax* 1014.

⁴⁰⁶ Section 4A(2) of the *EDA*; Stiglingh *et al SILKE: South African Income Tax* 1030.

the estate of the predeceased spouse.⁴⁰⁷ The executor of the estate of the surviving spouse has the responsibility to submit a copy of the estate duty return of the predeceased spouse or any other documentation that the Commissioner may regard as reasonable to claim the additional deduction.⁴⁰⁸ It is important to note that the amount claimed as an abatement by the predeceased spouse, cannot exceed R3 500 000,00.⁴⁰⁹

Consider the following scenario:⁴¹⁰ Jack is married to Jane. Jack passes away and the net value of his estate is R4 000 000,00 (after all deductions except the surviving spouse deduction in terms of section 4(q)). Jack's entire estate is transferred to Jane. Since the entire estate is transferred to Jane, the dutiable value of Jack's estate will be nil because the section 4(q) surviving spouse deduction of R4 000 000,00 is claimed. This means that Jack's estate does not use any portion of the section 4A abatement. This means that when Jane passes away, her estate will be entitled to a total abatement of R7 000 000,00 instead of only R3 500 000,00 because Jack's abatement will be rolled over to her estate. The rollover abatement will be subject to a copy of Jack's estate duty return or other relevant documentation being properly submitted to the Commissioner.

For the purposes of this study, it would be imperative to determine whether permanent life partners who have undertaken reciprocal duties of support will also qualify for the spousal deduction and rollover as mentioned above. The definition of "spouse" in terms of the *EDA* was amended in 2001 by section 5(j) of the *Taxation Laws Amendment Act*⁴¹¹ to provide for a broader spousal concept that aligns with the *Bill of Rights* and the right to equality.⁴¹² The *EDA* defines "spouse" as follows:⁴¹³

in relation to any deceased person, includes a person who at the time of death of such deceased person was the partner of such person—

⁴⁰⁷ Section 4A(2) of the *EDA*; Stiglingh *et al SILKE: South African Income Tax* 1030.

⁴⁰⁸ Section 4A(5) of the *EDA*; Stiglingh *et al SILKE: South African Income Tax* 1030.

⁴⁰⁹ Section 4A(4) of the *EDA*; Stiglingh *et al SILKE: South African Income Tax* 1030.

⁴¹⁰ Stiglingh *et al SILKE: South African Income Tax* 1030.

⁴¹¹ 5 of 2001.

⁴¹² Galt *An analysis of the South African Revenue Services* 36.

⁴¹³ Section 1 of the *EDA*.

(a) in a marriage or customary union recognised in terms of the laws of the Republic;

(b) in a union recognised as a marriage in accordance with the tenets of any religion; or

(c) *in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent: Provided that a marriage or union contemplated in paragraph (b) or (c) shall, in the absence of proof to the contrary, be deemed to be a marriage or union without community of property.*⁴¹⁴

Permanent life partners are thus included in the definition of spouse in terms of the *EDA*, provided that the Commissioner is satisfied that the relationship was intended to be permanent. Before the Commissioner can consider the life partnership of the deceased to qualify as a "spouse", SARS has to be provided with sufficient proof of the life partnership.⁴¹⁵

The Commissioner may regard the following as proof in support of a life partnership:⁴¹⁶ (a) three separate affidavits in which neighbours, relatives or professionals confirm that the parties were in fact partners in a permanent life partnership; (b) a cohabitation agreement; (c) a joint bank account; (d) the will of the deceased in which his surviving life partner is appointed as a beneficiary; (e) proof of joint ownership of immovable property or other assets; (f) life policies, retirement annuity or pension fund benefits in which the partner is the nominated beneficiary; (g) membership of a medical scheme reflecting the partner as a dependant; and (h) the length and duration of the relationship.

Concerning the duration of the relationship, it may be difficult for the Commissioner to recognise the validity of a permanent life partnership when it is a relatively new relationship.⁴¹⁷ In the case of a married couple, the duration of the relationship is irrelevant as even spouses that are married for an insignificant amount of time are entitled to full taxation benefits.⁴¹⁸ A further challenge may be where partners choose not to financially tie each other into some significant aspects of their lives,

⁴¹⁴ Own emphasis added.

⁴¹⁵ South African Revenue Service *Frequently Asked Questions: Deceased Estates* 7.

⁴¹⁶ South African Revenue Service *Frequently Asked Questions: Deceased Estates* 7.

⁴¹⁷ Galt *An analysis of the South African Revenue Services* 67.

⁴¹⁸ Galt *An analysis of the South African Revenue Services* 67.

for example, the purchasing of immovable property.⁴¹⁹ It seems that life partners in a relatively new relationship may be prejudiced by this factor and would possibly not have the financial ties to one another as partners in a relationship of numerous years.⁴²⁰ These factors may also prejudice those in low socio-economic classes who may not have a variety of financial commitments.⁴²¹ It may be questioned why it is a requirement for life partners to prove their emotional and financial commitment when their married counterparts are not required to do so.⁴²²

It must be noted that the factors the Commissioner will consider in determining whether the partnership was intended to be permanent, are similar to those factors the Courts consider in determining whether a permanent life partnership wherein the parties have undertaken the reciprocal duty of support exists.⁴²³ It may thus be argued that if permanent life parties undertook reciprocal duties of support, they would comply with the Commissioner's requirements and would be regarded as spouses for purposes of the *EDA*.

If life partners did, however, not undertake reciprocal duties of support, the Commissioner would likely not find that their relationship was intended to be permanent and therefore the parties would not be regarded as spouses for purposes of the *EDA*. The Commissioner's findings would coincide with the Court's findings in the *Satchwell* judgment where it was held that section 9 of the *Constitution* "does not require the benefits provided to spouses to be extended to all partners where no reciprocal duties of support have been undertaken".⁴²⁴ The Court further held

⁴¹⁹ Galt *An analysis of the South African Revenue Services* 68.

⁴²⁰ Galt *An analysis of the South African Revenue Services* 69.

⁴²¹ Galt *An analysis of the South African Revenue Services* 70.

⁴²² Galt *An analysis of the South African Revenue Services* 69.

⁴²³ Galt *An analysis of the South African Revenue Services* 36; *National Coalition* judgment para 88; See par 2.2 of this study for an outline of the *National Coalition* judgment; *Paixão* judgment para 19; See par 2.7 of this study for an outline of the *Paixão* judgment; *Bwanya* judgment para 77; See par 2.9 of this study for an outline of the *Bwanya* judgment; See par 2.10 of the study for a summary of what the Courts considered in determining whether a reciprocal duty of support exists.

⁴²⁴ *Satchwell* judgment para 24.

that “the *Constitution* cannot impose obligations on partners where those partners themselves did not undertake such obligations”.⁴²⁵

5.3 Transfer Duty Act⁴²⁶

Transfer duty is a separate tax that is payable on the acquisition of immovable property and is provided for by the *TDA*.⁴²⁷ This tax is payable by the purchaser or transferee of immovable property and is calculated as a percentage of the purchase price or value of the property.⁴²⁸ The transfer duty rate ranges between 0% and 13% of the value of the immovable property. Section 9 of the *TDA* provides for certain situations where the acquisition of immovable property will be exempt from transfer duty.

Section 9(1)(i) of the *TDA* reads as follows:

No duty shall be payable in respect of the acquisition of property by a surviving or divorced spouse who acquires the sole ownership in the whole or any portion of property registered in the name of his or her deceased or divorced spouse where that property or portion is transferred to that surviving or divorced spouse as a result of the death of his or her spouse or dissolution of their marriage or union.

It is thus clear that when a surviving or divorced spouse acquires immovable property from his deceased or divorced spouse, that acquisition will be exempt from transfer duty. For the purposes of this study, only acquisition by a surviving spouse as a result of the death of his spouse is discussed. The definition of spouse in terms of the *TDA* is identical to the definition of spouse in terms of the *EDA* as discussed in paragraph 5.2 above. This means that parties in a permanent life partnership will be regarded as spouses for purposes of the *EDA*, provided that the Commissioner is satisfied that the relationship was intended to be permanent. If the Commissioner is satisfied that the relationship was indeed intended to be permanent, no transfer duty will be payable when the deceased partner’s immovable property is transferred to the surviving partner. It is noteworthy to mention that transfer duty will also not

⁴²⁵ *Satchwell* judgment para 24.

⁴²⁶ 40 of 1949 (previously abbreviated to the *TDA*).

⁴²⁷ Stiglingh *et al* *SILKE: South African Income Tax* 1045.

⁴²⁸ Stiglingh *et al* *SILKE: South African Income Tax* 1045.

be payable where the surviving spouse “takes over” the assets of the deceased spouse in terms of section 38 of the *AEA* as discussed in paragraph 3.4 of this study.

Section 9(1)(e) of the *TDA* states that when an heir or legatee acquires immovable property of the deceased by intestate or testamentary succession, that acquisition will also be exempt from payment of transfer duty. Regarding intestate succession as discussed in paragraph 2.9 of this study, the Court held in the *Bwany* judgment that permanent life partners who have undertaken reciprocal duties of support are entitled to inherit in terms of the *ISA*. It may, however, be argued that if the life partnership is recognised in terms of the *ISA*, the Commissioner would also have accepted the partnership as permanent. As previously mentioned, the factors the Commissioner will consider are similar to those that are used in determining whether a reciprocal duty of support exists between parties. In this situation, the surviving life partner would still be entitled to exemption from transfer duty in terms of section 9(1)(i) of the *TDA*.

With reference to testamentary succession, in the instance where the surviving life partner was nominated as an heir or legatee in the deceased partner’s will and the Commissioner is not convinced that the partnership was intended to be permanent, the surviving partner would still be exempt from paying transfer duty in terms of section 9(1)(e) of the *TDA* seeing as he will be recognised as an heir or legatee in terms of the deceased’s will.⁴²⁹

5.4 Income Tax Act⁴³⁰

Income tax consequences in a deceased estate arise due to income received or accrued before and after the death of the deceased up until the finalisation of the deceased estate.⁴³¹ This income can be taxed either in the hands of the deceased or the deceased estate.⁴³² It is the executor of the deceased estate’s responsibility

⁴²⁹ Section 9(1)(e) of the *TDA* clearly states that an “heir or legatee” is exempt from payment of transfer duty and does not exclude a certain class of heir or legatee.

⁴³⁰ 58 of 1962 (previously abbreviated to the *ITA*).

⁴³¹ Stiglingh *et al* *SILKE: South African Income Tax* 1003.

⁴³² Stiglingh *et al* *SILKE: South African Income Tax* 1003.

to ensure that the deceased's final tax return as well as the tax return of the deceased estate is submitted to SARS.⁴³³

A natural person's final period of assessment will end on the day of death, which means that the person will have a final income tax assessment for the period from the first day of the year of assessment until the date of his death.⁴³⁴ The executor must complete the return of income of the deceased to the date of death and submit the claim for the income tax payable against the assets of the deceased estate.⁴³⁵ The final income tax payable by the deceased will thus be paid out of cash in the deceased estate.⁴³⁶ This payment to SARS will qualify as a deduction in the calculation of the dutiable amount for estate duty purposes.⁴³⁷

Capital gains tax forms part of an individual taxpayer's taxable income and is levied upon capital gains resulting from the disposal of certain assets by the individual during the year of assessment.⁴³⁸ A deceased person could have disposed of certain assets during his final period of assessment, resulting in capital gains or losses.⁴³⁹ The assets that the deceased did not dispose of during the course of his lifetime will be transferred to beneficiaries in terms of the deceased's will or where there isn't a valid will, in terms of the rules of intestate succession.⁴⁴⁰ For tax purposes, the deceased's assets are theoretically first transferred to the deceased estate, and from the deceased estate to the beneficiaries, or they are sold by the estate to third parties.⁴⁴¹

Capital gains can therefore be realised before death, on the date of death, and after death when assets are disposed of by the deceased estate.⁴⁴² For capital gains purposes, a deceased is deemed to have disposed of his assets to the deceased

⁴³³ Abrie *et al Bestorwe Boedels* 226.

⁴³⁴ Stiglingh *et al SILKE: South African Income Tax* 1003.

⁴³⁵ Stiglingh *et al SILKE: South African Income Tax* 1003.

⁴³⁶ Stiglingh *et al SILKE: South African Income Tax* 1003.

⁴³⁷ Section 4(b) of the *EDA*; Stiglingh *et al SILKE: South African Income Tax* 1003.

⁴³⁸ Stiglingh *et al SILKE: South African Income Tax* 1005.

⁴³⁹ Stiglingh *et al SILKE: South African Income Tax* 1005.

⁴⁴⁰ Stiglingh *et al SILKE: South African Income Tax* 1005.

⁴⁴¹ Stiglingh *et al SILKE: South African Income Tax* 1005.

⁴⁴² Stiglingh *et al SILKE: South African Income Tax* 1006.

estate at the date of his death for an amount equal to market value.⁴⁴³ Capital gains will accordingly be levied on the difference between the base cost of the assets and their market value.⁴⁴⁴

This rule does, however, not apply in the instance where assets are awarded to a surviving spouse who is resident in South Africa.⁴⁴⁵ Assets awarded to a surviving spouse are deemed to be disposed of by the deceased, but not at market value.⁴⁴⁶ The assets awarded to the surviving spouse will be deemed to be disposed of at the amount of the current year's expenditure or the base cost of the assets on the date of death.⁴⁴⁷ This means that no capital gain or loss arises on assets transferred from the deceased estate to the surviving spouse, provided that the surviving spouse is a South African resident.⁴⁴⁸

It is therefore important to establish who would qualify as a "surviving spouse" for purposes of the *ITA*. As mentioned in paragraph 5.2 of this study, the *Taxation Laws Amendment Act* amended the definition of "spouse" in taxation laws to a broader definition that includes same-sex and heterosexual unions that the Commissioner is satisfied are intended to be permanent. The definition of spouse in terms of the *ITA* was, however, further amended by section 3(1)(zE) of the *Taxation Laws Amendment Act*.⁴⁴⁹ The amended definition of spouse in terms of the *ITA* reads as follows:⁴⁵⁰

'spouse', in relation to any person, means a person who is the partner of such person—
(a) in a marriage or customary union recognised in terms of the laws of the Republic;
(b) in a union recognised as a marriage in accordance with the tenets of any religion; or
(c) *in a same-sex or heterosexual union which is intended to be permanent.*⁴⁵¹

⁴⁴³ Stiglingh *et al SILKE: South African Income Tax* 1006; Section 9HA(1) of the *ITA*.

⁴⁴⁴ Stiglingh *et al SILKE: South African Income Tax* 1006.

⁴⁴⁵ Section 9HA(1)(a) and (b) of the *ITA*.

⁴⁴⁶ Stiglingh *et al SILKE: South African Income Tax* 1006.

⁴⁴⁷ Stiglingh *et al SILKE: South African Income Tax* 1006.

⁴⁴⁸ Stiglingh *et al SILKE: South African Income Tax* 1011.

⁴⁴⁹ 25 of 2015.

⁴⁵⁰ Section 1 of the *ITA*.

⁴⁵¹ Own emphasis added.

The requirement that the Commissioner must be satisfied that the relationship was intended to be permanent is therefore not applicable to the *ITA*. In terms of the *ITA*, the parties only had to intend for the relationship to be permanent to qualify as spouses. It is, however, unclear from the Act what the requirements will be to prove that the relationship was in fact “intended to be permanent”. Even though the Commissioner does not have to be satisfied, in practice the Commissioner is still responsible for the approval of all income tax returns and would most likely require some form of proof to establish the intention of the relationship before it can accept that the life partnership was intended to be permanent. It may, however, be inferred that life partners who have undertaken reciprocal duties of support will automatically fall under the “intended to be permanent” requirement of the *ITA* and will therefore enjoy the same rights as their married counterparts in terms of the *ITA*.

5.5 Conclusion

From the above discussion, it is clear that the broader spousal concept has already been accepted by the various tax laws. Even though there is a requirement under the *EDA* and *TDA* that the Commissioner must be satisfied that the relationship was indeed intended to be permanent, permanent life partners who have undertaken reciprocal duties of support will most likely be able to convince the Commissioner of their intention, as the factors that he considers are similar to the requirements to establish a reciprocal duty of support. If partners did, however, not undertake reciprocal duties of support, it may be argued that they will also not be regarded as spouses for the purpose of the various tax laws as the *Constitution* cannot impose obligations on partners where those partners themselves did not undertake such obligations.⁴⁵²

The next chapter discusses the findings of the study on the possible effect of the broadened spousal concept on succession legislation, administration of deceased estates, and tax-related matters.

⁴⁵² *Satchwell* judgment para 24.

6 Conclusion and recommendations

6.1 Conclusion

The primary aim of the study was to determine to what extent the broader spousal concept may affect other legislation dealing with succession, the administration of deceased estates and related tax matters.

To address the research question adequately, it was firstly necessary to address the relevant court cases that recognised permanent life partnerships. The Court in the *Bwanya* judgment specifically held that permanent life partners who have undertaken reciprocal duties of support should be entitled to the same rights as their married counterparts in terms of the *ISA* and the *MOSSA*.⁴⁵³

The relationship must firstly be permanent, and secondly, the parties must have undertaken reciprocal duties of support before it may be argued that they are entitled to the same rights as their married counterparts. With reference to the requirement that the relationship must be permanent, the Court in the *National Coalition* judgment held that “permanent” means an “established intention of the parties to cohabit with one another permanently”.⁴⁵⁴ The Court further confirmed that the facts of each matter would have to be considered to establish whether the partnership should be regarded as permanent.⁴⁵⁵

Concerning the further requirement that the parties must have undertaken reciprocal duties of support, in the *Satchwell* judgment the Court held that whether a duty of support exists or not will depend on the circumstances of each case.⁴⁵⁶ In the *Gory* judgment, the court found that a reciprocal duty of support existed between the parties based on the evidence that the parties shared a common home and joint household and both contributed financially to the household.⁴⁵⁷

⁴⁵³ See par 2.9 of this study.

⁴⁵⁴ *National Coalition* judgment para 86.

⁴⁵⁵ *National Coalition* judgment para 88.

⁴⁵⁶ *Satchwell* judgment para 25.

⁴⁵⁷ *Gory* judgment para 52.

In the *Paixão* judgment the Court held that in any case where a plaintiff asserts that he or she was in a life partnership, the existence of such relationship must be proven.⁴⁵⁸ The Court further confirmed that proving the existence of a life partnership will entail more than merely showing that the parties cohabitated and jointly contributed to the upkeep of the common home. It would have to be shown that the partnership was “akin to and hand similar characteristics – particularly a reciprocal duty of support - to a marriage”.⁴⁵⁹

The Court in the *Bwanya* judgment concurred with the Court’s reasoning in the *Paixão* judgment that where a life partnership with characteristics akin to a marriage exists, the parties would have undertaken reciprocal duties of support.⁴⁶⁰ It is thus clear that our Courts will consider the facts of each case but that a relationship akin to marriage would be regarded as one in which the parties undertook reciprocal duties of support.

It was further necessary to establish the definition of “spouse” in terms of the *AEA*, the *Wills Act*, and the relevant tax laws. It was found that the definition of “spouse” in terms of the *AEA* and the *Wills Act* does not currently include permanent life partners who have undertaken reciprocal duties of support.⁴⁶¹ However, in terms of the *EDA* and the *TDA*, permanent life partners who have undertaken reciprocal duties of support may be regarded as spouses provided that the Commissioner is satisfied that the relationship was intended to be permanent.⁴⁶² In terms of the *ITA*, permanent life partners who have undertaken reciprocal duties of support will be included in the definition of spouse, as the only requirement under the *ITA* is that the relationship must have been intended to be permanent.⁴⁶³

Before the research question could be answered, it was necessary to emphasise that the Court’s argument in the *Bwanya* judgment was based on the right to

⁴⁵⁸ *Paixão* judgment para 29.

⁴⁵⁹ *Paixão* judgment para 29.

⁴⁶⁰ *Bwanya* judgment par 71-72.

⁴⁶¹ See Chapters 3 and 4 of this study.

⁴⁶² See par 5.2 and 5.3 of this study.

⁴⁶³ See par 5.4 of this study.

equality as enshrined in section 9 of the *Constitution*.⁴⁶⁴ It was established that since marital status is a listed ground in terms of section 9, discrimination based on this ground will be presumed unfair unless proven otherwise. In the *Bwanya* judgment, the court emphasised that “we should be wary not to emphasise the importance of the institution of marriage as to devalue other institutions that are also foundational to the creation of other categories of families”.⁴⁶⁵ The Court further confirmed that all categories of families are deserving of legal protection.⁴⁶⁶ Madlanga J⁴⁶⁷ reiterated that the proscription of unfair discrimination on the grounds of marital status exists for a reason and that “families that are established outside of civilly recognised marriages should not be subjected to unfair discrimination”. The Court accordingly found that the exclusion of permanent life partners who have undertaken reciprocal duties of support from the impugned provisions of the *ISA* and *MOSSA* amounts to unfair discrimination as the unfairness cannot be justified.⁴⁶⁸

It was submitted that the Court’s argument in the *Bwanya* judgment may also apply to the *AEA* and the *Wills Act* as it may surmount to unfair, unjustifiable discrimination to not afford the same rights to surviving life partners who have undertaken reciprocal duties of support, as these Acts afford to their married counterparts. With reference to the *AEA*, it was submitted in Chapter 3 that this argument may be further substantiated by the fact that the *AEA*, the *ISA* and the *MOSSA* are used in conjunction with one another in the administration of deceased estates. It would be illogical for the Master to recognise a surviving permanent life partner as a “spouse” in the winding up of a deceased estate in terms of the *ISA* and *MOSSA*, but not recognise that same partner as a spouse in terms of the *AEA*.

In Chapter 4 of this study, it was submitted that it would surmount to unfair discrimination based on marital status if the *Wills Act* was found not to apply to permanent life partnerships in which the parties had undertaken reciprocal duties of support. It was further submitted that the legislature would have to provide

⁴⁶⁴ See par 3.5 of this study.

⁴⁶⁵ *Bwanya* judgment para 52.

⁴⁶⁶ *Bwanya* judgment para 53.

⁴⁶⁷ *Bwanya* judgment para 57.

⁴⁶⁸ *Bwanya* judgment para 81, 92.

guidance as to when a life partnership would be regarded as terminated and from what date the three month period as stipulated in section 2B will commence.⁴⁶⁹ It was also held that even though some of the provisions of the *Wills Act* limit a spouse's capability to inherit, it would be flawed to argue that permanent life partners should only enjoy the advantages provided to surviving spouses in terms of the *Wills Act* and not the limitations.

Chapter 5 established that the broader spousal concept has been accepted by the various tax laws since 2001 when the definition of "spouse" was amended to include permanent life partners.⁴⁷⁰ There is, however, a requirement under the *EDA* and *TDA* that the Commissioner must be satisfied that the relationship was indeed intended to be permanent. It was submitted that permanent life partners who had undertaken reciprocal duties of support will most likely be able to convince the Commissioner of their intention, as the factors that he considers are similar to the requirements to establish a reciprocal duty of support. It was further submitted that if partners did, however, not undertake reciprocal duties of support, it may be argued that they will also not be regarded as spouses for purposes of the various tax laws as the *Constitution* cannot impose obligations on partners where those partners themselves did not undertake such obligations.⁴⁷¹

6.2 Recommendations

From the above discussions, it is clear that societal norms are rapidly changing and that the Courts are willing to accommodate these changes. It is further clear that there is currently no legislation that regulates permanent life partnerships.⁴⁷² As mentioned in paragraph 1.1 of this study, the SALRC recommended in 2006 that a *Domestic Partnership Act* be enacted to afford rights to unmarried same-sex and heterosexual couples. The *Draft Domestic Partnership Bill* was subsequently published for commentary in 2008 but was never enacted.

⁴⁶⁹ See par 4.1 of this study.

⁴⁷⁰ The definition of spouse was amended by section 5(j) of the *Taxation Laws Amendment Act*.

⁴⁷¹ *Satchwell* judgment para 24.

⁴⁷² Smith 2011 *SALJ* 560.

In 2021 the SALRC released a Discussion Paper that proposed a single marriage statute. The proposed single marriage statute affords the same rights to permanent life partners as married couples, provided that the permanent life partners cohabit.⁴⁷³ Osman⁴⁷⁴ aptly pointed out that the requirement of cohabitation is problematic because, “for the majority of South Africans, intimate relationships do not coincide with cohabitation”.⁴⁷⁵ There are numerous South Africans that are members of multiple households, that share long-term sexual, emotional and economic relationships while not permanently cohabitating.⁴⁷⁶ The Bill is furthermore unclear on whether a party may have a life partnership in addition to a valid marriage.⁴⁷⁷ The final report containing the recommendations for the statute has, however, not been published.

On 7 July 2023 Parliament published the *Draft Marriage Bill*, which endeavours to provide for recognition of marriages entered by spouses regardless of their religious, cultural, sex, gender, sexual orientation or any other belief.⁴⁷⁸ The *Draft Marriage Bill* does, however, not include permanent life partnerships in the definition of spouse.⁴⁷⁹ Parliament did also not enact legislation to address the constitutional defects as ordered in the *Bwanya* judgment.⁴⁸⁰

It is evident from this study that the broader spousal concept will affect succession legislation and the administration of deceased estates. The Legislature must enact legislation that addresses the rights and responsibilities of permanent life partnerships in which the parties have undertaken reciprocal duties of support. This may either be done by: (a) enacting legislation similar to the proposed single marriage statute in which permanent life partners who had undertaken reciprocal duties of support are regarded as “spouses” for all intents and purposes; (b)

⁴⁷³ See respectively s 1(xvi)(cc) of the *Protected Relationships Bill* and s 1(xi)(cc) of the *Recognition and Registration of Marriages and Life Partnership Bill*.

⁴⁷⁴ Osman 2021 *PER* 8.

⁴⁷⁵ Osman 2021 *PER* 8.

⁴⁷⁶ Osman 2021 *PER* 8.

⁴⁷⁷ Osman 2021 *PER* 9.

⁴⁷⁸ Preamble to the *Draft Marriage Bill*.

⁴⁷⁹ The *Draft Marriage Bill* defines spouse as “a person’s partner in marriage”.

⁴⁸⁰ *Bwanya* judgment para 95.

enacting legislation similar to the *Draft Domestic Partnership Bill* which specifically pertains to the rights and obligations of permanent life partners; or (c) the Legislature amending the *AEA* and the *Wills Act* to provide recognition for permanent life partners. This may be done similarly to the way in which the tax legislation was amended by section 5(j) of the *Taxation Laws Amendment Act*.⁴⁸¹

It would in any case be imperative for the Legislature to specifically set out: (a) the requirements to establish a reciprocal duty of support; (b) the requirements to be regarded as permanent life partners; (c) the requirements for termination of a permanent life partnership; (d) whether parties may be partners in more than one permanent life partnership simultaneously; (e) whether there will be a general community of property between life partners. It would also be important for the Legislature to acknowledge that not all permanent life partners can cohabit.⁴⁸²

Until such legislation is enacted, permanent life partners who have undertaken reciprocal duties of support will be unable to enjoy the same rights as their married counterparts, unless they approach the courts for the necessary relief.

⁴⁸¹ 5 of 2001.

⁴⁸² See Osman 2021 *PER* 8 in this regard.

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