

Recognition of domestic partnerships in South African law

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Summary

With the advent of a new constitutional dispensation in South Africa, intimate relationships that were not formally recognised, such as customary marriages, became fully recognised through designated legislation. Domestic partnerships are, however, afforded only limited recognition despite compelling reasons that lead people to domestic partnerships. Domestic partners are also discriminated against based on marital status despite a Constitution that forbids discrimination based on equality, human dignity and marital status. The object of this study is to investigate whether there are sufficient grounds to afford domestic partnerships full recognition similar to that granted to civil marriage. This study includes arguments in favour and against the recognition of domestic partnerships and a discussion of the reasons that lead people into domestic partnerships. There will also be an analysis of the draft Domestic Partnership Bill 36 of 2008 to determine the suitability of the draft Bill to regulate domestic partnerships. This investigation is conducted with reference to relevant draft Bills, legislation, and case law.

Key terms

Choice

Domestic partnerships

Family life

Heterosexual domestic partnerships

Human dignity

Functional approach

Marital status

Registered domestic partnerships

The right to equality

Unregistered domestic partnerships

Same-sex domestic partners

Substantive equality

Chapter 1

1.1 Introduction

There is no legislation in South Africa that regulates domestic partnerships despite the fact that people have been living in domestic partnerships for centuries.¹ The lack of recognition of domestic partnerships has to do with the fact that marriage is accepted as a cornerstone of society, a better environment for raising children and an integral social institution, while domestic partnerships are seen as a threat to the institution of marriage.² Since the advent of the Constitution of the Republic of South Africa, 1996 the courts have extended certain consequences of marriages to domestic partnerships who meet the requirements for those legal consequences. However most of these developments have favoured same-sex domestic partners while living heterosexual domestic partners further aggrieved by the lack of legal recognition.³

The current state of the law that views marriage as more important than other forms of intimate relationships is untenable and has to be challenged.⁴ In *Volks v Robinson*⁵ the Constitutional Court denied the benefits of the Maintenance of Surviving Spouses Act⁶ to a surviving domestic partner owing to the importance attached to the institution of marriage. The Constitutional Court argued that “the distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage”.⁷ Furthermore the law cannot impose legal obligations on domestic partners who have chosen not to marry when the Choice to marry is open to them.⁸ The Constitutional Court further argued that the other issue with regulating domestic partnerships is the difficulty in proving the existence of such partnerships.⁹ It is however argued in this study that the arguments advanced by the Constitutional Court are not convincing and should not prevent the regulation of domestic partnerships. Marriage and domestic partnerships have proven to form a significant part of society.

¹ Sinclair and Heaton *The law of marriage* (JUTA Kenwyn 1996) 269; Hahlo “The law of concubinage” 1972 *SALJ* 321-332.

² Schafer “Marriage and marriage like relationships: Constructing a new hierarchy of life partnerships” 2006 *SALJ* 626-647; Singh “Cohabitation relationships revisited: Is it not time for acceptance?” 1996 *CILSA* 317-328; Sinclair and Heaton *The law of marriage* 291; Hutchings and Delport “Cohabitation: A responsible approach” 1992 *De Rebus* 121-125.

³ Heaton *South African family law* 3rd (Lexis-Nexis Durban 2010) 243. See par 2.1 below.

⁴ Meyerson “Rethinking marriages and its privileges” 2013 *AJ* 385-408.

⁵ 2005 5 *BCLR* 446 (CC).

⁶ Act 27 of 1990

⁷ Par 56.

⁸ *Volks* par. 94

⁹ Par 95.

The law has to be developed towards an approach that focuses on the purpose of family rather than marriage. The number of people living in domestic partnerships continues to grow. There is, in fact, a decline in the conclusion of marriages in general as more and more people are either opting for or are forced into domestic partnerships.¹⁰

1.2 Terminology

Different terms have been used to refer to domestic partnerships, association *libre*, *verhaltnis*, living together, concubinage, extra marital relationships, shacking up, quasi-marriage, private marriage, friendships, paramour, permanent life partnerships, *de facto* marriage, trial marriage and cohabitation.¹¹

The term “domestic partnership” refers to a relationship of a man and woman who live together as husband and wife without concluding a marriage ceremony.¹² According to a more evolving definition, the term “domestic partnership” connotes an established intimate relationship of a permanent nature between two people of the same or opposite sex who live together without concluding a marriage ceremony.¹³

In this study, the term “domestic partnership” will be the preferred term owing to the fact that it is commonly used in South Africa by academic writers and the South African Law Reform Commission.¹⁴ It is worth noting that the Constitutional Court has used the term permanent life partnerships¹⁵ and both terms, permanent life partnerships and domestic partnerships, are suitable within the South African context owing to the fact that they both connote an established intimate relationship of a permanent nature between two people of the same or opposite sex who live together without concluding a marriage.¹⁶

¹⁰ Hosegood, McGrath and Moultrie *Dispensing with marriage: marital and partnership trends in rural Kwazulu-Natal, South Africa 2000-2006* 2009 http://demographic-research.org/volumes/120/13/DOI_10.4054/DemRes2009.20.13. Accessed on 28 January 2015.

¹¹ Sinclair and Heaton *The law of marriage* 267.

¹² Hahlo *The South African law of husband and wife* 5th ed (JUTA Kenwyn 1985) 35-36.

¹³ South African Law Reform Commission Report on *Domestic Partnerships* Project 118 (2006); South African Law Reform Commission Discussion Paper on *Domestic Partnerships* Project 103 (2003).

¹⁴ De Vos and Barnard “Same sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga” 2007 *SALJ* 795-825.

¹⁵ *National Coalition for gay and lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC); *Du Toit v Minister of Welfare and population Development* 2003 (4) SA 198 (CC); *Satchwell v President of the Republic of South Africa* 2002 (6) SA (CC).

¹⁶ Heaton *Family law* 243.

1.3 Problem statement

In South African law, there is no legislation that is promulgated specifically to regulate domestic partnerships. Domestic partners receive only limited recognition through the extension of ordinary legal rules which are not sufficient to deal with challenges faced by domestic partners.¹⁷ In light of this, the question is whether domestic partners should receive full recognition by the law, thus be regulated by legislation that fully addresses its challenges and affords domestic partners legal protection similar to that in civil marriage, customary marriages and civil unions. This is problematic in that, during the subsistence and after the breakdown of domestic partnerships, partners have no automatic legal protection.¹⁸ Domestic partners are left with no automatic rights to maintenance, duty of support, property, inheritance claims or any legal recourse against the estate of the other domestic partner.¹⁹ The area of the law with regard to domestic partnerships is mostly unregulated.

Although the draft Domestic Partnership Bill has been proposed, it is not known when or if the draft Bill will become an Act of Parliament. Domestic partners are not protected while other forms of intimate relationships, such as civil marriages, civil unions and customary marriages are afforded full legal protection.²⁰

1.4 Rationale for the study

In light of the fact that there is no legislation in South Africa recognising domestic partnerships as a formal intimate relationship with legal rights and duties, this study will investigate whether there are sufficient reasons to pass legislation that can provide full legal recognition to domestic partnerships. The draft Domestic Partnership Bill Notice 36 of 2008 will be analysed to determine whether the draft Bill provides an acceptable framework for the legal recognition of domestic partnerships. In view of the growing number of domestic partnerships and a Constitution that protects diversity and forbids discrimination on the ground of equality, dignity and marital status,²¹ it is necessary to investigate whether domestic partnerships should receive full legal recognition. In South African law, great emphasis is placed on marriage in a way that creates a hierarchy that regards marriage as

¹⁷ Smith "The interplay between registered and unregistered domestic partnerships under the draft Domestic Partnerships Bill, 2008 and the potential role of the putative marriage doctrine" 2011 *SALJ* 560-593.

¹⁸ Goldblatt "Regulating domestic partnerships: A necessary step in the development of South African family law" 2003 *SALJ* 610-628.

¹⁹ Kruuse "Here's to you Mrs Robinson: Peculiarities and paragraph 29 in determining the treatment of domestic partnerships" 2007 *SAJHR* 380-391.

²⁰ *Ibid* at 387.

²¹ S 9 of the Constitution.

being more important than all other forms of intimate relationships.²² The Civil Union Act²³ has been enacted to co-exist with the Marriage Act.²⁴ This creates the impression that a civil marriage is more important than a civil union. It would have been preferable had the legislature opted to insert civil unions into the Marriage Act²⁵ rather than enacting new legislation to regulate civil unions.²⁶ Furthermore the Civil Union Act²⁷ does not allow minors to conclude civil unions while a minor can conclude a marriage in terms of the Marriage Act.²⁸

It is argued that the value placed on marriage above other intimate relationships is unjustified as it discriminates against persons based on their marital status, equality, and dignity. In *Volks*, the court argued that it is fair to discriminate between persons based on their marital status.²⁹ This, however, should not prevent the regulation of domestic partnerships.

1.5 Points of departure, assumptions and hypothesis

There are many factors that contribute to people living in domestic partnerships, including poverty, unemployment, the migrant labour system and people choosing not to marry.³⁰ The assumption in South African law, however, is that people deliberately make a choice not to marry but to live in domestic partnerships.³¹ Based on this choice, it is believed that the law cannot impose legal obligations on domestic partners when partners have opted not to make legal obligations of a marriage part of their intimate relationship by not concluding a marriage.³²

The point of departure is that choice is one factor only among a long list of factors. Everyone has a choice however, a domestic partner's choice may be influenced by a number of factors including for instance unemployment or poverty. The realistic choice for many men and

²² See par 1.1 above; Bakker "Chaos in family law: A model for the recognition of intimate relationships in South Africa" 2013 *PELJ* 115-142.

²³ Act 17 of 2006.

²⁴ Act 25 of 1961.

²⁵ Act 25 of 1961.

²⁶ Bakker 2013 *PELJ* 125.

²⁷ Act 25 of 1961.

²⁸ Act 25 of 1961. *Ibid.*

²⁹ See par 1.1 above.

³⁰ Sinclair and Heaton *The law of marriage* 271-274.

³¹ *Volks* par 92-94.

³² *Volks* par 92-94; Mamashela and Carnelly "Cohabitation and the same-sex marriage. A complex jigsaw puzzle *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355 (CC): Case" 2006 *Obiter* 379-390.

women lies between poverty, being homeless, or continuing a domestic partnership with an uncertain future and no hope of marriage.³³

Owing to factors such as poverty, patriarchy and unemployment, the financially, emotionally, or physically weaker domestic partner often does not have a choice when the financially stronger partner is unwilling to marry.³⁴ The law should regulate family law through a system of law that acknowledges the difficulty of the choice to marry.³⁵ The submission of this work is that limited recognition of domestic partnerships through ordinary legal rules is insufficient and the situation is made worse by unequal bargaining powers found in intimate relationships.³⁶

The lack of choice to marry by domestic partners is likely to impact on the choice to register domestic partnerships when or if the draft Domestic Partnerships Bill becomes an Act of Parliament, as domestic partners will still be faced by the same inequalities. As a result, not many domestic partnerships will be registered.³⁷ This is a foreseen problem that will still prevail even with legislation on domestic partnerships in place. It is, therefore, argued that a registration system or regulation of intimate relationships through contracts is not the best method for South African family law.

South African law should do away with the “choice to marry” argument, as it affords recognition only to a minority of intimate relationships. The focus should be on affording legal protection to family life as an important social institution.³⁸ The regulation of family law, based on the function families fulfil, will afford full legal recognition to all families without focusing on the contracts partners sign.³⁹ Denial of the fact that domestic partnerships form family units is an infringement of the Bill of Rights.⁴⁰

Heterosexual domestic partnerships are, furthermore, entitled to less legal protection than same-sex domestic partners, owing to the fact that, prior to the Civil Union Act,⁴¹ same-sex domestic partners were not allowed to marry but courts afforded certain consequences similar to marriage to same-sex domestic partners.⁴² The same protection was not afforded to heterosexual domestic partners owing to the fact that heterosexual domestic partners had

³³ *Volks* par 225. Further see Goldblatt 2003 *SALJ* 614.

³⁴ Goldblatt 2003 *SALJ* 616.

³⁵ Lind “Domestic partnerships and marital status discrimination” 2005 *AJ* 108-130.

³⁶ Heaton “An overview of current legal position regarding heterosexual life partnerships” 2005 *THRHR* 662-670.

³⁷ Lind 2005 *AJ* 128.

³⁸ *Ibid* at 129.

³⁹ Picarra “Notes and comments: 97 *Gory v Kolver* 2007 (4) SA” 2007 *SAJHR* 563-569.

⁴⁰ *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 36.

⁴¹ Act 17 of 2006

⁴² Heaton *Family law* 253. See 1.1 above.

the choice to marry. They could, therefore, by choice receive the consequences of a marriage. The Civil Union Act⁴³ now provides same-sex domestic partners with the same choice and they will, therefore, not be entitled to legal protection if the argument in *Volks* is followed.⁴⁴ The protection provided by the court to same-sex domestic partners, however, remains until it is recalled by legislation or altered by a court decision.⁴⁵

It would be preferable that heterosexual domestic partners be awarded the same legal protection, although it is likely that courts will follow the decision in *Volks*. It is, however, worth noting that in *Paxiao v Road Accident Fund*,⁴⁶ the dependant's action for loss of support was recently extended to heterosexual domestic partners.

1.6 Research methodology

Research is based on a desktop qualitative study of the relevant literature available, i.e. books, case law, journal articles and legislation. The study analyses the relevant South African literature critically, particularly in family law.

1.7 Scope of the study

In chapter 2, the current regulation of domestic partnerships will be investigated to determine whether this provides sufficient protection to domestic partners. In chapter 3, the draft Domestic Partnership Bill 36 of 2008 will be analysed to determine the suitability of the draft Bill to regulate domestic partnerships. In chapter 4, recommendations will be made with the aim of finding solutions to the current insufficient regulation of domestic partnerships. Finally, in chapter 5 a conclusion will be reached regarding what should be the preferred approach to regulating domestic partnerships.

⁴³ Act 17 of 2006.

⁴⁴ Heaton *Family law* 253-254.

⁴⁵ *Gory v Kolver* 2007 (4) SA 97 (CC) par 29-30.

⁴⁶ 2012 (4) All SA (SCA) 130.

Chapter 2

Recognition of domestic partnerships

2.1 Introduction

It was mentioned in chapter one that same-sex domestic partners are afforded more spousal benefits than heterosexual domestic partners. In this chapter, an analysis will be made of the unsatisfactory position which sees the law distinguishing between heterosexual and same-sex domestic partners. An answer will be provided to the question of what the position should be now that same-sex domestic partners can marry. The approach used by courts to determine the existence of a domestic partnership will further be discussed. The reasons for the existence of domestic partnerships will be investigated. The Constitution has provisions that protect human rights, such as the right to equality and the right to human dignity. It will be investigated in this chapter whether domestic partnerships are recognised under the Constitution. The current regulation of domestic partnerships by legislation and ordinary legal remedies will be discussed particularly heterosexual domestic partnerships.

2.2 The differentiation between same-sex domestic partners and heterosexual domestic partners

Same-sex domestic partners are afforded more spousal benefits than heterosexual domestic partners owing to the fact that same-sex domestic partners did not have the choice to marry while heterosexual domestic partners have the choice to marry.⁴⁷ For example, heterosexual domestic partners do not have legal protection under the Intestate Succession Act.⁴⁸ If a domestic partner dies without a surviving spouse or children, his or her estate, will accrue to his or her blood relations in equal shares, in accordance with the degree of relations to the direct line and collateral line.⁴⁹ As a result of the non-regulation of domestic partnerships there are many intestate and property claims that go to the parents or siblings of the deceased domestic partner rather than going to a surviving domestic partner.⁵⁰ If domestic partnerships are properly regulated, these intestate and property claims would be inherited by surviving domestic partners and there would be less reliance on the public sector. Thus,

⁴⁷ Heaton *Family law* 253; Wood-Bodley "Intestate succession and gay and lesbian couples" 2008 *SALJ* 46-62.

⁴⁸ Act 81 of 1987.

⁴⁹ Ss 1(1)(d)-(f) and 4 of the Intestate Succession Act 81 of 1987.

⁵⁰ Schweltnus "Patrimonial consequences of cohabitation in England as basis for legal reform in South Africa" 1996 *Obiter* 42-64).

legal recognition could enable domestic partnerships to rely on their partners for social support.⁵¹

The benefits of the Intestate Succession Act⁵² continue to be extended to intimate relationships that do not conform to the traditional concept of marriage: The Constitutional Court in *Hassim v Jacobs*⁵³ declared section 1 of the Intestate Succession Act⁵⁴ “inconsistent with the Constitution and invalid to the extent that it does not include more than one spouse” in a polygamous Muslim marriage.⁵⁵ In *Daniels v Campbell*⁵⁶ the court interpreted the definition of ‘spouse’ in the Intestate Succession Act⁵⁷ to include a spouse to a monogamous Muslim marriage.⁵⁸ In *Govender v Ragavayah*⁵⁹ the court held that the word ‘spouse’ in the Intestate Succession Act⁶⁰ should be interpreted to include a surviving partner in a monogamous Hindu marriage.⁶¹ South African family law differentiates between civil marriages, same-sex domestic partners, purely religious marriages and heterosexual domestic partnerships in a way that places heterosexual domestic partnerships at the bottom of the hierarchy for the purpose of intestate succession. It seems that heterosexual domestic partners may continue to be denied the benefit of the Intestate Succession Act⁶² until there is legislation that regulates and affords domestic partners invariable consequences of marriage.⁶³ In *Gory Van Heerden* AJ acknowledged that “depending on the nature and extent of the statutory dispensation if any, there is a possibility that unmarried heterosexual couples will continue to be excluded from the ambit of s 1(1) of the Act”.⁶⁴

It has been argued that the preferential treatment afforded to same-sex domestic partners should not be taken away because the choice to marry is difficult for same-sex domestic partners owing to homophobia in society.⁶⁵ In terms of section 6 of the Civil Union Act,⁶⁶ a marriage officer may object to solemnise a civil union as a result of being homophobic.⁶⁷

⁵¹ Clark “Families and domestic partnerships” 2002 *SALJ* 634-648.

⁵² Act 81 of 1987.

⁵³ 2009 (11) BCLR 1148 (CC).

⁵⁴ Act 81 of 1987.

⁵⁵ Par 52.

⁵⁶ 2004 (5) SA 331 (CC).

⁵⁷ Act 81 of 1987.

⁵⁸ Par 109.

⁵⁹ 2009 (3) SA 178 (D).

⁶⁰ Act 81 of 1987.

⁶¹ Par 44.

⁶² Act 81 of 1987.

⁶³ Smith and Heaton “Extension of the dependant’s action to heterosexual life partners after *Volks No v Robinson* and the coming into operation of the Civil Union Act-Thus far and no further” 2012 *THRHR* 472-484.

⁶⁴ Par 29.

⁶⁵ De Ru “A critical analysis of the retention of spousal benefits for permanent same-sex life partners after the coming into the operation of the Civil Union Act 17 of 2006” 2009 *SJ* 111-

The choice to marry is also difficult on heterosexual domestic partners owing to inequality issues in intimate relationships. Kruuse⁶⁸ argues that when considering the impact of homophobia on the free choice to marry for same-sex domestic partners, the law should also take into account the lack of free choice to marry by heterosexual domestic partners. The preferential treatment of same-sex domestic partners is an infringement of the equality clause in the Constitution.⁶⁹ A solution is needed that will benefit same-sex domestic partners and heterosexual domestic partners equally. Heaton⁷⁰ is of the opinion that the benefits extended to same-sex domestic partners should not be taken away, however such benefits should also be extended to heterosexual domestic partnerships. Thus heterosexual domestic partnerships should be enabled to inherit intestate in terms of the Intestate Succession Act.⁷¹ Section 1(1) of the Intestate Succession Act⁷² could be read in to include heterosexual domestic partners if a court is approached by a heterosexual domestic partner.

Smith and Heaton⁷³ notes that extending such benefits to heterosexual domestic partners could present an obstacle owing to the implications of the Constitutional Court judgment in *Volks v Robinson*⁷⁴ Smith⁷⁵ suggests that the court could be approached to extend such benefits on the grounds of unfair discrimination based on sexual orientation rather than focusing on the difference between married and unmarried couples. The suggestion of Heaton for the extension of the same benefits to heterosexual domestic partners is supported in this chapter. The approach that is used to determine the existence of a domestic partnership will be analysed in the next paragraph.

2.3 Determining the existence of a domestic partnership

South African courts have used marriage as a yardstick to provide spousal benefits to domestic partnerships by providing recognition to consequences of domestic partnerships that have similar characteristics to marriage.⁷⁶ Courts tend to focus on whether a domestic

126; Wood-Bodley "Same-sex discrimination in employments benefits: Where to now? 2008 SALJ 483-488; Wood-Bodley "Establishing the existence of a same-sex life partnership for the purpose of intestate succession" 2008 SALJ 259-272; De Vos "Same-sex sexual desire and the imagining of the South African family" 2004 SAJHR 179-206.

⁶⁶ Act 17 of 2006.

⁶⁷ De Ru "The Civil Union Act 17 of 2006: A transformative act or a failed conciliation between social legal and political issues?" 2010 THRHR 553-568.

⁶⁸ Kruuse 2009 SAJHR 386.

⁶⁹ Heaton *Family law* 253-254.

⁷⁰ *Ibid* at 254.

⁷¹ Act 81 of 1987.

⁷² Act 81 of 1987.

⁷³ Smith and Heaton 2012 THRHR 484.

⁷⁴ See 1.1 above

⁷⁵ Smith "The dissolution of a life or domestic partnership" (JUTA Kenwyn 2014) ed Heaton *The law of divorce and dissolution of life partnerships in South Africa* 389-474.

⁷⁶ *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) par 14 and 42.

partnership was similar to marriage or whether domestic partners have expressly or tacitly concluded a contract establishing a reciprocal duty of support or whether the domestic partnership has a degree of permanence.⁷⁷ The requirements that the court focus on will be discussed in the following paragraph including dependence and monogamy.

2.3.1 *A reciprocal duty of support as requirement for a domestic partnership*

The reciprocal duty of support is an important element of a marriage contract. The duty of support is an invariable consequence of marriage and enables spouses to rely on each other for accommodation, clothing, food and medical services.⁷⁸ Upon marriage both spouses will no longer rely on their parents or families for the duty of support. The duty of support of parents towards the spouses will exist when the need arises.⁷⁹ Spouses do not need to prove the existence of the duty of support owing to the fact that the duty arises by operation of law.⁸⁰ Courts acknowledge the existence of the duty of support in domestic partnerships where the partners have undertaken a reciprocal duty of support either tacitly or expressly.⁸¹ In *Paxiao* the court stated that:

“Proving the existence of a life partnership entails more than showing that the parties cohabited and jointly contributed to the upkeep of the common home. It entails, in my view, demonstrating that the partnership is akin to marriage. Its existence would have to be proved by credible evidence of a conjugal relationship in which the parties supported and maintained each other.”⁸²

As a result, in *Paxiao* the court extended the common law dependant’s action for loss of support to a heterosexual domestic partnership on the strength that the domestic partners had concluded a tacit contract establishing a reciprocal duty of support during the existence of their domestic partnership.⁸³ The nature of their domestic partnership was similar to marriage. In addition, the fact that there was a joint will between the domestic partners

⁷⁷ Steynberg and Mokotong “The common law duty of support: Developed and extended to include the surviving homosexual partner” 2005 *THRHR* 330-337.

⁷⁸ Sinclair and Heaton *The law of marriage* 442.

⁷⁹ Skelton, Carnelly, Human, Robinson and Smith *Family law in South Africa* (Oxford University Press 2010).

⁸⁰ Heaton *Family law* 46.

⁸¹ *Paxiao v Road Accident Fund* 2012 4 All SA 130 (SCA) par 20; *Du Plessis* par 14. Further see *McDonald* where the existence of a joint venture agreement purporting to provide financial support to the appellant prevented the inference of a tacit contractual duty of support (par 22).

⁸² *Paxiao* par 29.

⁸³ Par 21.

where they made each other sole heirs was taken to be an indication of commitment and existence of an agreement by the deceased to maintain the appellant.⁸⁴

Case law dealing with domestic partnerships in South African family law has proved that being in a domestic partnership alone is not sufficient to receive legal recognition in a domestic partnership.⁸⁵ Domestic partners have to tacitly or expressly establish a reciprocal duty of support in order to be afforded recognition. It is argued that a reciprocal duty of support was established in *Volks* but was not recognised by the majority judgment. The court acknowledged that the facts of the case made it clear that both partners regarded themselves to be in a permanent domestic partnership in which reciprocal duties of support were undertaken.⁸⁶ However, the court emphasised the fact that the domestic partners chose not to marry.⁸⁷

Smith⁸⁸ argues that free choice to marry should not play a role when dealing with need based claims. Maintenance claims, inheritance claims and the dependant's action for loss of support fall within the category of need based claims. It would be preferable that the existence of the duty of support was determined by relying on need based claims. Thus a surviving domestic partner such as Mrs Robinson in *Volks* should receive protection in terms of section 2(1) of the Maintenance of Surviving Spouses Act⁸⁹ because she needs maintenance. The question of whether domestic partners had free choice to marry should not be relevant where the duty of support is inferred from the factual existence of a domestic partnership.⁹⁰ The choice argument creates a bar for recognition of many domestic partners who do not have free choice to marry owing to social, political and economic reasons. The *Volks* judgment has been criticized by academics.⁹¹ Smith⁹² notes the choice argument may still have a role to play. For example, the choice argument can be used where domestic partners chose not to marry because they do not want the consequences of marriage. However, partners who need maintenance upon termination of a domestic partnership by death should be able to receive maintenance provided his or her domestic partner provided the maintenance during the domestic partnership. This submission is supported in this study.

⁸⁴ Par 20-21.

⁸⁵ *Volks* par 3.

⁸⁶ *Volks* par 104.

⁸⁷ *Volks* par 104.

⁸⁸ Smith *The law of divorce and dissolution of life partnerships in South Africa* 424.

⁸⁹ Act 27 of 1990.

⁹⁰ Smith *The law of divorce and dissolution of life partnerships in South Africa* 426.

⁹¹ Kruuse 2009 *SAJHR* 383; Lind 2005 *AJ* 128; Wildenboer "Domestic partnerships and the Constitution: A discussion of *Volks v Robinson* 2005 (5) *BCLR* 446 (CC)" 2005 *SAPL* 659-667; Cooke "Heterosexual life partners, death and poverty" 2005 *SALJ* 542-557.

⁹² Smith *The law of divorce and dissolution of life partnerships in South Africa* 427.

It is argued that the court in *Volks* should have helped Mrs Robinson and other vulnerable domestic partners in similar situations who need support.⁹³ The approach taken in *Volks* is in contrast to the one taken in *National Coalition* where the court had identified circumstances where a reciprocal duty of support could be inferred.⁹⁴ The court in *Volks* should have determined from the facts of the case whether a reciprocal duty of support existed. Such an approach would be in line with *Satchwell* where the court was open to identify the existence of a duty of support in a domestic partnership based on the circumstance of such a domestic partnership.⁹⁵ *Paxiao* focused on whether a reciprocal duty of support had tacitly or expressly been established.⁹⁶ Thus not focusing on whether the domestic partners were free to marry.⁹⁷ This judgment is a more progressive approach than *Volks* where the Constitutional Court shied away from providing solutions to the challenges faced by vulnerable domestic partners.⁹⁸ The Constitutional Court missed an opportunity to develop the common law to bring it in line with changing social values.⁹⁹ An intention to marry should not be relevant for recognition of a domestic partnership but proving the existence of a duty of support should be an important requirement.¹⁰⁰ Even when such duty does not exist by operation of the law, nothing stands in the way of domestic partners creating the duty of support by contract.¹⁰¹

2.3.2 A domestic partnership similar to marriage

Courts have on a number of occasions mentioned that a domestic partnership was similar in characteristics to marriage.¹⁰² However it is not clear whether this is an important factor in determining consequences of a domestic partnership. Steynberg and Mokotong¹⁰³ argue that the requirement that a domestic partnership should be similar to marriage puts a burden

⁹³ Cooke 2005 SALJ 557; Steynberg and Mokotong argue that the requirement to prove a duty of support places more of a burden on domestic partners. If the requirement that a domestic partnership similar in characteristics to marriage with reciprocal duties of support is continued, it could result in only a limited number of domestic partners being legally recognised, as many domestic partners may not be able to prove that their domestic partnership is similar in characteristics to marriage (Steynberg and Mokotong 2005 THRHR 332-335).

⁹⁴ Par 88. Further see *Volks* par 104; Cooke 2005 SALJ 557; Lind 2005 AJ 127.

⁹⁵ “The law attaches a duty of support to various family relationships, for example, husband and wife, and parent and child. In a society where the range of family formations has widened, such a duty of support may be inferred as a matter of fact from in certain cases of persons involved in permanent, same-sex life partnerships. Whether such a duty of support exists or not will depend on the circumstances of each case” (Par 25).

⁹⁶ Para 17-18.

⁹⁷ Par 40.

⁹⁸ Calvino and Iyer “Advancing the rights of heterosexual life partners in respect of loss of support *Paxiao v Road Accident Fund* 2012 JDR 1749 (SCA): cases” 2014 *Obiter* 162-171.

⁹⁹ Calvino and Iyer 2014 *Obiter* 170; Lind 2005 AJ 126-127.

¹⁰⁰ Calvino and Iyer 2014 *Obiter* 170.

¹⁰¹ *Paxiao* par 26.

¹⁰² *Paxiao* par 29; *Du Plessis* par 14 and 42; *Satchwell* par 25.

¹⁰³ Steynberg and Mokotong 2005 SAJHR 332-335.

on domestic partnership. In *Paxiao* the court noted that the reason for extending protection to a surviving domestic partner was based on the fact that her domestic partnership functioned similar to marriage.¹⁰⁴ What the court did was not to diminish the importance attached to marriage but to recognize that the benefits afforded to marriage can also be extended to other intimate relationships.¹⁰⁵ The court seemed to adopt a functional approach in *Paxiao*. This approach of the court is supported in this study.

2.3.3 Permanence

It is not clear how long a domestic partnership should exist before partners can be afforded legal protection. In *Volks* domestic partners lived together for a *period* of 16 years but the period was not considered by the court. In *Langemaat v Minister of Safety and Security*¹⁰⁶ the court stated that same-sex domestic partners who have been in a domestic partnership for years while sharing a common home owed each other a duty of support. The court was, however, silent on what period may be considered long. In *National Coalition* the court provided a list of factors to determine whether a same-sex domestic partnership was permanent which included: the duration of a domestic partnership, whether the partners share, lease or own a common residence and the extent to which they share responsibilities for living expenses and maintaining of such residence, whether one partner provides financial support, medical and other related benefits. The existence of a domestic partnership agreement, universal partnership agreement or a will where partners nominate each other as heirs could be relevant and could lead a court towards the conclusion that domestic partners had the intention to live together permanently.¹⁰⁷

The period of time a domestic partnership exists before being afforded recognition should not be important provided the intention of the parties is to enter into a domestic partnership.¹⁰⁸ Permanence could further apply from the beginning of a permanent domestic partnership.¹⁰⁹ Wood-Bodley¹¹⁰ argues that it could be unfair discrimination to require a longer period for a domestic partnership to exist while a marriage is afforded permanence from the day it is concluded.

Goldblatt¹¹¹ proposes that courts should have a wider discretion to determine whether a domestic partnership existed. Goldblatt¹¹² also lists a number of factors that should aid a

¹⁰⁴ Par 39.

¹⁰⁵ Par 39.

¹⁰⁶ 1998 (3) SA 312 (T) at 316H-I.

¹⁰⁷ Par 88.

¹⁰⁸ Wood-Bodley 2008 SALJ 262.

¹⁰⁹ Steynberg and Mokotong 2005 SAJHR 332.

¹¹⁰ Wood-Bodley 2008 SALJ 263; Steynberg and Mokotong 2005 THRHR 332.

¹¹¹ Goldblatt 2003 SALJ 624.

court in determining the existence of a domestic partnership. These include: whether domestic partners shared a common home; contributed to the maintenance of the common home or in the other domestic partner's income; the duration of a domestic partnership or whether there were children born of a domestic partnership. Although it might be difficult to determine the exact time a domestic partnership came into existence, the above factors will help courts to determine the existence of a domestic partnership. The list of factors, however, should not be limited to the factors mentioned above and any other relevant factors should also be used.¹¹³

This approach is to be supported. It would be preferable for the existence of a domestic partnership to be determined on its own facts and merits. It is recommended that, where any of the above factors are present, the court should afford legal protection to a domestic partnership. The onus should be on the domestic partner claiming the existence of a domestic partnership to establish the existence of any of these factors. Where no domestic partner or third party argues against the existence of a domestic partnership then such domestic partnership should be protected. For example, if X approaches a court to claim maintenance from Y on the grounds that X was in a domestic partnership with Y, then Y should also be summoned to court to establish whether Y was in a domestic partnership with X. If Y does not dispute the existence of a domestic partnership with X, there should not be a problem of uncertainty. Where Y disputes the existence of a domestic partnership with X, then witnesses, such as neighbours, may be summoned to attest to the existence of such a domestic partnership.

The law, however, should not simply rely on the evidence of the other domestic partner where he or she denies the existence of a domestic partnership. A domestic partner might claim that he or she lived with the other domestic partner out of generosity and such generosity does not constitute a domestic partnership. Functions that are served in a domestic partnership should be the guiding factors. Where domestic partners have been providing support to each other financially, providing medical expenses, performing household duties, such as cleaning, cooking, washing, looking after children, and sharing a common home, such conduct should be a positive indication of the existence of a duty of support between domestic partners.

¹¹²

Ibid.

¹¹³

Smith *The law of divorce and dissolution of domestic partnerships in South Africa* 409.

2.3.4 Dependence

A surviving partner in a domestic partnership can qualify as a “factual dependant” in terms of section 1(b)(i) of the Pension Funds Act¹¹⁴ provided the surviving partner establishes that he or she and the deceased were mutually dependant or inter-dependent on each other and shared a common home with each other while the deceased was alive.¹¹⁵ Thus pension funds do not focus on whether a dependant was free to marry when determining whether a surviving partner qualifies as a “factual dependent”. Provided the surviving partner can prove mutual dependency and the sharing of a common home with the deceased.

2.3.5 Monogamy

Courts have not been confronted by a domestic partner in more than one domestic partnership or who was involved with a domestic partner who is married to a third party. As a result it is unclear whether monogamy is a requirement for affording domestic partnerships recognition.¹¹⁶ It is submitted that, a domestic partner should not be denied recognition based on the fact that he or she was involved with a partner who was married to a third party.¹¹⁷

It is clear that requirements such as permanence and the existence of a duty of support are important in proving the existence of a domestic partnership. The focus should be on these requirements although monogamy and dependence may serve as requirements. There are many reasons that lead people into domestic partnerships, these reasons will subsequently be discussed in the next paragraph.

2.4 Reasons for the existence of domestic partnerships

There are many reasons that lead people into domestic partnerships. In *Volks*, the court acknowledged some of the varying circumstances or reasons that lead people to domestic partnerships.¹¹⁸ Regardless of the reasons that give rise to the existence of domestic

¹¹⁴ Act 24 of 1956.

¹¹⁵ Dyani “Extending death benefits to cohabitants under section 37C of the South African Pension Funds Act: *Hlathi v University of Fort Hare retirement Fund*” 2012 *JAL* 296-306; Mhango “What should the board of management of a pension Fund consider when dealing with death claims involving surviving cohabitants” 2010 *PELJ* 183-204; Dyani “Distribution of death benefits in terms of section 37C of the Pension Funds Act-Rejecting the dominant-servient test in cases of cohabitation” 2010 *SJ* 28-42; Mhango “An examination of the accurate application of the dependency test under the Pension Funds Act 24 of 1956: Case comments” 2008 *SA Merc LJ* 126-135.

¹¹⁶ Wood-Bodley 2008 *SALJ* 266.

¹¹⁷ Smith *The law of divorce and dissolution of life partnership in South Africa* 411.

¹¹⁸ Mokgoro J and O’ Regan J noted that, of the partners who are in domestic partnerships, “some may be living together with no intention of permanence at all, others may be living together because there is a legal or religious bar to their marriage, others may be living

partnerships, the intimate relationships between the domestic partners are important because they result in families being created. The Constitutional Court has emphasized the importance of the protection of family life.¹¹⁹

2.4.1 Migration

Labour migration was a major force in family breakdown before 1994 and it has contributed to the increase in domestic partnerships.¹²⁰ Owing to a lack of work opportunities and government policies prior to 1993, many people left their spouses and children behind in rural areas to migrate to urban areas where they ended up living for a long time and finding new intimate relationships.¹²¹ Many of these relationships resulted in domestic partnerships. The domestic partner who already had a family might leave the new-partner at any time to go back to his or her family.¹²² Many men who migrated to the cities were normally given contracts that kept them away from their families for years and they could see their families only for a maximum period of four weeks in a year.¹²³ These men had to live in single sex compounds where they became lonely and the situation resulted in extramarital relationships which ultimately resulted in domestic partnerships.

2.4.2 Married persons

A married spouse may be unwilling to dissolve his or her marriage to avoid a portion of his or her assets going to the other spouse owing to their matrimonial property regime.¹²⁴ A man who has a wife in one city may start a domestic partnership with a woman in a different city where both domestic partners may share household responsibilities.¹²⁵

2.4.3 Poverty and unemployment

Many women and to a lesser extent men, are forced into domestic partnerships due to scarce work opportunities, lack of income and poverty. As a result, they rely on their domestic partners for basic needs.¹²⁶ A domestic partner will continue to be in a domestic partnership even when he or she is emotionally or physically abused or when the other partner does not have the intention to marry. The material needs of a vulnerable domestic

together on the firm and joint understanding that they do not wish their relationship to attract legal consequences, and still others may be living together with the firm and shared intention of being permanent life partners" (par 120).

¹¹⁹

Dawood par 31.

¹²⁰

Hosegood *et al* 281; Sinclair and Heaton *The law of marriage* 273.

¹²¹

Hosegood *et al* 281-282; Sinclair and Heaton *The law of marriage* 273.

¹²²

Ibid.

¹²³

Budlender and Lind "South Africa: A legacy of family disruption" 2011 *DC* 925-946.

¹²⁴

SALRC (2006) 2.2.26.

¹²⁵

Goldblatt 2003 *SALJ* 613.

¹²⁶

Ibid; Further see Lind 2005 *AJ* 112-113.

partner will outweigh the abuse suffered by such partner at the expense of a partner in a financially stronger position.¹²⁷

Poverty and unemployment are a reality for millions of South Africa's population. It is argued, however, that women are affected more by poverty than men.¹²⁸ Women's remuneration is usually less than that of men in similar positions.¹²⁹ It is argued that many women are not able to run a household on their own as a result of earning lower remuneration than men. Such women rely on men to supplement their income and help contribute to the running of the household. It is argued that such a situation may result in a domestic partnership based on necessity.

2.4.4 *Lobolo*

Men sometimes struggle with the cost of paying *lobolo*.¹³⁰ A man willing to deliver *lobolo* may struggle with the amount of *lobolo* which may result in a delay in formalising an intimate relationship.¹³¹ Particularly in South African customary law where delivering *lobolo* for a bride is required by her family. *Lobolo* is a challenge for many African men owing to the rate of unemployment and the high amount that may be asked today.¹³² A domestic partnership becomes an option when a man cannot afford to deliver *lobolo* or until he can afford to deliver *lobolo*.¹³³

2.4.5 Ignorance of the law

There are many men and women who believe that, by living with a partner in a domestic partnership for a certain period, the law will automatically afford protection to their domestic partnerships.¹³⁴ These partners expect the same matrimonial benefits as married spouses and such partners are shocked when they are not afforded matrimonial benefits upon the termination of their domestic partnerships. There is an alarming lack of knowledge as far as legal protection of domestic partnerships is concerned.¹³⁵

¹²⁷ Goldblatt 2003 SALJ.614.

¹²⁸ Goldblatt "The right to social security-addressing women's poverty and disadvantage" 2009 SAJHR 442-446.

¹²⁹ Cooper "Women and the Right to Work" (JUTA Kenwyn 2011) In *Women's Social and Economic Rights Developments in South Africa* 245-276.

¹³⁰ Goldblatt 2003 SALJ 614.

¹³¹ Posel and Rudwick "Changing patterns of marriage and cohabitation in South Africa" 2013 AJ 169-180.

¹³² *Ibid* at 176-177.

¹³³ *Ibid* at 178.

¹³⁴ Monareng & Zounmeno "Black Women are you aware that you are concubines? The legal implications of South African Law" 2007 *Agenda* 122-129.

¹³⁵ SALRC (2006) 2.2.29-2.2.30.

2.4.6 Blood relations

Partners in an intimate relationship, who want to marry, may find that they are unable to marry due to blood relationships by affinity or consanguinity.¹³⁶ As a result, domestic partnerships become an option for such partners.

It is clear that there are many reasons for the existence of domestic partnerships than simply the free choice of domestic partners to remain unmarried. In most of the instances, the parties involved do not have a choice at all to marry but are forced into domestic partnerships in order to escape social challenges such as poverty. In many instances, therefore, domestic partners are not free to choose their form of commitment. This implies that, the choice argument used in *Volks* should not stand in the way of vulnerable domestic partners to be afforded recognition.

The problem is that domestic partners are not afforded recognition despite compelling reasons for the existence of domestic partnerships. The question is whether domestic partnerships should not be afforded recognition in light of a Constitution that calls for equal treatment for all.¹³⁷ The Constitution will subsequently be evaluated in the following paragraph to determine whether domestic partners can be protected under the Constitution.

5 The Constitution and domestic partnerships

2.5.1 The right to equality

The equality clause found in the Constitution is a notion of sameness and similar treatment of everyone which it is argued results in inequality.¹³⁸ Substantive equality aims at curing defects of formal equality. A court acknowledges that inequality arises from power relations in society and family relations, and the law has an important role to play in removing social inequalities.¹³⁹

The problem with formal equality is that it regards people as equal irrespective of their social or economic circumstances.¹⁴⁰ Formal equality does not make room for difference or affirmative action and as a result, people who come from disadvantaged groups of society

¹³⁶ Sinclair and Heaton *The law of marriage* 271.

¹³⁷ S 9(1)-(3).

¹³⁸ De Vos "Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court" 2000 *SAJHR* 63-75.

¹³⁹ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) par 81; *Hugo* par 41; *Brink v Kitshoff* 1996 4 SA 197 (CC) par 40-42.

¹⁴⁰ Bonthuys "Institutional openness and resistance to feminists arguments: The example of the South African Constitutional Court" 2008 *CJL* 1-36).

are treated the same way even if such treatment results in more inequality. Thus the fact that inequalities should be eliminated is ignored in the process.¹⁴¹

Substantive equality is future oriented, as the focus is placed on what can be done to remedy inequalities in society.¹⁴² It is argued that substantive equality in favour of domestic partnerships is needed to address the inequalities of domestic partners as marginalised groups in society.¹⁴³

In *Hugo* the court explained that:¹⁴⁴

“We need therefore to develop a concept of unfair discrimination which recognises that although a society which affords human being equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case therefore will require a careful and thorough understanding of the impact of discriminatory action, upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.”

Substantive equality was ignored by the court in *Volks* and it took a backward step at the expense of a formalistic approach to law which has no understanding of difference and disadvantage in a society characterised by inequality and diversity.¹⁴⁵ As a result, the decision in *Volks* has left a legacy that the challenges faced by domestic partners as vulnerable family units are not worthy of constitutional protection. It would be preferable if substantive equality be applied to domestic partnerships in order to protect vulnerable domestic partners.

Bonthuys¹⁴⁶ argues that constitutional principles of equality and rectifying past injustices does not allow for western traditions of marriage to define and provide the yardstick for legal solutions to problems faced by marginalised groups of South African society. Such a continued measure will not achieve much but put “past injustices under the guise of present neutrality”. It is argued that the decision in *Volks* unfairly discriminates against domestic

¹⁴¹ De Ru 2010 *THRHR* 556-558; Albertyn and Kentridge “Introducing the right to equality in the interim constitution” 1994 *SAJHR* 149-178).

¹⁴² Heaton “Striving for substantive gender equality in family law: Selected issues” 2005 *SAJHR* 547- 574.

¹⁴³ Albertyn “Substantive equality and transformation in South Africa” 2007 *SAJHR* 253-276.

¹⁴⁴ Par 41.

¹⁴⁵ Albertyn 2007 *SAJHR* 267.

¹⁴⁶ Bonthuys “Accommodating gender, race, culture, and religion: Outside legal subjectivity 2002 *SAJHR* 40-58; Albertyn and Goldblatt “Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality” 1998 *SAJHR* 248-276.

partners and as a result, *Volks* was incorrectly decided.¹⁴⁷ The *Volks* decision should not be accepted owing to the fact that it has set an unfair precedent that the law may fairly discriminate between married and unmarried partners.

Kruuse¹⁴⁸ argues that we have to find a way to challenge or soften the doctrine of *stare decisis*. Although such a task will be difficult in light of the fact that *Volks* was a judgment of the Constitutional Court. One of the ways proposed could be for another court to find that the majority judgment in *Volks* erred in its constitutional interpretation and as a result the outcome of *Volks* is incorrect.¹⁴⁹ Otherwise domestic partnerships will continue to be afforded limited recognition through ordinary legal remedies which are discussed in the next paragraph.

2.5.2 The right to dignity

The right to dignity is one of the founding values of the Constitution. The constitutional court has emphasised that the purpose of the prohibition of unfair discrimination in the interim and final Constitution is not only to avoid discrimination against previously disadvantaged people (such as domestic partners), but to afford all members of society equal dignity.¹⁵⁰ In the past domestic partners were affected by the passing of oppressive laws and the dignity of many families were infringed.¹⁵¹ The right to dignity is at the heart of the constitutional interpretation of other fundamental rights, such as the right to equality and the right to life. The right to dignity entails respect and protection for all human beings and the intrinsic worth.¹⁵² Particularly in light of South Africa's past where human dignity was derailed by oppressive laws.¹⁵³

However, in *Volks* the court argued that the differential treatment of domestic partners does not mean that their dignity is less important than that of married spouses.¹⁵⁴ The court noted that there is a difference between a domestic partnership and a marriage for the purpose of maintenance.¹⁵⁵ As a result the court will not impose a maintenance obligation on a domestic

¹⁴⁷ Smith "Rethinking *Volks v Robinson*: The implications of applying a "contextualised choice model" to prospective South African domestic partnerships legislation" 2010 *PELJ* 238-300.

¹⁴⁸ Kruuse 2009 *SAJHR* 387.

¹⁴⁹ *Ibid.*

¹⁵⁰ *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) par 41.

¹⁵¹ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) par 31; *National Coalition* par 124.

¹⁵² *Dawood* par 35.

¹⁵³ *Dawood* par 36; *S v Makwanyane* 1995 (3) SA 391 (CC) par 328-329.

¹⁵⁴ Par 62.

¹⁵⁵ Par 62.

partner when such obligation was not established during the existence of a domestic partnership.¹⁵⁶

It is clear that the right to human dignity is an important right in the Constitution, however it seems domestic partners cannot rely on violation of their right to human dignity when they are treated differently from civil marriage or customary marriage spouses.

2.5.3 The right to family life and the right to marry

The Constitution does not provide for the right to marry nor does it provide for the right to family.¹⁵⁷ However, many international instruments highlight the importance of marriage and family life.¹⁵⁸ The duty is imposed on countries such as South Africa which is a signatory to these instruments, to ensure that the institution of marriage and family life are protected.¹⁵⁹ The Bill of Rights prohibits unfair discrimination on the ground of marital status and recognises that marriages can be concluded under different religious systems or traditions.¹⁶⁰ The absence of these rights in the South African Constitution is recognition of the diverse nature of the South African family law.¹⁶¹

In terms of article 16 of the Universal Declaration of Human Rights:¹⁶²

- “(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society.”

Article 23 of the International Covenant on Civil and Political Rights¹⁶³ provides:

- “(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

¹⁵⁶ Par 62

¹⁵⁷ *Volks* par 80.

¹⁵⁸ See n 158-160 below.

¹⁵⁹ *Volks* par 85.

¹⁶⁰ S 9(3).

¹⁶¹ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certificate of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) Par 99.

¹⁶² UN General Assembly, Universal Declaration of Human Rights (1948).

¹⁶³ UN General Assembly, International Convention on Civil and Political Rights (1966).

- (2) The right of men and women of marriageable age to marry and to found a family should be recognised.
- (3) No marriage shall be entered into without the free and full consent of the intending spouses.
- (4) States parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”

Article 18 of the African Charter on Human and Peoples’ Rights provides:¹⁶⁴

- “(1) The family shall be the natural unit and basis of society. It shall enjoy protection and support of the state for its establishment and development.
- (2) The state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
- (3) The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.
- (4) The aged and the disabled shall also have the rights to special measures of protection in keeping with their physical or moral needs.”

It is clear that the above international instruments do not regard marriage as more important than the family. The family is regarded as a natural unit and basis of society, it would be preferable for South African family law to protect family life as an important social institution rather than the institution of marriage.¹⁶⁵ South African family law should move away from the canon law concepts of marriage that still exist today, which regards marriage as a more important institution than other intimate relationships.

Married and unmarried partners are treated differently in South African family law and although it could be argued that the discrimination is unfair, *Volks* was a judgment of the Constitutional Court of South Africa and has established the precedence that the law can discriminate between married and unmarried persons for the purpose of matrimonial benefits and that such discrimination is not unfair.¹⁶⁶ Among the reasons the court provided for its reasons for the decision were the importance attached to marriage.¹⁶⁷ Secondly, the court

¹⁶⁴ Organisation of African Unity, African Charter on Human and Peoples’ Rights (1981).

¹⁶⁵ Bakker 2013 *PELJ* 129.

¹⁶⁶ Par 56-60.

¹⁶⁷ Par 52-54.

refers to the importance of honouring a person's autonomy to enter into a marriage.¹⁶⁸ These reasons are regarded as unconvincing and subject to criticism.

Sinclair and Heaton¹⁶⁹ argue that domestic partnerships have co-existed with marriage in Roman law for two thousand years without marriage being under any threat of losing its value. The law should make marriage more attractive rather than regarding domestic partnerships as a reason behind the decline in the conclusion of marriages.

Meyerson¹⁷⁰ questions the purpose of favouring marriage above other intimate relationships when such relationships carry the same dependencies, vulnerabilities, similar functions of reproduction, child-rearing and mutual commitment to a shared life. Marriage may create certainty and a better environment for child rearing while a domestic partnership may be seen as morally inferior however, the benefits of formalising an intimate relationship are not sufficiently convincing to justify denying recognition to vulnerable domestic partners.¹⁷¹

Sachs J¹⁷² stated that prioritising marriage should not be at the expense of treating other intimate relationships as inferior. Voluntariness may not be best served if people are coerced into marriage in order to avoid non-recognition of their intimate relationships. Prioritising marriage and denying benefits to intimate relationships outside marriage is unlikely to encourage such partners to get married. Particularly in a country such as South Africa where families are constituted in different forms and the nuclear family is not common.¹⁷³

It would be preferable for South African family law to develop a family jurisprudence that guarantees and protects liberal constitutional values such as diversity and legal pluralism and stop enforcing western traditions of marriage to South African families.¹⁷⁴ This is done

¹⁶⁸ See par 1.1 above. It is also argued that domestic partnership have the potential to lead to polygamy (SALRC (2006) 2.4.192); Polygamy is seen as a threat to the nuclear family and marriage, in that it opens the potential for exploitation of women by men. It is further argued that the situation justifies committing adultery which is a ground for divorce (Singh "Cohabitation relationships revisited: Is it not time for acceptance"? 1996 *CILSA* 317-328"); (SALRC (2006) 2.4.194-2.4.216). It has also been argued that public opinion will not accept domestic partnerships. Public opinion should co-exist with substantive reasoning in order to move the South African family law forward and provide equal treatment to people other members of the public may feel are not worthy of legal protection (Currie "Judicial avoidance" 1999 *SAJHR* 138-163); (Cockrell "Rainbow Jurisprudence" 1996 *SAJHR* 1-38). Already there are members of the public who have changed their opinion about domestic partnerships and accept domestic partnerships (Lind 2005 *AJ* 112).

¹⁶⁹ Sinclair and Heaton *The law of marriage* 292.

¹⁷⁰ Meyerson 2013 *AJ* 394.

¹⁷¹ *Ibid.*

¹⁷² *Volks* para 233-235.

¹⁷³ Meyerson 2013 *AJ* 393.

¹⁷⁴ Chicktay, "Gay and Lesbian partner immigration and the redefining of family: *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*" 2000 *SAJHR* 313-337; Sinclair and Heaton *The law of marriage* 16; Van Reenen "The relevance of the Roman–(Dutch) law of legal integration in South Africa" 1995 *SALJ* 276-308).

today for example, with the Recognition of Customary Marriages Act¹⁷⁵ while same-sex domestic partnerships are able to marry through the Civil Union Act.¹⁷⁶ It is argued that the problem is that the family has always been seen as an integral part of marriage rather than a separate institution. Hence, there is the reluctance to afford protection to intimate relationships that fall outside traditional marriage. The time has come for a development of an approach that regards family as being more important than marriage in South Africa.¹⁷⁷

Cooke¹⁷⁸ notes that the autonomy argument advanced in *Volks* has merit. The autonomy argument acknowledges the fact that there are intimate partners who choose not to marry because they do not want the consequences of marriage. However, the autonomy argument ignores the fact that there are couples who do not have free choice to marry but are forced into domestic partnerships by economic factors.¹⁷⁹ Some intimate relationships are one sided. A vulnerable partner cannot force the stronger partner to marry and cannot leave when the stronger partner is unwilling to marry.¹⁸⁰ It is not justified to argue that domestic partners have free choice to marry when such circumstances exist.¹⁸¹ In certain cases parties have different intentions. One party may be willing to marry while the other party could be unwilling to marry.¹⁸² Should the law then honour the autonomy of the party who is willing to marry but does not have free choice to marry or should the law honour the autonomy of the party who is unwilling to marry? What if the party unwilling to marry is in a financially and emotionally stronger position while the party willing to marry is in a financially and emotionally weaker position to bargain equally in an intimate relationship?¹⁸³

Lind¹⁸⁴ argues that the approach followed in *Volks* favours the autonomy of the stronger party. He argues that a more appropriate answer to questions about whose autonomy to honour should be inferred from the conduct of the parties. Thus functions that are performed in a domestic partnership such as mutual support, sharing maintenance obligations and

¹⁷⁵ Act 120 of 1998.

¹⁷⁶ Act 17 of 2006.

¹⁷⁷ Meyerson 2013 *AJ* 394; Pantazis "An argument for the legal recognition of gay and lesbian marriage" 1997 *SALJ* 556-577; In *Farr v Mutual and Federal Insurance Co Ltd* 2000 (3) SA 684 (C) at 690D the court found that a domestic partner is liable for limited compensation to his or her partner who is a passenger in his or her vehicle. The court adopted a functional approach to the word "family". The fact that the domestic partners were in a mutual relationship of love, affection and that their domestic partnership had lasted for a period of ten years convinced the court that the domestic partners functioned as a family and that the law should afford them legal protection (at 690D-E).

¹⁷⁸ Cooke 2005 *SALJ* 553.

¹⁷⁹ *Ibid.*

¹⁸⁰ Meyerson 2013 *AJ* 388.

¹⁸¹ *Ibid.*

¹⁸² *Volks* par 104; Lind 2005 *AJ* 123.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

dependence should point towards a willingness to be in a permanent domestic partnership worthy of protection by the law. This submission is supported in this study.

Intimate partners who do not have the autonomy to formalise their intimate relationships should be protected even if such protection is at the expense of infringing the autonomy of partners who have free choice to marry.¹⁸⁵ Inequalities make the choice more difficult.¹⁸⁶ It is contended that the reasons advanced in *Volks* to withhold benefits to domestic partners should not be used in a country like South Africa. Families should be protected above marriage. A domestic partnership that functions similar to marriage should be afforded recognition despite the fact that such partnership is not formalised.¹⁸⁷

2.6 Statutory regulation of domestic partnerships

The application of certain Acts has been extended by case law to apply to domestic partnerships.¹⁸⁸

2.6.1 *Aliens and Control Act 96 of 1961*

In *National Coalition* section 25(5) of the Aliens Control Act¹⁸⁹ was declared unconstitutional owing to the fact that the Aliens and Control Act¹⁹⁰ unfairly discriminated against same-sex domestic partners on the ground of sexual orientation and marital status.¹⁹¹ Section 25(5) of the Aliens Control Act¹⁹² granted exemptions to foreign spouses and their dependants while excluding same-sex domestic partners from the same benefits.

2.6.2 *Children's Act 38 of 2005*

Section 21 of the Children's Act¹⁹³ provides unmarried fathers with full parental responsibilities and rights in respect of children born out of wedlock, if, at the time of the birth of the child, the father was living with the mother of the child in a domestic partnership.¹⁹⁴

¹⁸⁵ Cooke 2005 SALJ 554.

¹⁸⁶ Lind 2005 AJ 119.

¹⁸⁷ Meyerson 2013 AJ 394.

¹⁸⁸ Heaton 2005 THRHR 662-663.

¹⁸⁹ Act 96 of 1961.

¹⁹⁰ Act 96 of 1961.

¹⁹¹ Par 98.

¹⁹² Act 96 of 1961.

¹⁹³ Act 38 of 2005.

¹⁹⁴ In *KLVC v SDI* 2015 (1) ALL SA 532 (SCA) the court found that an unmarried father (first respondent) had acquired full parental responsibilities and rights in terms of s 21(1)(b) of the Children's Act 38 of 2005. As a result his consent was required before his child could be removed from South Africa (par 36). The unmarried father and the mother of the child (appellant) were not in a domestic partnership but the unmarried father had at all times consented to being identified as the father of the child (par 1).

This is a welcomed development as, prior to the Children’s Act,¹⁹⁵ a father did not have parental responsibilities and rights.¹⁹⁶ Only the mother had full parental responsibilities and rights. The rights and maintenance obligations of parents towards their children are not determined with regard to the marital status of parents but with regard to the best interest of the child.¹⁹⁷

2.6.3 *Compensation for Occupation and Injuries and Diseases Act 130 of 1993*

Sections 1 and 22 of the Compensation for Occupation and Injuries and Diseases Act¹⁹⁸ enables a domestic partner who is dependent on an injured employee to claim compensation if the employee is killed in the course of his or her employment.

2.5.4 *Domestic Violence Act 116 of 1998*

The Domestic Violence Act¹⁹⁹ enables a domestic partner who has been a victim of domestic violence to approach a court for a protection order or to open a criminal case where a crime has been committed.²⁰⁰

2.6.5 *Employment Equity Act 55 of 1998*

Section 6 of the Employment Equity Act²⁰¹ specifically prohibits unfair discrimination on grounds listed in section 9 of the Constitution, including the right not to be unfairly discriminated against based on marital status, sexual orientation, family responsibility and belief.

2.6.6 *Estate Duty Act 45 of 1955*

The definition of spouse in the Estate Duty Act²⁰² has been amended to include a partner of a person in a domestic partnership where the commissioner is satisfied that the domestic partnership is intended to be permanent.²⁰³ The implication of the amendment of the definition of “spouse” is that everything that may accrue to persons identified in the definition,

¹⁹⁵ Act 38 of 2005.

¹⁹⁶ Sinclair and Heaton *The law of marriage* 287-288. In terms of section 231(1) of the Children’s Act 38 of 2005, same-sex and heterosexual domestic partners may adopt jointly. The Children’s Act 38 of 2005 includes domestic partners as adoptive parents and persons sharing a common home and constituting a family unit with a degree of permanence.

¹⁹⁷ Ss 7 and 18-22.

¹⁹⁸ Act 130 of 1993.

¹⁹⁹ Act 116 of 1998.

²⁰⁰ Ss 1 and 4(1).

²⁰¹ Act 55 of 1998.

²⁰² Act 45 of 1955.

²⁰³ S 1.

qualify as a deduction in terms of section 4(q) of the Estate Duty Act²⁰⁴ even when they are not married. Section 4(q) of the Estate Duty Act²⁰⁵ allows any amount of the surviving spouse, whether it is in the form of a donation, life insurance payment or inheritance to be deductible in order to arrive at a net value of the estate.

2.6.7 *Immigration Act 13 of 2005*

The definition of 'spouse' in section 1 of the Immigration Act²⁰⁶ includes a partner in a domestic partnership.²⁰⁷

2.6.8 *Intestate Succession Act 81 of 1987*

In *Gory* the Constitutional Court declared section 1(1) of the Intestate Succession Act²⁰⁸ unconstitutional owing to the fact that same-sex domestic partners were excluded from intestate inheritance from their partner's deceased estate. The court concluded that the exclusion was unfair owing to the fact that same-sex domestic partners could not marry.²⁰⁹ As a result, section 1(1) of the Intestate Succession Act²¹⁰ violated the right of same-sex domestic partners not to be unfairly discriminated against based on sexual orientation in terms of section 9(3) of the Constitution.²¹¹ The court stated that, where same-sex domestic partners have undertaken reciprocal duties of support, they should be afforded the benefits of the Intestate Succession Act²¹² and failure to do so is a violation of their right to dignity and equality.²¹³ The court corrected the unconstitutionality by reading words into section 1(1) of the Intestate Succession Act²¹⁴ to enable same-sex domestic partners protection of the Intestate Succession Act.²¹⁵

2.6.9 *Judges' Remuneration and Conditions of Employment Act 47 of 2001*

In *Satchwell*²¹⁶ sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act²¹⁷ were declared unconstitutional because the sections denied a Judge's same-sex domestic partner benefits which are afforded to a Judge's spouse. The two sections were

²⁰⁴ Act 45 of 1955.
²⁰⁵ Act 45 of 1955.
²⁰⁶ Act 13 of 2002.
²⁰⁷ The Immigration Act 13 of 2002 repealed The Aliens Control Act 96 of 1961.
²⁰⁸ Act 81 of 1987.
²⁰⁹ Par 19.
²¹⁰ Act 81 of 1987.
²¹¹ Par 19. Further see par 2.1 above.
²¹² Act 81 of 1987.
²¹³ Par 65.
²¹⁴ Act 81 of 1987.
²¹⁵ Act 81 of 1987; Par 66.
²¹⁶ Par 5.
²¹⁷ Act 47 of 2001.

found to discriminate unfairly against same-sex domestic partners on the grounds of sexual orientation and marital status. The same-sex domestic partners had established a permanent stable relationship and had undertaken reciprocal duties of support. Spousal benefits will not be extended where the parties did not undertake a reciprocal duty of support.²¹⁸

2.6.10 *Maintenance Act 99 of 1998*

The duty of support is an invariable consequence of marriage and obliges married or civil partners to support one another, provide food, shelter, clothing, medical and dental assistance, as well as other family needs.²¹⁹ Domestic partners have to establish a duty of support by contract to be afforded legal protection in terms of section 2(1) of the Maintenance Act.²²⁰ For a court to recognise a reciprocal duty of support, the conduct of domestic partners must justify an inference that they both consented expressly or by conduct to establish a reciprocal duty of support.²²¹ Thus a domestic partner may succeed with a maintenance claim during or after termination of a domestic partnership provided there is evidence proving the existence of such a duty.²²²

2.6.11 *Medical Schemes Act 131 of 1998*

Section 1 of the Medical Schemes Act²²³ includes a domestic partner as a dependant. Any dependant or immediate family member of a domestic partner is, thus, afforded protection under the Medical Schemes Act.²²⁴ Section 24(1)(e) states that the scheme will not unfairly discriminate against anyone on forbidden grounds and these include gender, marital status and social origin.

2.6.12 *Pension Funds Act 24 of 1956*

Section 1 of the Pension Funds²²⁵ Act includes domestic partners under the definition of "spouse". In terms of section 37C(1) of the Pension Funds Act,²²⁶ a pension fund may, within twelve months of the deceased's death, award a death benefit to a dependant of a domestic

²¹⁸ Par 22-23.

²¹⁹ SALRC (2006) 3.2.33.

²²⁰ Act 99 of 1998.

²²¹ *Paxiao* par 26; *McDonald v Young* 2012 (3) SA 1 SCA par 25. *Satchwell* par 25.

²²² *McDonald* par 25.

²²³ Act 131 of 1998.

²²⁴ Act 131 of 1998.

²²⁵ Act 24 of 1956.

²²⁶ Act 24 of 1956.

partner provided the benefit did not form part of the deceased's estate or was not regulated by the Intestate Succession Act.²²⁷

2.6.13 Road Accident Fund Act 56 of 1996

A domestic partner can institute a claim for maintenance or alternatively for loss of support. in terms of section 17(1) of the Road Accident Fund Act,²²⁸ where his or her partner dies or suffer serious bodily injury arising from an accident caused by the wrongful act or negligent driving "by a driver or owner of the motor vehicle or of his or her employee in the performance of the employees duties as employee" who is insured by the Fund or agent should the motor vehicle accident occur within the Republic of South Africa.

The surviving partner must first prove that the deceased supported him or her while the deceased was still alive, secondly, that the fund, as a third party, is bound by the deceased agreement to support the surviving partner or that the agreement is worthy of protection by the law.²²⁹

It is clear that certain Acts afford domestic partners recognition. However, recognition through such Acts is not sufficient. These Acts were not promulgated with the purpose of regulating domestic partnerships. There are areas of domestic partnerships which are not covered by the above Acts, such as the right of a domestic partner to occupy the common home and domestic partners also do not have legal protection in terms of the Maintenance of Surviving Spouses Act.²³⁰ Other legal remedies affording recognition to domestic partners will be discussed in the next paragraph.

2.7 Ordinary legal remedies available to domestic partnerships

2.7.1 Contract

2.7.1.1 Universal partnership

Domestic partners can tacitly or expressly enter into a contract to create a universal partnership.²³¹ Each one of the domestic partners must undertake to contribute their skill, labour or money or bind them to contribute something into the partnership. The universal partnership must benefit both partners and the intention of each partner should be to make a

²²⁷ Act 81 of 1987.

²²⁸ Act 56 of 1996.

²²⁹ Neethling, Potgieter and Visser *The law of delict* 6 edition (Lexis-Nexis Durban 2010).

²³⁰ Act 27 of 1990.

²³¹ *Ally v Dinath* 1984 (2) SA 451 (T) at 216F.

profit. Furthermore, the universal partnership contract should be created with a legitimate purpose, thus not be contrary to public policy or the law.²³²

A universal partnership agreement does not have to be in writing as the court can infer from the conduct of the contracting partners whether they intended a universal partnership to exist.²³³ After entering into an agreement, the universal partnership becomes a joint undertaking and neither of the domestic partners may contract with a third party without the consent of both partners. The termination of the universal partnership will be regulated by the partners' contract. The universal partnership will be regulated by the law of partnerships in the absence of an agreement by the partners.

In *V (also known as L) v De Wet*²³⁴ a domestic partner was awarded half of the estate of the combined assets in the universal partnership. The partners had been in a domestic partnership for a period of 21 years. The woman had contributed to the commercial undertaking by raising children and doing domestic duties, she had also worked in the man's business enterprise.

In *Butters v Mncora*²³⁵ the Supreme Court of Appeal found that a tacit universal partnership had been established in a domestic partnership that had existed for twenty years and the court awarded the female partner a thirty per cent share of the universal partnership estate.²³⁶ Despite the fact that the female partner had not made a direct contribution to the commercial undertaking, it was sufficient that she had supported the male partner, maintained their home and cared for their children during the period of their domestic partnership. Thus the non-commercial contributions of a partner are taken into account when determining a partner's entitlement in the partnership.²³⁷

The *societas universam bonorum* is an example of a family law universal partnership where parties agree to share all present and future profits acquired from commercial undertakings or non-profit undertakings.²³⁸ All the movable and immovable property each partner had at

²³² *Young* par 25.

²³³ *Young* par 25; Subramanien "A note on "tacit universal partnerships": Clarity at last: ex-partner can get slice of the pie: Note" 2013 *Obiter* 545-557.

²³⁴ 1953 (1) SA 612 (O) at 616H.

²³⁵ 2012 (4) SA 1 (SCA).

²³⁶ Par 27. The court noted that the facts of the domestic partnership were normal incidents of a domestic partnership, just as they are found in marriage. A financially stronger partner will provide accommodation, food, clothing, education, transport and healthcare while the other partner will look after the needs of the family including the raising of children (par 39).

²³⁷ *Mncora* par 19 and 20.

²³⁸ *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) par 20; *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 338C-D; *Isaacs v Isaacs* 1949 (1) SA (C) at 955; Domestic partners may also conclude a *societas universorum qua ex quaestu veniunt* where they agree to share the profits of only the commercial property they acquired during their partnership (Henning "Perspectives on the

the beginning of an intimate relationship will become the property of the universal partnership, including inheritances, gifts and donations.²³⁹ However a property can be excluded from the universal partnership where a party acquired the property on condition that it will not form part of a universal partnership.²⁴⁰

Mncora extended the limited remedies domestic partners have and affords them an opportunity to claim the financial benefits of a universal partnership even when they did not directly contribute to accumulating such financial benefits. A court will infer the existence of a universal partnership where it is more probable that the parties tacitly concluded such a contract.²⁴¹ This is a progressive step for domestic partnerships after the “narrow approach” adopted by the majority judgment in *Volks*.²⁴²

2.7.1.2 Domestic partnership contract

Domestic partners can enter into a domestic partnership contract and make provision for maintenance during and after the termination of their domestic partnership. This can include: who is to occupy the partners’ joint home during and after the death of one partner, who will make a contribution to the assets of their estate or who will be in possession of the partners’ property.²⁴³ Domestic partners moreover, can make provision with regard to the role and responsibilities of each partner during the continuation of their domestic partnership. A domestic partnership contract enables partners to make provision to have most of the rights and responsibilities similar to those of married spouses.²⁴⁴

A domestic partnership agreement has to be in writing, signed and witnessed either by the parties or a representative of the domestic partners.²⁴⁵ The contract is only enforceable between the partners. Such a contract should not be immoral, it is however, not immoral for two partners to be in a domestic partnership. However a court is unlikely to enforce such a contract where a man offers to pay a woman for the woman to agree to leave with the man as his mistress.²⁴⁶ The situation could be different where the man remunerates the woman for work the woman does as the man’s secretary for instance, while they are in a domestic

239 universal partnership of all property (*Societas universorum bonorum*) and the origin and correction of a historical fault line (2)” 2014 *THRHR* 427-439).

240 Henning “Perspectives on the universal partnership of all property (*societas universamorum bonorum*) and the origin and correction of a historical fault line (1)” 2014 *THRHR* 231-245.

241 Hennings 2014 *THRHR* 233.

242 Par 17.

243 Bonthuys “Developing the common law of breach of promise and universal partnerships: rights to property sharing for all cohabitants” 2015 *SALJ* 76-99.

244 Sinclair and Heaton *The law of marriage* 281.

245 Heaton *Family law* 246-247.

246 SALRC (2006) 3.1.37.

Hahlo 1972 *SALJ* 324.

partnership.²⁴⁷ A domestic partnership contract may also be found to be against public policy and unenforceable where one of the parties in a domestic partnership is married to a third²⁴⁸ party and is being sued.²⁴⁹ Although a domestic partnership may be declared void for immorality. Heaton²⁵⁰ argues that in light of the increasing recognition of domestic partnerships, a contract regulating consequences of a domestic partnership should not be declared contrary to public policy for immorality reasons.

2.7.2 *Testate succession*

Domestic partners have the option of concluding a will in which they can nominate each other as heirs.²⁵¹ A married domestic partner may even exclude his or her spouse from inheritance in favour of his or her domestic partner. However a domestic partner should be clear in his or her intention to nominate the other domestic partner as a beneficiary.²⁵² In *McDonald*,²⁵³ the respondent was in a domestic partnership with the appellant and made provisions for financial support of the appellant in a series of wills. While in *Paxiao* the deceased executed a will in which he nominated himself and his domestic partner as sole heirs of their entire estate upon the death of either one of them.²⁵⁴

2.7.3 *Unjustified enrichment*

Smith²⁵⁵ notes that there is not yet explicit authority where unjustified enrichment claims have been afforded for the benefits of domestic partnerships. However he also notes that in theory such claims can be recognised at the expense of an impoverished domestic partner. An example would be where a domestic partner was financially dependent on another partner while rendering services to that partner. The dependent partner could succeed with an enrichment claim if he or she was unjustly impoverished at the expense of his or her partner.²⁵⁶ A domestic partner could also succeed with the claim where they jointly bought a house or opened a business but the house or business was registered in the name of one partner. An impoverished partner could use the action to be compensated for being unjustly impoverished if he or she is kicked out of the house or denied the benefits of the business.²⁵⁷

²⁴⁷ *Ibid* at 325.

²⁴⁸ Par 21.

²⁴⁹ SALRC (2006) 3.1.42-47.

²⁵⁰ Heaton *Family law* 247.

²⁵¹ *Ibid*.

²⁵² Sinclair and Heaton *The law of marriage* 289.

²⁵³ Par 21.

²⁵⁴ Par 9 and 20.

²⁵⁵ Smith *The law of divorce and dissolution of life partnerships in South Africa* 442.

²⁵⁶ SALRC (2006) 3.1.64.

²⁵⁷ Hutchings and Delpont 1992 *De Rebus* 122.

A court could be reluctant to award the claim to a domestic partner where the claim is uncertain or is not clear.²⁵⁸

2.7.4 Estoppel

Where a domestic partner represents himself or herself as being married to third parties, the domestic partner will be estopped from escaping liability against third parties when it later becomes known that he or she is not married.²⁵⁹ A domestic partner could rely on estoppel as a defence where the partner was led to believe that he or she has acquired a legal right over property if this information is not correct, provided the domestic partner acted to his or her detriment.²⁶⁰ If a domestic partner represents him or herself as an agent of the other domestic partner to a third party, the third party could use estoppel to prevent the domestic partner from escaping liability. Both domestic partners are treated similar to married spouse for the purpose of estoppel.²⁶¹

2.7.5 The dependant's action for loss of support

The dependant's action for loss of support is not available to everyone who intends to institute a claim for loss of support. It does not automatically afford protection to heirs, contracting parties or immediate family members of the deceased.²⁶² There should be a legal duty of support before the law extends the duty of support to domestic partners.²⁶³ A surviving domestic partner will be able to claim the dependant's action for loss of support provided that he or she can prove the existence of a legal duty of support between the deceased and the surviving partner while the deceased was still alive.²⁶⁴

*Verheem v Road Accident Fund*²⁶⁵ was the first case in South African law which found that a contractual duty of support between heterosexual domestic partners had been well established and is legally enforceable.²⁶⁶ The plaintiff had the required *locus standi* to claim

²⁵⁸ SALRC (2006) 3.1.70.

²⁵⁹ Sinclair and Heaton *The law of marriage* 447.

²⁶⁰ SALRC (2006) 3.1.61.

²⁶¹ *Ibid* at 3.1.62.

²⁶² Rautenbach and Du Plessis "The extension of the dependant's action for loss of support and the recognition of Muslim marriages: The saga continues: *Amod v multilateral Motor Vehicle Accidents Fund 1999 4 SA 119 (SCA)*" 2000 JCRDL 302-313. See par 2.3.1 above.

²⁶³ Van der Walt and Midgley *Principles of delict* 3rd edition (Lexis-Nexis Durban 2010); Loubser *et al The law of delict in South Africa* (Oxford University Press Southern Africa 2009).

²⁶⁴ *Du Plessis* par 14. In *Du Plessis*, when the Supreme Court of Appeal extended the dependant's action for loss of support to same-sex domestic partners, the court left open the question whether the dependant's action for loss of support can be extended to heterosexual domestic partners (par 43).

²⁶⁵ 2012 (2) SA 409 (GNP).

²⁶⁶ Par 12. An attempt to extend the dependent's action for loss of support to heterosexual domestic partners had failed in *Meyer v Road Accident Fund* (Unreported case no 29950/2004 (T) delivered on 2006-03-28).

a dependant's action for loss of support against the defendant, however, the Judge did not grant the claim to the plaintiff.²⁶⁷ Although this case is welcomed with positivity as the Judge found the undertaking by the deceased to constitute a duty of support between the two domestic partners, it is argued that this case was incorrectly decided as the plaintiff was not seeking the recognition of an *ex lege* duty of support in the context of heterosexual domestic partners but for the extension of the common law dependant's action for loss of support to heterosexual domestic partners.²⁶⁸ Furthermore, it is argued that the plaintiff should have been awarded the dependant's action for loss of support by Goodey AJ due to the fact that a dependant's action for loss of support is completely different to a maintenance claim that was argued for in *Volks*.²⁶⁹

The Supreme Court of Appeal in *Paxiao* decided that *Volks* does not prevent the extension of the dependant's action for loss of support to heterosexual domestic partners.²⁷⁰ The court then extended the dependant's action for loss of support to heterosexual domestic partners.²⁷¹ *Paxiao* is an important case for heterosexual domestic partners. Prior to *Paxiao*, the dependant's action for loss of support was not extended to heterosexual domestic partners. Thus *Paxiao* removed the distinction between heterosexual domestic partners and same sex domestic partners for the purpose of the dependant's action for loss of support.²⁷²

2.7.6 Constructive trust

A domestic partner can create a constructive trust. The intention of the founder should expressly state that he or she aims to create a trust for the benefit of the other partner. Should the intention to create a trust not be clear, it may be difficult for the court to find that a trust was established by one or both partners.²⁷³ Constructive trusts are common in Anglo-American law, however in South Africa there is not enough scope for the application of constructive trusts, particularly where the intention to create a trust is not clear.²⁷⁴ Despite

²⁶⁷ The judge noted that "The duty of support towards the plaintiff by the deceased (over and above the permanent domestic partnership) was not merely an undertaking but was in fact a binding contract in that the deceased clearly did so with the intention of being legally bound and being part of this permanent domestic partnership and acted accordingly and the parties and the three daughters were a close-knit, stable family" In order to conclude that a duty of support was established between the domestic partners (par 12).

²⁶⁸ Smith and Heaton 2012 *THRHR* 476.

²⁶⁹ *Ibid* at 479.

²⁷⁰ Para 26-27.

²⁷¹ Para 39-40.

²⁷² Calvino and Iyer 2014 *Obiter* 170-171.

²⁷³ Sinclair and Heaton *The law of marriage* 277.

²⁷⁴ SALRC (2006) 3.1.72; Sinclair and Heaton *The law of Marriage* 277.

the lack of scope dealing with trusts in South Africa, one or both domestic partners may create a trust with a clear intention to nominate either or both partners as beneficiaries.²⁷⁵

2.7.7 Insurance

Domestic partners may nominate each other as beneficiaries under a life insurance policy. It will, however, have to be clear in the nomination clause that a benefit is being conferred to a partner as a “family member” of the policy holder.²⁷⁶

2.7.8 Joint bank account

Domestic partners are not allowed to open a joint bank account. Domestic partners can use a bank account opened by one of the partners. The non-account holder will, however, have limited rights to the account. The non-account holder will have to rely on the account holder to access overdraft facilities or to fund the account since the account holder will be the only one with signing powers over the account.²⁷⁷

It is clear from the above that only piecemeal recognition is provided to domestic partnerships through legislation, case law and the application of ordinary legal principles by the domestic partnerships themselves.

2.8 Preliminary conclusion

Comments have been made in this chapter about the lack of proper regulation of domestic partnerships. The Constitutional Court has been approached in the hope that the court will help vulnerable domestic partners who need protection during and upon termination of their domestic partnerships. The Constitutional Court, however, has ruled that domestic partnerships should not be afforded the same legal consequences as marriage. Where does the hope lie for domestic partnerships if the Constitutional Court has reached a decision that discriminating between married and unmarried couples does not amount to unfair discrimination? The solution has to be based on how a domestic partnership functions. There should not be a distinction between married and unmarried couples. Courts should recognise the existence of a duty of support from the facts of every case by relying on how a domestic partnership functioned during its existence. Free choice to marry should not have any role to play in determining recognition of a domestic partnership. A draft Bill has been proposed with the purpose of regulating domestic partnerships. In the next chapter, the draft Bill will be analysed to determine its suitability to regulate domestic partnerships.

²⁷⁵ Smith *LLD thesis UFS* 389.

²⁷⁶ Sinclair and Heaton *The law of marriage* 290.

²⁷⁷ Schweltnus “The legal position of cohabitantes in the South African law” 1995 *Obiter* 133-157.

Chapter 3

The draft Domestic Partnerships Bill

3.1 Introduction

It was stated in the previous chapter that there is no dedicated legislation that specifically regulates domestic partnerships. As a result domestic partners have to rely on ordinary legal remedies to regulate their partnerships. In this chapter, the draft Domestic Partnership Bill will be analysed to determine the suitability of the draft Bill to regulate domestic partnerships. Attention will be paid to the criticism of the draft Bill and the hierarchy of intimate relationships in South African family law.²⁷⁸

There are currently only three forms of intimate relationships in South Africa that are regulated by legislation: Civil marriages regulated by the Marriage Act,²⁷⁹ customary marriages regulated by the Recognition of Customary Marriages Act²⁸⁰ and same-sex domestic partnerships regulated by the Civil Union Act.²⁸¹

The Civil Union Bill,²⁸² which appeared in Government Gazette 29169 of 31 August 2006, had a chapter regulating domestic partnerships. Owing, however, to the fact that the one year deadline for the promulgation of the Civil Union Act²⁸³ was looming, the chapter regulating domestic partnerships was dropped by parliament from the final draft Civil Union Bill which was eventually promulgated as the Civil Union Act.²⁸⁴

In 2008, the draft Domestic Partnership Bill appeared in the Government Gazette.²⁸⁵ The objective of the draft Bill is to afford protection to the legal rights, status and interests of domestic partners.²⁸⁶ The draft Domestic partnership Bill, as it appeared in the Government Gazette, was similar to chapter three of the first Civil Union Bill GG 29169 of 31 August 2006.

The SALRC's rationale in making proposals for legal reform to domestic partnerships was to create an alternative to marriage and make family law more accessible to vulnerable

²⁷⁸ Bakker 2013 *PELJ* 123-127.

²⁷⁹ Act 25 of 1961.

²⁸⁰ Act 120 of 1998.

²⁸¹ Act 17 of 2006. It is noted that domestic partnerships are not the only form of intimate relationships in South African law that are not regulated by legislation. Muslim marriages and Hindu marriages are also not regulated by legislation. Muslim and Hindu marriages are not, however, discussed, as they fall outside of the scope of this study.

²⁸² B26-2006.

²⁸³ Act 17 of 2006.

²⁸⁴ Act 17 of 2006. Smith *LLD thesis UFS* 462-463.

²⁸⁵ 30663 of 14 January Notice 36 of 2008.

²⁸⁶ Preamble to the draft Domestic Partnerships Bill.

domestic partners and affordable to indigent people.²⁸⁷ The draft Domestic Partnership Bill aims to provide domestic partners with some of the rights, benefits and obligations similar to those afforded to spouses in civil marriages. Upon registration, domestic partners will be afforded most of the consequences of a civil marriage.²⁸⁸

The draft Bill proposes a two-tier system of regulation which distinguishes between registered domestic partnerships regulated by chapter three of the draft Bill and unregistered domestic partnerships regulated by chapter 4 of the draft Bill. Consequently the requirements for registering a domestic partnership in terms of the draft Bill will be discussed below.

3.2 Requirements for registering a domestic partnership

3.2.1 Registration age

Only persons who are 18 years or older can register a domestic partnership.²⁸⁹ As a result a person under the age of 18 will not be able to register a domestic partnership even when such a person is assisted by a parent or guardian. The position is similar with that of minors who want to contract a civil union in terms of the Civil Union Act.²⁹⁰ A minor is allowed to contract a civil marriage or customary marriage with the necessary consent but this is not possible under the draft Bill.²⁹¹ This violates the equality clause. The Constitution prohibits unfair discrimination on the ground of age.²⁹²

²⁸⁷ SALRC (2006) 6.2.22. The SALRC further mentioned the need for striking a balance between the interests of emotionally and financially weaker partners who need legal protection and protecting the autonomy of partners who prefer not to formalise their domestic partnerships. In addition, provision had to be made for family units which are made up of care givers who provide services and benefits to vulnerable members of the family without remuneration for their services. Such families also need legal recognition (SALRC (2006) 1.3.6). However care-givers fall outside the scope of this study and will not be discussed.

²⁸⁸ CL 9-11; Bakker 2013 *PELJ* 133-134.

²⁸⁹ CI 6.

²⁹⁰ Act 17 of 2006.

²⁹¹ Ss 24(1) and (2) of the Marriage Act 25 of 1961, read with s 18(3)(c) and (5) of the Children's Act 38 of 2005, enables a minor to enter into a civil marriage provided the minor obtains the consent of his or her parent or guardian. The only exception to s 24 is when a minor under the age of 18 years has already entered into a marriage that was dissolved by death or divorce. In addition s 3 of the Recognition of Customary Marriages Act 120 of 1998 enables a minor to enter into a customary marriage provided the minor is granted written consent by the Minister of Home Affairs where the child could not obtain consent from his or her parent, guardian or alternatively could not use section 25 of the Marriage Act 25 of 1961 which enables a Commissioner of Child Welfare to grant written consent to the minor, approving the marriage of the minor. A minor may approach the High Court for consent in terms of s 25(4) of the Marriage Act 25 of 1961 where the parents, guardian or commissioner of child welfare refuse to consent to the civil marriage of the minor. In addition, s 26(1) of the Marriage Act 25 of 1961 enables a boy under the age of 18 and a girl under the age of 15 to marry with the written consent of the Minister of Home Affairs provided the Minister is satisfied that the marriage is desirable. The Minister also has the authority to ratify the marriage of a minor,

A minor who has already concluded a civil marriage or customary marriage will not need consent to enter into another marriage where the first marriage was dissolved by death or divorce.²⁹³ The draft Bill is silent on whether a minor who has attained the age of majority through entering a civil or customary marriage can register a domestic partnership upon the dissolution of the civil or customary marriage.

It is clear that the draft Bill makes civil and customary marriages the only vehicles for minors to attain the age of majority. It would be preferable for minors to be enabled to register a domestic partnership.²⁹⁴ Consequently the citizenship of prospective domestic partners will be discussed in the next paragraph.

3.2.2 Citizenship

A registered domestic partnership between two foreign partners will not be allowed. One of the partners should at least be a South African citizen.²⁹⁵ The draft Bill does, however not contain a provision that requires either of the two registering domestic partners to produce an identification document or an affidavit which could help the registration officer to establish the nationality of prospective partners. Section 12 of the Marriage Act²⁹⁶ prohibits the

where a minor under the age of 15, enters into a civil marriage without the required consent of the Minister and the Minister believes the marriage is in the best interests of the minor, provided the marriage complies with the other provisions of the Marriage Act 25 of 1961.

²⁹² S 9; De Ru 2010 *THRHR* 561-562. Further see s 1 of the Children's Act 38 of 2005 which defines a child as someone who is under the age of 18 years and makes no reference to differential treatment.

²⁹³ S 24(2) of the Marriage Act 25 of 1961.

²⁹⁴ Art 18 of the African Charter on the Rights and Welfare of the Child (1990) states that children should not be discriminated against based on sexual orientation, marital status, social, economic grounds or any other grounds. Art 4 of the United Nations Conventions on the Rights of the Child (1989) states that children should be afforded equal rights irrespective of their conditions or social circumstances. Further see Muller and Tait "The best interest of children: A criminal law concept?" (1999 *De Jure* 323-329 in this regard). International instruments require the best interests of the child to be of paramount importance when implementing marriageable age or regulating child law (UN General Assembly, Convention on Consent, Minimum Age and Registration of Marriages (1962). Further see art 16(1) of the United Nation's Convention on the Elimination of All Forms of Discrimination against Women (1979) which also requires the best interest of the child to be of paramount when dealing with child law. S (1) of the Children's Act 38 of 2005 has laid down guidelines to be used to assist family law in ascertaining what qualifies as being in the best interest of the child and s 28 of the Constitution regards the best interest of the child as paramount (Sloth Nielsen "Ratification of the United Nations Convention on the rights of the child: Some implications for South African Law" 1995 *SAJHR* 401-420). S 7(1) of the Children's Act 38 of 2005, however, does not state under which circumstances such factors will be considered or regarded as relevant factors (Heaton *Family law* 165). South African family law should honour duties imposed by international instruments (*Ibid* at 163-164).

²⁹⁵ CI 4(6).

²⁹⁶ Act 25 of 1961.

solemnization of any marriage without the prospective spouses producing an identification document or prescribed declaration.²⁹⁷

It would be preferable that the draft Bill also makes the production of an identity document or an affidavit compulsory prior to registering a domestic partnership. Producing an identity document or affidavit could help the court to ascertain the citizenship and the age of prospective domestic partners where a registration officer is uncertain about the citizenship or age of prospective partners.²⁹⁸

3.2.3 Registration of a domestic partnership

Registration is a requirement for a valid registered domestic partnership.²⁹⁹ The registration process is overseen by the Minister of Home Affairs or his or her duly authorised representative.³⁰⁰ Registration officers are appointed from within the ranks of officers or employees in the public, diplomatic or consular service of the Republic of South Africa.³⁰¹ The registration of a domestic partnership is completed by partners in writing in front of a registration officer.³⁰²

It is uncertain whether a domestic partnership will be afforded the same consequences of a registered domestic partnership or whether it will be regarded as an unregistered domestic partnership where one of the requirements of registration was not fulfilled or the registration of a domestic partnership was defective. It would be preferable that a domestic partnership is afforded postnuptial registration provided that domestic partners can prove that they tried to register their domestic partnership earlier.

Upon registration of a domestic partnership, domestic partners will be furnished with a registration certificate as proof of the existence of their domestic partnership. This is a positive step as it signifies a public commitment and creates a formal status.

Registered domestic partners will have the option of concluding a domestic partnership agreement.³⁰³ The agreement will have the same validity as an ante-nuptial contract against

²⁹⁷ S 7 of the Civil Union Act 17 of 2006 which requires the prospective spouses also to produce an identity document or an affidavit before a civil union is concluded.

²⁹⁸ S 5(2) of the Recognition of Customary Marriages Act 120 of 1998 empowers a registration officer to approach a magistrate court when the registration officer is unsure or the age of the minor is in dispute. A magistrate will then identify the age of the person in question and issue a prescribed certificate confirming the age of the person.

²⁹⁹ CI 6.

³⁰⁰ CI 5(1).

³⁰¹ CI 5(1).

³⁰² CI 6(2), (3), (4) and (6).

³⁰³ CI 7.

third parties notwithstanding that the agreement will not be attested by a notary or registered in the deeds office.

It is clear that the registration process of a domestic partnership is formal and domestic partners will further receive a registration certificate upon registration. The draft Bill however prohibits registration of certain domestic partnerships. Such domestic partnerships will be discussed in the next paragraph.

3.2.4 Married domestic partners and polygamous domestic partnerships

A person who has already concluded a civil marriage, customary marriage or a civil union will be prohibited from registering a domestic partnership.³⁰⁴ The draft Bill makes it clear which domestic partners will be prohibited from registering their domestic partnerships. It further seems that such partners will not be afforded recognition in terms of chapter 4 of the draft Bill as unregistered domestic partners.³⁰⁵ Smith³⁰⁶ notes that clauses 4(2) and 26(4) are under-inclusive and could cause certain predicaments. For instance, partners in purely religious marriages are not included amongst domestic partners who are prohibited from registering a domestic partnership.³⁰⁷ Thus it is unclear whether registration of a domestic partnership between a Muslim or Hindu marriage partner and a domestic partner will be recognised as a registered domestic partnership. Nor is it clear whether such a domestic partnership can be recognised as an unregistered domestic partnership. In light of the silence of the draft Bill, it can be concluded that such domestic partnerships may be afforded recognition. Smith³⁰⁸ proposes an amendment to clause 4 of the draft Bill making it clear that the aim of the draft Bill is not to regulate purely religious marriages. He argues that this amendment can ensure that all registered domestic partnerships will be monogamous.³⁰⁹

It is clear that the draft Bill only intends to afford recognition to monogamous domestic partnerships. This is made clear in the case of a party who is already married or has registered a domestic partnership.³¹⁰ It seems, however, that unregistered domestic partners are not prohibited to be in polygamous domestic partnerships.³¹¹ Clause 26(4) empowers the

³⁰⁴ CI 4(2).

³⁰⁵ CI 26(4).

³⁰⁶ Smith *LLD thesis UFS* 504; Smith 2011 *SALJ* 586-587.

³⁰⁷ CI 4(2) and CI 26(4). A partner married in accordance with a Muslim or Hindu religious system can also be involved in an unregistered domestic partnership with a third party with the result that the unregistered domestic partnership will be afforded the remedies provided in chapter 4 (Smith 2011 *SALJ* 587).

³⁰⁸ *Ibid* at 587-588; Smith *LLD thesis UFS* 505.

³⁰⁹ *Ibid* at 506.

³¹⁰ CI 4(1)-(2) and 26(4).

³¹¹ CI 28(2)(h) empowers the court to take into account the circumstances of another unregistered domestic partnership when ordering the payment of maintenance order to an existing domestic partnership.

court not to make an order in terms of chapter 4 where one of the parties to a registered domestic partnership is already a spouse in a civil marriage or union. Clause 26(4) is however silent on whether a court can make an order in terms of chapter 4 where a spouse in a customary marriage is also a partner in an unregistered domestic partnership with a third party. It is argued that clause 26(4) may encourage multiple unregistered domestic partnerships between customary marriages spouses and third parties. If the court were to award an order to the third party in terms of chapter 4, it may open the possibility for conflicting claims from a number of surviving partners upon termination of an unregistered domestic partnership. Who could allege, for instance, that they were in an unregistered domestic partnership with the deceased and are, therefore, entitled to an intestate succession order. This predicament can be resolved by including customary marriage spouses in clause 26(4). This measure would ensure that most unregistered domestic partnerships are monogamous and the court may not award an order where they are not.

3.2.5 Prohibited degrees of relationship

Domestic partners in the prohibited degrees of consanguinity and affinity similar to that of civil marriages will be prohibited from registering a domestic partnership.³¹² The prohibited degrees of relationship however, do not apply in the case of unregistered domestic partners and this is a serious shortcoming in the draft Bill.³¹³

Consanguinity may thus, occur in the direct line between ascendants and descendants. A father and his daughter can enter into a domestic partnership. Two people who are related to each other in the collateral line and share a common ancestor such as an uncle and his niece would be able to claim protection under the draft Bill as unregistered domestic partners.³¹⁴

It would be preferable for registered and unregistered domestic partnerships to be treated equally for the purpose of the prohibited degrees of relationship. The prohibited degrees of relationship should also apply to unregistered domestic partnerships.³¹⁵ An unregistered domestic partnership which violates the prohibited degrees of relationship should be declared void. As a result, no remedy should be afforded to unregistered domestic partners who violate prohibited degrees of relationship while aware of such violation.

It is clear that the prohibited degrees of relationship may be violated in the case of unregistered domestic partners and such partners may be afforded any of the remedies in

³¹² CI 4(5).

³¹³ Smith 2011 SALJ 585.

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

chapter 4. Violating prohibited degrees of relationship may have serious consequences for registered domestic partners and children born of such domestic partnerships. In the next paragraph, the consequences of violating the prohibited degrees of relationship and of non-compliance with registration formalities will be discussed.

3.2.6 Void and voidable domestic partnerships

The draft Bill is silent on the consequences of defective registration. Should registration of a domestic partnership be defective, the domestic partnership may be classified as an unregistered domestic partnership and will not have the consequences of a registered domestic partnership.³¹⁶ The non-owner of the family home will not have the right to occupy the family home, with the result that he or she may be evicted. The draft Bill offers no recourse for the non-owner. The draft Bill is silent on whether defective registration may be ratified. It is uncertain what the position would be in cases where the defective registration was made in good faith and all other formalities were followed.³¹⁷

A civil marriage can be rendered voidable in certain circumstances, such as where a minor fails to obtain the necessary consent from his or her parents or legal guardian.³¹⁸ A voidable civil marriage has all the legal consequences of a civil marriage and remains in force until it is set aside by the court.³¹⁹ The status of a child born from a voidable civil marriage is not affected by an annulment order.³²⁰ It would be preferable for the draft Bill to make provision for voidable domestic partnerships to protect the interests of children and innocent domestic partners who may not be aware of the presence of a defect when a domestic partnership is registered.

The draft Bill should draw a distinction between void and voidable registered domestic partnerships. Where a domestic partnership is void owing to a lack of formal requirements, such as a defective registration, the registration of the domestic partnership should be ratified by the court, Minister of Home Affairs or anyone duly authorised by the Minister of Home Affairs. There should also be a solution to circumstances where one or both partners are not aware during registration that there is a defect that renders their registration void. A solution to defective registration will be discussed in the next paragraph.

³¹⁶ *Ibid* at 582.

³¹⁷ *Ibid*.

³¹⁸ S 24A(1) of the Marriage Act 25 of 1961. A civil marriage can also be rendered voidable where there is a material mistake concerning the nature of the juristic act (Heaton *Family law* 25). An innocent party may apply to court for the annulment of a civil marriage based on fraudulent concealment of sterility from his or her spouse (*Venter v Venter* 1949 (4) SA 123 (W) at 132. *Stuprum* may also render a civil marriage voidable (Heaton *Family law* 37).

³¹⁹ Sinclair and Heaton *The law of marriage* 401.

³²⁰ S 39(1) of the Children's Act 38 of 2005.

3.2.6.1 The putative marriage principle

Smith³²¹ is of the opinion that the solution to void registered domestic partnership should be found in the putative marriage principle. A putative marriage exists when there is a defect that renders a civil marriage void, however one or both parties to the marriage were not aware of the defect.³²² A putative marriage is not a valid marriage but can have some of the consequences of a valid marriage despite being void. Provided parties entered into the void marriage in good faith and all the formalities were adhered to when the marriage was solemnised.³²³ The purpose of the putative marriage principle is to save innocent parties from the consequences of declaring a marriage void particularly where children are involved.³²⁴ A putative marriage will be in community of property if both parties acted in good faith when concluding the putative marriage.³²⁵ Provided both parties did not conclude an ante-nuptial contract when concluding the marriage. The putative marriage may still be in community of property even when it is only one party who acted in good faith if the court believes treating the marriage to be in community of property will benefit the innocent party.³²⁶ A party who acts in good faith may claim half of the joint estate where community of property was excluded by an ante-nuptial contract when entering into the marriage.³²⁷

The putative marriage principle has not been applied to cases dealing with domestic partnerships in South Africa. Smith³²⁸ notes this is caused by the lack of legislation regulating domestic partnerships. He submits that the law should treat registered domestic partnerships and civil marriage similar despite the significance attached to marriage. He points out that a registered domestic partnership is a formal and public commitment with similar legal consequences to a civil marriage. As a result, the putative marriage principle should also be extended to registered domestic partners who act in good faith when registering a domestic partnership that is void owing to a defect in registration.³²⁹ A void domestic partnership will have no legal status despite the fact that the domestic partners acted in good faith.

³²¹ Smith 2011 SALJ 571-578.

³²² *Zulu v Zulu* 2008 (4) SA 12 (D) at 14H; *Ngubane v Ngubane* 1983 (2) SA 770 (T) at 770A-B; *Heaton Family law* 40.

³²³ *Moola v Aulsebrook* 1983 (1) SA 687 (N) at 690A-B; *Heaton Family law* 40; *Skelton et al Family law* 54.

³²⁴ *Ibid* at 54-55.

³²⁵ *Heaton Family law* 41.

³²⁶ *Ibid*; *Skelton et al Family law* 55.

³²⁷ *Zulu* at 15B.

³²⁸ Smith 2011 SALJ 578.

³²⁹ *Ibid*.

The distinction between registered and unregistered domestic partners is also important under the draft Bill for the purpose of children born of a registered domestic partnership.³³⁰ In terms of clause 16 of the draft Bill, the court may not order the termination of a registered domestic partnership where termination is not in the best interests of children born of a registered domestic partnership. Clause 17 affords a father of a child born of a registered domestic partnership parental rights and responsibilities similar to a father with minor children born from a civil marriage. Where a registered domestic partnership is declared void due to non-compliance with formal requirements, the father's rights and responsibilities in terms of clause 17 will not automatically vest. The father will have to rely on section 21(1) of the Children's Act³³¹ to be afforded parental responsibilities and rights.³³² The application of the putative marriage principle can help children from the consequences of declaring a registered domestic partnership void. Smith's submissions are supported in this study. It is recommended that the putative marriage principle should be applied in cases of void registered domestic partnerships, to protect partners who act in good faith when they register a domestic partnership.

The application of the patrimonial consequences of the putative marriage principle to domestic partners, however, could be a problem to domestic partners owing to the fact that the default system proposed in the draft Bill is out of community of property. Smith³³³ argues that the fact that a civil marriage has a different default property regime to the one proposed in the draft Bill does not mean the putative marriage principle cannot be applied to registered domestic partnerships. The application of the putative marriage principle depends on the intention of the parties and a formal and public commitment or ceremony. The conclusion of a registered domestic partnership is also performed in a formal and public ceremony.³³⁴ He submits that, although the default system proposed in the draft Bill is out of community of property, registered domestic partners should still be afforded the same legal consequences they would have been entitled to if the registration was valid.³³⁵ Thus an existing registered domestic partnership agreement between the two parties should still be honoured.

It is clear that the putative marriage principle can be a solution to the consequences of a void registered domestic partnership, particularly where children are involved. It was also argued in the above paragraph that the property regime proposed in the draft Bill should not be a deterrent to the application of the putative marriage principle to registered domestic

³³⁰ *Ibid* at 582-583.

³³¹ Act 38 of 2005.

³³² Smith 2011 *SALJ* 583. See par 2.6.2 above.

³³³ Smith 2011 *SALJ* 577.

³³⁴ *Ibid*.

³³⁵ Smith 2011 *Supra* n 259 at 580.

partnerships. Legal rights and obligations can still be enforced between registered domestic partners and any agreement concluded by the parties such as a universal partnership or a domestic partnership agreement can still be enforced. Universal community of property may make application of the putative marriage principle easier. It will be argued in the next paragraph that the default system in the draft Bill should be in community of property.

3.2.7 Property regime

The proposed default property regime in the draft Bill is out of community of property while the default property regime in civil marriages, customary marriages and civil unions is in community of property.³³⁶ The rationale of the SALRC was to create a simple and less complicated property regime that will be understood by registering domestic partners. Registering domestic partners can conclude a registered domestic partnership agreement to regulate the patrimonial consequences of their partnership.³³⁷

When civil marriage spouses do not conclude an ante-nuptial contract, the patrimonial consequences of their marriage are automatically regulated through the universal community of property.³³⁸ Universal community of property will not automatically vest in registered domestic partnerships.³³⁹ This is an unsatisfactory position for domestic partners who may not be able to conclude a registered domestic partnership agreement owing to, for example, financial constraints, despite the fact that a registered domestic partnership agreement might be more cost effective than an ante-nuptial contract. The option of concluding a registered domestic partnership agreement should be kept since it costs less and is as effective as an ante-nuptial contract. It is, however, recommended that the universal community of property should automatically apply to registered domestic partners where they do not conclude a registered domestic partnership agreement.

Universal community of property is not complicated and partners who register a domestic partnership should not have a problem understanding the fact that they will have equal powers of management of a joint estate, should they not register a domestic partnership agreement.³⁴⁰ Domestic partners should be informed how universal community of property operates when they register their domestic partnership. The only difference should be that civil marriage spouses will sign an ante-nuptial contract where they want to deviate from the

³³⁶

CI 7.

³³⁷

CI 6(5)-(6) and CI 7.

³³⁸

Heaton *Family law* 85.

³³⁹

CI 7.

³⁴⁰

S 14, 15, 16 and 17 of the Matrimonial Property Act 88 of 1984. Further see Skelton *et al Family law* 72-73.

universal community of property, while registering domestic partners may deviate from the universal community of property by concluding a domestic partnership agreement.

A default system out of community of property will also not benefit domestic partners who cannot financially afford the additional cost of effecting a domestic partnership agreement on top of the cost of registering a domestic partnership.³⁴¹ Registered domestic partners who do not bring property to the domestic partnership or cannot afford to register a domestic partnership agreement will, thus, not be afforded legal protection while spouses in civil unions, civil and customary marriages will be afforded automatic protection in terms of the Matrimonial Property Act.³⁴²

It is clear that a property regime that is out of community of property may not benefit certain domestic partners owing to challenges that are already faced in intimate relationships. The difficulties that domestic partners may face when drafting contracts should be taken into consideration when legislation is enacted regulating domestic partnerships. The joint property of registered domestic partners will be discussed in the next paragraph.

3.2.8 Joint property

Where a registered domestic partner enters into a contract to dispose of joint property of his or her domestic partnership without the consent of the other partner, the contract will be void.³⁴³ In terms of section 15 of the Matrimonial Property Act³⁴⁴ a contract entered into by a spouse without the consent of the other spouse may be valid, provided there is compliance with certain requirements.³⁴⁵ However this provision is not in the draft Bill, it would be preferable for the same provision to be inserted in the draft Bill in order to protect the interest of a third who has suffered loss as a result of concluding a contract with a registered domestic partner to dispose of property belonging to the joint estate.

This provision places registered domestic partners in the same position as spouses married in community of property, but still different from spouses under the Marriage Act³⁴⁶ or Civil Union Act,³⁴⁷ as division takes place upon dissolution of the civil marriage or civil union by court order. While in terms of the draft Bill, dissolution will take place after the termination of

³⁴¹ SALRC (2006) 6.4.15.

³⁴² Act 88 of 1984.

³⁴³ Cl 10. Further see cl 25(1) and (2).

³⁴⁴ Act 88 of 1984.

³⁴⁵ In terms of s 15(9)(a) of the Matrimonial Property Act 88 of 1984 when a spouse enters into a transaction with a third party without the spouse acquiring the required consent to dispose of joint property of both spouses, such transaction shall be declared as having been entered with the consent of the other spouse provided the third party acted in good faith when entering into the transaction.

³⁴⁶ Act 25 of 1961.

³⁴⁷ Act 17 of 2006.

a registered domestic partnership.³⁴⁸ Registered domestic partners will have a two year period within which to approach a court for a division of property order after the dissolution of their domestic partnership. On application after two years, the court may grant permission for the division of property if it leads to greater hardship if not provided.³⁴⁹

The Matrimonial Property Act³⁵⁰ will not be applicable to registered and unregistered domestic partners in this regard. Registered domestic partners will not be treated similar to civil marriage spouses.³⁵¹ As a result, registered domestic partners will not be able to incur household debts under the draft Bill while civil marriage spouses are able to do so.³⁵² It would be preferable for domestic partners to be afforded the opportunity to have the Matrimonial Property Act³⁵³ applicable to their domestic partnerships. This option should be made available to domestic partners by letting them contract for its application in the registered domestic partnership agreement.

The interests of both registered domestic partners will be protected in the joint property. The interest of third parties may be prejudiced by conduct of one of the registered domestic partners. Redistribution of assets of the registered domestic partners will be discussed in the next paragraph.

3.2.9 Redistribution of assets

A registered domestic partner will be able to approach a court for the redistribution of assets provided he or she has made direct or indirect contributions to the separate property of the other registered domestic partner.³⁵⁴ The draft Bill puts registered domestic partners in a better position than spouses married in community of property. Sections 7(3)-(6) of the Divorce Act³⁵⁵ afford redistribution of assets only to spouses married out of community of property, subject to judicial discretion. Redistribution is awarded in limited circumstances only.³⁵⁶ These circumstances are:

³⁴⁸ CI 22(1); S 3 and 7(1) of the Divorce Act 70 of 1979; S 13 of the Civil Union Act 17 of 2006; S 15 of the Matrimonial Property Act 88 of 1984.

³⁴⁹ CI 23(2).

³⁵⁰ Act 88 of 1984.

³⁵¹ Smith and Robinson "An embarrassment of riches or a profusion of confusion? An evaluation of the continued existence of the Civil Union Act 17 of 2006 in the light of prospective domestic partnerships legislation in South Africa" 2010 *PELJ* 30-75.

³⁵² Bakker 2013 *PELJ* 134.

³⁵³ Act 88 of 1984.

³⁵⁴ CI 22(3) and (5).

³⁵⁵ Act 70 of 1979.

³⁵⁶ Heaton *Family law* 132-133.

- (a) The spouses should have been married prior to the commencement of the Matrimonial Property Act³⁵⁷ before 1 November 1984, subject to an ante-nuptial contract which excludes community of property, community of profit and loss and accrual sharing and any form of accrual sharing;
- (b) The spouses should have been married prior to the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1998 before 2 December 1988 in terms of section 22(6) of the Black Administration Act.³⁵⁸

Registered domestic partners will not be in a better position than spouses who conclude their marriage through the Recognition of Customary Marriages Act.³⁵⁹ Customary marriage spouses can apply for redistribution of assets even when their marriage was in community of property. The court in *Gumede v President of the Republic of South Africa*³⁶⁰ determined that section 7(3) of the Divorce Act³⁶¹ is applicable to all customary marriages regardless of their matrimonial property system.³⁶² The court further determined that a spouse who seeks redistribution of assets in a customary marriage does not bear the onus of proof that he or she is entitled to redistribution.³⁶³ The court must look at all the relevant circumstances surrounding the marriage to determine whether redistribution would be just and equitable.³⁶⁴

Heaton³⁶⁵ argues for the introduction of a broad judicial discretion regarding the division of matrimonial property upon divorce. The court should be empowered to deviate from the ordinary consequences of the matrimonial property system if equity and justice demand this. She argues that in order for the court to determine whether equity and justice demand a deviation the court should take into account, *inter alia*, the career or business sacrifices or curtailing participation in the labour or business market of women due to their child-care and elder responsibilities and household duties.³⁶⁶ The same broad judicial discretion should be afforded to registered domestic partners. Treating customary marriage spouses differently to other intimate relationships for purposes of redistribution of assets amounts to unfair

³⁵⁷ Act 88 of 1984.

³⁵⁸ Act 38 of 1927. These circumstances apply to spouses who did not enter into an agreement regulating their division and exclusion of property by ante-nuptial contract.

³⁵⁹ Act 120 of 1998.

³⁶⁰ 2009 (3) BCLR 24 (CC).

³⁶¹ Act 70 of 1979.

³⁶² Par 59.

³⁶³ Par 48.

³⁶⁴ Par 48.

³⁶⁵ Heaton "Striving for substantive gender equality in family law" 2005 *SAJHR* 547-574.

³⁶⁶ *Ibid* at 563-565.

discrimination on the ground of equality and ignores financial and social inequalities experienced by intimate partner upon divorce or termination of their relationships.³⁶⁷

Registered domestic partners can apply for redistribution of assets, although just for joint property. The invariable consequences of a registered domestic partnership will be discussed in the next paragraph.

3.3 Invariable consequences of a registered domestic partnership

3.3.1 The common home

Both registered domestic partners will have the right to occupy the family home during the existence of their domestic partnership.³⁶⁸ Both partners will be protected against eviction from the other partner.³⁶⁹

3.3.2 Duty of support

The duty of support is defined in the draft Bill as “the responsibility of each registered domestic partner to provide for the other partner’s basic living expenses while the registered domestic partnership exists”.³⁷⁰ Registered domestic partners will owe each other a duty of support resulting from registration of their domestic partnership. As a result, registered domestic partners will not need to conclude a contract or prove the existence of a contractual duty of support. The duty of support vests by operation of law.³⁷¹

3.3.3 Delictual claims

A registered domestic partner can institute a delictual claim against any wrongful third party. A partner in a registered domestic partnership is further regarded as a dependant for the purpose of the Compensation for Occupational Injuries and Diseases Act.³⁷²

It is clear that registered domestic partners will be afforded most of the consequences of a civil marriage upon registration of a domestic partnership. Some of the consequences of a civil marriage are afforded to a spouse upon divorce. Consequently, the manner in which a registered domestic partnership can be terminated will be discussed in the next paragraph.

³⁶⁷ Heaton *Family law* 136-137.

³⁶⁸ CI 11(1)

³⁶⁹ CI 11(2).

³⁷⁰ CI 1.

³⁷¹ The duty of support encompasses many elements that are important to an intimate relationship, such as accommodation, clothing, food, medical, and dental services (Skelton *et al Family law* 62-63).

³⁷² Act 130 of 1993. CI 9.

3.4 Termination of a registered domestic partnership

A registered domestic partnership can be terminated by the death of one or both partners, by agreement or by a court order.³⁷³

3.4.1 Termination by death

Upon the death of one or both partners, a domestic partnership will terminate.³⁷⁴ A registered domestic partner will be considered to be a “spouse” in terms of the Intestate Succession Act.³⁷⁵ Registered domestic partners will be placed in the same position as spouses married in terms of the Civil Union Act³⁷⁶ or the Marriage Act³⁷⁷ with regard to intestate succession. This changes the current position where heterosexual domestic partners are unable to inherit intestate, as they are not included in the definition of “spouse” in terms of section 1 of the Intestate Succession Act.³⁷⁸

A surviving partner in a registered domestic partnership can institute a maintenance claim in terms of the Maintenance of Surviving Spouses Act³⁷⁹ against the deceased estate.³⁸⁰ For the purpose of the draft Bill, the word “spouse” in section 1 of the Maintenance of Surviving Spouses Act³⁸¹ will be construed to include a partner in a registered domestic partnership.³⁸²

It was clear from *Volks* that a surviving domestic partner will not be afforded any legal protection in terms of section 2(1) of the Maintenance of Surviving Spouses Act.³⁸³ However, it is a positive step for domestic partners to know that a surviving partner can rely on the provisions of the draft Bill to claim for maintenance in terms of the Maintenance of Surviving Spouses Act³⁸⁴ should the draft Bill be passed into law.

3.4.2 Termination by agreement

The process of termination is overseen by a registration officer.³⁸⁵ The officer must sign the prescribed documents after each domestic partner declares their desire to terminate the partnership in writing. Upon termination, a registration officer is required to keep a register of

³⁷³ CI 12(1).
³⁷⁴ CI 12(1)(a).
³⁷⁵ Act 81 of 1987. CI 20.
³⁷⁶ Act 17 of 2006.
³⁷⁷ Act 25 of 1961.
³⁷⁸ Act 81 of 1987.
³⁷⁹ Act 27 of 1990.
³⁸⁰ CI 19.
³⁸¹ 27 of 1990.
³⁸² CI 19.
³⁸³ Act 27 of 1990.
³⁸⁴ Act 27 of 1990.
³⁸⁵ CL 13.

all terminated registered domestic partnerships and transmit the register to all relevant officials for inclusion in the population register.³⁸⁶

Termination by agreement is not best equipped to address gender inequality in domestic partnerships. It will be left to domestic partners to negotiate the terms of their termination. The emotionally and financially weaker domestic partners will lack the autonomy to bargain equally. Nor will he or she have the protection of the court to scrutinise the fairness of the terms of termination.³⁸⁷ For this reason, it would be preferable for the court to have judicial discretion over termination agreements in order to ensure that weaker partners are protected. Thus the court should ensure there is equity and justice. The extent to which the partners were in an unequal bargaining position when they signed their domestic partnership agreement should be taken into account, as well as any subsequent change in the circumstances of the domestic partners when the termination agreement is signed.

3.4.3 Termination by court order

A registered domestic partnership can only be terminated by a court order when domestic partners have minor children.³⁸⁸ The court will award a court order for the termination of a domestic partnership only if it is satisfied that termination is in the best interest of children.³⁸⁹ It would be preferable if domestic partners could be able to go to court even if there are no children involved.

³⁸⁶ CI 13(6)-(8).

³⁸⁷ Smith *LLD Thesis UFS* 595.

³⁸⁸ CI 15. The court may order any person to appear before it and the court may further appoint a legal representative to represent children (CI 16(2), (4) and (7)). The court has the power to make provision with regard to maintenance, education, guardianship, care or contact of children. Children in registered domestic partnerships will be placed in a similar position to children in civil marriages in terms of s 6 of the Divorce Act 70 of 1979. CI 16 of the draft Bill does not provide the court with the power to amend, vary or suspend a maintenance order. Should it later turn out that the order initially made by the court is no longer in the best interests of children or that the order has become unsuitable, the court will not be able to amend it (Smith *LLD thesis UFS* 608-612). In *MN v AJ* 2013 (3) SA 26 (WCC) the respondent paid maintenance for a child born of the respondent's marriage in accordance with a divorce order granted in terms of s 6 of the Divorce Act 70 of 1979. The plaintiff grew suspicious about the paternity of the child and paternity tests were done. The tests revealed that the child, who was 15 years at the time, was not the biological child of the respondent (par 4-5 and 45). The plaintiff applied to court for an amendment of the maintenance order in terms of s 8 of the Divorce Act 70 of 1979 to the end that the respondent could be relieved of his maintenance obligations. The court amended the maintenance order (par 5-6). Although the court will take proper measures to ensure that a termination order will be in the best interest of the child, the possibility exists that, after making the termination order, circumstances might change which makes the order unfavourable and in need of variation or suspension (s 8(1) of the Divorce Act 70 of 1979). S 8(1) of the Divorce Act 70 of 1979 should be incorporated into cl 16 of the draft Bill. The court, however, warned of the need to be cautious when recognising claims where the maternity or paternity of a child is in dispute. Such claims have the potential to destroy long established parental relationships and might not be in the best interest of the child to award such claims or for the child to find out about this experience in court (par 79).

³⁸⁹ CI 16.

If domestic partners do not have children, the only avenue to terminate their partnership is by agreement. However, the problem is that one or both partners may not reach an agreement regarding termination. The draft Bill is silent on whether the court can grant termination where one of the partners does not agree to termination. Furthermore, courts are not empowered to determine whether termination is justified based on the circumstances of the parties.³⁹⁰ The draft Bill should make it possible for domestic partners to terminate their partnerships unilaterally.

The ways in which a domestic partnership can be terminated were discussed in the previous paragraph. It was pointed out that regulating termination by agreement in courts can result in shortcomings. The process can bring hardships to domestic partners owing to inequality issues between partners, particularly in a country such as South Africa where the adversarial system operates. As a result termination of a domestic partnership should be regulated by a system that endeavours to level inequalities between parties and assist in addressing the needs and reaching amicable agreement for both parties. Mediation will be discussed in the next paragraph as a solution to regulating termination of domestic partnerships.

3.5 Mediating domestic partnerships

It would be preferable for registered domestic partners to mediate before going to court, to draft a termination agreement or partners should be referred by court for mediation. Mediation takes into account the need for the continued contact of both parents for the benefit of children, thus regarding the best interest of the child as paramount.³⁹¹ Through mediation, domestic partners will be able to address all of their issues holistically in the presence of an unbiased third party and the court will be approached only as a matter of last resort should mediation fail.³⁹²

It has been argued that parties should opt for post-divorce mediation on the grounds that it is most suitable for women who are in a financially weaker position after divorce as they face scarce work opportunities.³⁹³ As a result, it would be preferable that mediation is also made a possibility for partners upon the termination of their domestic partnerships. Mediation is

³⁹⁰ Smith *LLD thesis UFS* 613.

³⁹¹ De Jong "The newly introduced public mediation service in the maintenance court environment: Does it make a difference in the short term" 2009 *THRHR* 275-295; Clark "No holy cow- Some caveats on family mediation" 1993 *THRHR* 454-462; McNab and Mowatt "Family mediation-South Africa's awakening interest" 1987 *De Jure* 41-52.

³⁹² De Jong "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce" 2012 *SLR* 225-239; De Jong "An acceptable, applicable, accessible family- law system for South Africa- Some suggestions concerning a family court and family mediation" 2005 *TSAR* 515-529.

³⁹³ De Jong "Judicial stamp of approval for divorce and family mediation in South Africa" 2005 *THRHR* 95-102; Clark 1993 *THRHR* 460.

supported in this study as the best option for termination of a registered domestic partnership owing to the following characteristics of mediation:³⁹⁴

- (1) Mediation is a socio-legal process and the negotiation process of mediation is facilitated by an impartial and neutral third party while decisions are taken by the parties.
- (2) The mediator is not directly involved in the mediation, however assist parties in reaching a mutual agreement that benefits both parties and their children while focusing on future relations.
- (3) The mediation process is confidential and complies with the law or public policy. The mediation process can also be adapted with the dispute of the parties in order to assist the parties to reach an outcome that meet their needs.

De Jong³⁹⁵ explains that the flexibility of mediation enables the process to solve many of the challenges faced in court by families during separation. Mediation has disadvantages but similar disadvantages are present and can be worse in litigation.³⁹⁶ For instance, unequal bargaining powers during litigation are a feature of an adversarial system. Mediation is more likely to reconcile than heighten the differences between parties.³⁹⁷

Although there is a threat that parties may not feel obliged to abide by their agreement, a method of ensuring parties abide by their agreement could be by ensuring that the mediation agreement is made an order of court. Consequently parties will know that there will be legal consequences or the matter may end up in court should they refuse, fail to reach a settlement or should they not abide by their agreement.³⁹⁸

The different phases of mediation are aimed at renegotiating family relationships and also help parties in maintaining continuity rather than the “winner takes all” approach of adversarial systems.³⁹⁹ Termination of a domestic partnership will not spell the end of the partners’ obligations to each other. Certain obligations will continue upon termination such as the duty of support towards children and maintenance between partners. The maintenance obligations of the partners upon termination will be discussed in the next paragraph.

³⁹⁴ De Jong 2005 *THRHR* 96.

³⁹⁵ *Ibid* at 101-102.

³⁹⁶ De Jong “Opportunities for mediation in the new Children’s Act 38 of 2005” 2008 *THRHR* 630-641.

³⁹⁷ Mediation is less expensive than litigation and is in the best interests of the child owing to the fact that s 28 of the Constitution is taken into account. Mediation also takes the religious and cultural surroundings of families into account (De Jong 2005 *THRHR* 97-99).

³⁹⁸ De Jong 2005 *THRHR* 636-637.

³⁹⁹ De Jong 2009 *THRHR* 278-279.

3.6 Maintenance after termination

Registered domestic partners can enter into a maintenance agreement to be applicable upon termination of their partnership.⁴⁰⁰ Where domestic partners have not reached an agreement regarding post-termination maintenance, they can approach the court for a maintenance order. The court will make an order which it deems just and equitable under the particular circumstances.⁴⁰¹

A registered domestic partner can apply for a maintenance order upon termination even if no provision was made for maintenance or within two years thereafter.⁴⁰² The maintenance order granted by the court may continue for as long as the domestic partner receiving maintenance continues to live, concludes or registers another domestic partnership or registers a civil union, customary or civil marriage.⁴⁰³ When deciding to order payment of maintenance and the amount and nature of the maintenance, the court will consider:⁴⁰⁴

- “(a) the respective contributions of each partner to the registered domestic partnership; the existing and prospective means of each of the registered domestic partners;
- (b) the respective earning capacities, future, financial needs and obligations of each of the registered partners;
- (c) the age of the registered partners;
- (d) the duration of the registered domestic partnership;
- (e) the standard of living of the registered domestic partners prior to the termination of the registered domestic partnership; and
- (f) any other factor which in the opinion of the court should be taken into account.”

Smith⁴⁰⁵ notes that the draft Bill is more restrictive than section 7(2) of the Divorce Act.⁴⁰⁶ The Divorce Act⁴⁰⁷ allows a maintenance order in terms of section 7(2) to terminate only when the indebted spouse dies or remarries. Section 7(2) does not contemplate a situation where the indebted partner concludes a civil union or alternatively registers a domestic partnership. Civil marriage spouses will, however, not be able to claim maintenance after divorce if no provision was made in the divorce order. It is possible under the draft Bill to claim maintenance even when no provision was made for maintenance upon the termination

⁴⁰⁰ CI 18(1).

⁴⁰¹ CI 18(1).

⁴⁰² CI 18(1) and 23.

⁴⁰³ CI 18(1).

⁴⁰⁴ CI 18(2).

⁴⁰⁵ Smith “The statutory domestic partnership cometh” (Family Law 2010) in Atkin (ed) *The International Survey of Family Law* 297-311.

⁴⁰⁶ Act 70 of 1979.

⁴⁰⁷ Act 70 of 1979.

of a domestic partnership. Such a claim can be brought within two years after termination of a registered domestic partnership.⁴⁰⁸ The court will have the power to grant maintenance orders that resemble divorce order maintenance.⁴⁰⁹

It is clear that many of the provisions in the draft Bill will afford better legal protection to registered domestic partners. However, there are also provisions which may not best serve the interest of registered domestic partners such as termination by agreement. The draft Bill also aims to protect domestic partners who may not be able to register their domestic partnerships. The recognition that will be extended to unregistered domestic partners will consequently be discussed in the next paragraph.

3.7 Unregistered domestic partnerships

The SALRC in the 2006 Report had a choice between a *de facto* model and a judicial discretion model to regulate unregistered domestic partnerships.⁴¹⁰ A *de facto* model entails that domestic partners who have not registered their domestic partnership will be awarded with a civil status by legislation as if they had formalised their domestic partnerships.⁴¹¹ Thus unregistered domestic partners will also be afforded legal protection during their domestic partnership. In addition, the domestic partners do not have to be aware of the existence of such legislation to qualify for protection.⁴¹² With the judicial discretion model, domestic partners may attempt to regulate the financial consequences of their partnerships privately or they may approach the court for a just and equitable order with regard to the financial consequences upon termination of their domestic partnership. The judicial discretion model becomes applicable upon the termination of an unregistered domestic partnership.⁴¹³

The SALRC opted for a judicial discretion model as it was submitted that the *de facto* model is difficult to prove. Most importantly, the emotionally and financially weaker partners in domestic partnerships often need protection upon the termination of a domestic partnership. The judicial discretion model was seen as the appropriate model to regulate unregistered domestic partnerships.⁴¹⁴ Unregistered domestic partners will be afforded the opportunity

⁴⁰⁸

CI 18.

⁴⁰⁹

CI 18; Smith 2011 SALJ 565.

⁴¹⁰

See preface to the SALRC 2006.

⁴¹¹

SALRC (2006) 7.2.2-7.2.27.

⁴¹²

SALRC (2003) 10.3.

⁴¹³

SALRC (2006) 7.2.7 and 7.2.9.

⁴¹⁴

Ibid at 7.2.30. The submission of the commission is that, when unregistered domestic partners “opt in” after termination of a domestic partnership or through the death of one of the unregistered domestic partners, the partners will only be “opting in” to be afforded protection of the Act which already existed before the end of their unregistered domestic partnerships. The protection, however, becomes relevant only after the unregistered domestic partnership has ceased to exist. “The most important difference between the *de facto* model and judicial

upon termination of contracting for financial aspects of their domestic partnerships before they approach a court for a just and equitable settlement where there is a dispute.⁴¹⁵

Unregistered domestic partners do not receive automatic protection under the draft Bill. A party to an unregistered domestic partnership can, however, after termination of the domestic partnership “opt in” by applying to a court for the enforcement of some of the consequences of a registered domestic partnership as the draft Bill envisages a default system to unregistered domestic partnerships. The court will then consider appropriate relief on an *ad hoc* basis after considering the following factors:⁴¹⁶

- “(a) the duration and nature of the relationship;
- (b) the nature and extent of the common residence;
- (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the unregistered domestic partners;
- (d) the ownership, use and acquisition of property;
- (e) the degree of mutual commitment to a shared life;
- (f) the care and support of children of the unregistered domestic partners;
- (g) the performance of household duties;
- (h) the reputation and public aspects of the relationship; and
- (i) the relationship status of the unregistered domestic partners with third parties.”

The above list is not a *numerus clausus* and the court can consider any other relevant factor.⁴¹⁷ Before the court can grant the award, it has to ascertain whether either or both unregistered domestic partners have concluded a civil marriage, civil union or registered a domestic partnership with a third party. A domestic partner who is already married will, thus, not be afforded protection under the draft Bill.⁴¹⁸ Emotionally and financially weaker partners who are unable to insist on registration of a domestic partnership will find relief upon termination of their domestic partnership.⁴¹⁹ The consequences of an unregistered domestic partnership will consequently be discussed in the next paragraph.

discretion model is the stage at which the status of marriage like relationship or *de facto* relationship is determined” (SALRC (2006) 7.2.7-7.2.9).

⁴¹⁵ CI 7, 8, 12, 14, 15, 18, 22, 23 and 24.

⁴¹⁶ CI 26(2).

⁴¹⁷ CI 26(3).

⁴¹⁸ CI 26(4).

⁴¹⁹ SALRC (2006) 7.2.41.

3.7.1 Termination

An unregistered domestic partnership can be terminated either by death or separation. Upon termination, one or both partners may approach a court for a maintenance claim, intestate succession claim or a property division claim.

3.7.1.1 Maintenance after death

A surviving unregistered domestic partner may bring an application to court after the death of his or her partner to be awarded maintenance in accordance with his or her reasonable maintenance needs.⁴²⁰ Registered domestic partners will be construed as spouses for purposes of the Maintenance of Surviving Spouses Act,⁴²¹ while an unregistered domestic partner will rely on the court to make an order which the court deems just to provide for his or her reasonable maintenance needs.⁴²²

3.7.1.2 Maintenance upon termination

A domestic partner may apply to court to be awarded a maintenance order upon separation of an unregistered domestic partnership. One or both unregistered domestic partners may, upon separation approach a court to apply for the payment of maintenance, the court may make an order that is a just and equitable.⁴²³ It will be in the discretion of the court to ascertain whether awarding a maintenance order is justified.⁴²⁴ Unregistered domestic partners will rely on the surrounding factors of their domestic partnership as opposed to registered domestic partners who will be afforded the duty of support as soon as their domestic partnership is registered. The maintenance order granted to an unregistered domestic partner lasts for a specific period determined by the court.⁴²⁵ It is uncertain in the draft Bill how long this period will be.⁴²⁶

The court should exercise a wider discretion beyond the *ex lege* duty of support in favour of unregistered domestic partnerships. Thus the maintenance order could be extended to an unregistered domestic partner until the partner concludes a civil or customary marriage, civil union or registers a domestic partnership or is a partner in another unregistered domestic partnership.

⁴²⁰ CI 29(1).

⁴²¹ Act 27 of 1990.

⁴²² CI 29(1).

⁴²³ CI 28.

⁴²⁴ CI 18(1)-(2).

⁴²⁵ CI 18(1).

⁴²⁶ CI 28(1).

3.7.2 Intestate succession

An unregistered domestic partner will be able to bring an application for an intestate succession order. A surviving unregistered domestic partner can further be awarded the intestate succession order even when there is a competing claim from a customary marriage spouse who was married to the deceased.⁴²⁷

The competing intestate succession claims are limited only to a surviving unregistered domestic partner and a surviving customary marriage spouse.⁴²⁸ Thus a surviving unregistered domestic partner will not be entitled to the intestate succession order if the deceased was party to a civil marriage while in an unregistered domestic partnership with the surviving unregistered domestic partner.⁴²⁹

3.7.3 Property division

Unregistered domestic partners can conclude a contract during or after the termination of their domestic partnership to regulate the division of their domestic partnership property.⁴³⁰ The division of property will be left in the hands of the court to make an award that is just and equitable taking into account all relevant factors that existed during the unregistered domestic partnership.⁴³¹ Mediation can provide a solution if domestic partners cannot agree on division. Thus, provision should be made for mediation before domestic partners approach the court for relief.⁴³²

The draft Bill affords registered and unregistered domestic partners similar rights with regard to concluding an agreement to regulate the division of property and also approaching a court for relief where there is no agreement or where the content of the agreement causes dispute or prejudices one of the domestic partners. The factors that the court will consider in awarding a division of property are similar for registered and unregistered domestic partnerships, however registered domestic partners have to attach their domestic partnership agreement or refer to the agreement in their registration certificate otherwise the court will not consider the agreement.⁴³³

⁴²⁷ CI 31(3).

⁴²⁸ CI 31(3).

⁴²⁹ CI 31(3).

⁴³⁰ If domestic partners failed to conclude an agreement regarding property division, the court can be approached for an order to divide the joint, separate or part of the separate property of the partners (CI 32).

⁴³¹ CI 32(1).

⁴³² See par 3.5 above.

⁴³³ CI 22(4) and 32(4).

Unregistered domestic partnerships will be afforded legal protection after termination of a domestic partnership. The draft Bill is a positive step towards regulation of domestic partnerships, however the draft Bill will add to a hierarchy of intimate relationships that already exist in South African family law. The hierarchy will be discussed in the next paragraph.

3.8 A hierarchy of intimate relationships

The common law definition of marriage is still applied despite the fact that it was declared unconstitutional.⁴³⁴ A draft Bill has been drafted to co-exist with all the other intimate relationships. Marriage is regarded as the preferred intimate relationship. All other intimate relationships are regarded as inferior.⁴³⁵ Domestic partners, whether registered or not, will be afforded fewer rights than those accorded to civil marriage spouses. As a result, domestic partners will feel that their intimate relationship is less important than civil marriage. The differences between married and unmarried people will continue to exist even though the Constitution forbids unfair discrimination on the ground of marital status, sex and upholds the right to equality and dignity.⁴³⁶ A hierarchy exist in South African family law on a sociological level that need to be eradicated.⁴³⁷

Bakker⁴³⁸ notes that there are too many different sets of legislation with different procedures that regulates the registration, legal consequences and termination of intimate relationships in South Africa. As a result it is difficult for the ordinary couple on the street to understand which legislation is best suited to formalise their intimate relationship, is less expensive, less formal and which consequences are best for their intimate relationship. When these couples finally understand the consequences of different legislation they are likely to realise that all these intimate relationships have similar consequences upon registration. This leads to the question of why there need to be different Acts and procedures when the legal consequences of formalising intimate relationships are similar?

3.9 Preliminary conclusion

It was stated in the introduction to this chapter that a Bill regulating domestic partnerships has been drafted. The draft Bill might offer domestic partners hope that in future their intimate relationships will be regulated by legislation in the same way as civil marriages, customary marriages and civil unions. There are estates that need to be wound up and

⁴³⁴ *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) par 82.

⁴³⁵ Bakker "Die Civil Union Act, Draft Domestic Partnership Bill en moontlike deregulering van die huwelik" 2009 *JJS* 1-20.

⁴³⁶ S 9.

⁴³⁷ Bakker 2009 *JJS* 18-19.

⁴³⁸ Bakker 2013 *PELJ* 123-127.

many claims that need to be addressed while domestic partners wait for the draft Bill to be promulgated. Despite the proposed draft Bill, domestic partners are still without protection. Progress was made with the publication of the draft Bill but unfortunately nothing further has happened since the draft Bill was published in 2008.

It cannot be disputed that domestic partnerships legislation will afford more legal recognition to domestic partnership than what is currently afforded to domestic partners.⁴³⁹ Amendments were proposed to the draft Bill.⁴⁴⁰ However it should be emphasised that the proposed amendments are made with the purpose of ensuring a more efficient method of regulating domestic partnerships should the draft Bill be enacted. After all, any protection is better and will be appreciated by domestic partners. The draft Bill should be seen as a positive step towards regulating domestic partnerships rather than an answer to challenges faced by domestic partnerships owing to inequalities. A more appropriate approach than the draft Bill will be recommended in the next chapter.

⁴³⁹ See cl 9-11 of the draft Bill and par 2.5-2.6 above.
⁴⁴⁰ Par 3.2-3.5.

Chapter 4

Recommendations

4.1 Introduction

In this chapter recommendations will be made with the aim of finding solutions to the current insufficient regulation of domestic partnerships. The draft Domestic Partnership Bill will solve many of the problems faced by domestic partners, should the draft Bill be passed into law. However, the draft Bill should not be seen as a proper solution to regulating domestic partnerships.⁴⁴¹ The proper solution to regulating domestic partnerships is through a functional approach which will be discussed in this chapter.

Over the years it has been suggested that domestic partners should endeavour to regulate their partnerships through contracts that will enable them to affix some of the invariable consequences of marriage to their partnerships. Contracts, however are not best equipped to afford proper legal protection to intimate partners owing to unequal bargaining positions that exist in intimate relationships.

The terms of ante-nuptial contracts, universal partnership agreements, domestic partnership agreements or registration of domestic partnerships are negotiated by individuals privately.⁴⁴² The state has no role to play. When there is a dispute, the matter is taken to litigation in an adversarial system that does very little to come to the aid of vulnerable partners.⁴⁴³ Many men and women in intimate relationships enter or negotiate contracts already affected by unemployment, dependence, poverty, patriarchy, gender inequality and economically weaker positions. These factors lead to unequal bargaining positions.⁴⁴⁴ The concern for many men and women when signing contracts is shelter and evading poverty.⁴⁴⁵ Such men and women, therefore focus less on the prejudices these contracts bring to them. As a result the terms of a contract concluded often favours the stronger partner.⁴⁴⁶

Furthermore an intimate relationship contract is signed at the beginning of a marriage or domestic partnership. Contracts only reflect the position of the parties at the time the contract was signed. At the beginning of intimate relationships, parties may be less focused

⁴⁴¹ The draft Domestic Partnership Bill will add to an already complex situation regulating intimate relationships in South Africa (Bakker 2009 *JJS* 18-19).

⁴⁴² Bonthuys "Family contracts" 2004 *SALJ* 879-901.

⁴⁴³ *Ibid* at 880.

⁴⁴⁴ Sinclair and Heaton *The law of marriage* 302.

⁴⁴⁵ Despite major strides for gender equality, gender discrimination and patriarchy hierarchies continue to exist. For as long as inequality and patriarchy exist, contracts are not the best form of regulating intimate relationships (Boshoff "Fractured landscape of family law" 2001 *SALJ* 312-328).

⁴⁴⁶ Sinclair and Heaton *The law of marriage* 302.

on the future.⁴⁴⁷ As a result they fail to contemplate unforeseen circumstances. For instance breakdown of a relationship is not contemplated and the consequences thereof are not provided for.⁴⁴⁸

It is clear regulation of intimate relationships through contracts presents problems for partners. As a result intimate relationships should be regulated by an approach that limits discrimination and the lack of free choice to marry. The approach will consequently be discussed in the next paragraph.

4.2 Development of a functional approach

The formal approach where the focus is on the official status of the parties has made way for a functional approach in countries such as Australia and New Zealand.⁴⁴⁹ The formal approach has been criticized for not being in reality with the increasing forms of families that exist outside traditional marriage.⁴⁵⁰

A functional approach focuses on the substance rather than the form of an intimate relationship.⁴⁵¹ According to the functional approach intimate relationships should be afforded legal protection based on the functions they serve rather than focusing on the formalities or the marital status of the partners.⁴⁵² Thus the only difference between marriage and domestic partnerships are public commitment, a marriage certificate and the formalities spouses go through to formalise their marriage.⁴⁵³ All functions served by marriage are similarly served by domestic partnerships. If a marriage is important for providing a stable parent child relationship, permanence, commitment, physical and emotional involvements, then domestic partnerships also serve the same functions. Domestic partners love each other, provide food, shelter and medical care for one another. All the consequences of marriage are extended to intimate relationships that play a similar role as marriage. This approach helps alleviate the financial hardships faced by vulnerable parties and their children upon breakdown of an intimate relationship. This approach opposes the formal approach and the registration system proposed in the draft Domestic Partnership Bill. Inequality makes the free choice to marry or formalise intimate relationships difficult. A registration system proposed in the draft Bill will not benefit weaker parties who do not have

⁴⁴⁷ Bonthuys 2004 *SALJ* 899.

⁴⁴⁸ *Ibid* at 896 and 899.

⁴⁴⁹ Meyerson "Who's in and who's out? Inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa" 2010 *CCR* 295-316.

⁴⁵⁰ *Ibid* at 295.

⁴⁵¹ *Ibid*.

⁴⁵² *Ibid*; Meyersfeld "If you can see, look: Domestic partnerships and the law" 2010 *CCR* 271-294; Goldblatt "*Amod v Multilateral Society Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA)" 2000 *THRHR* 138-144.

⁴⁵³ SALRC (2006) 2.4.63.

the choice to register an intimate relationship or understand the consequence of such registration or of failure to register their domestic partnership.⁴⁵⁴

Meyerson⁴⁵⁵ notes that the Constitutional Court has kept abreast with contemporary changes in family law and refers to a number of Constitutional Court judgments which have used the equality clause to invalidate legislation which did not extend certain spousal benefit to intimate relationships outside traditional marriage such as same-sex domestic partnerships and Muslim marriages. The extension of certain marriage benefits to these intimate relationships is welcomed, however the court have failed to develop a functional approach in the process.⁴⁵⁶ What the Constitutional Court has done is extend spousal benefits in cases such as *Gory* and *Daniels* rather than finding that there was unfair discrimination between married and unmarried couples.⁴⁵⁷ The spousal benefits extended to same-sex domestic partnerships and Muslim marriages have not been extended to heterosexual domestic partnerships.⁴⁵⁸ As a result Meyerson⁴⁵⁹ contends that the Constitutional Court has discriminated against people who have chosen not to marry and those who do not have free choice to marry. Vulnerable domestic partners should be afforded legal protection. Choosing not to marry whether by choice or by circumstances does not mean that a person has chosen not to be afforded legal protection.⁴⁶⁰

Meyerson⁴⁶¹ argues that the approach adopted by the Constitutional Court favours certain intimate relationships, particularly same-sex domestic partnerships and religious domestic partnerships. In *Daniels* the Constitutional Court read the word spouse into section 1 of the Intestate Succession Act⁴⁶² and surviving spouse into section 2(1) of the Maintenance of Surviving spouses Act⁴⁶³ to include a party in a monogamous Muslim marriage.⁴⁶⁴ The choice to conclude a formal marriage was available to such a party but was not told by the

⁴⁵⁴ Meyerson 2010 CCR 296.

⁴⁵⁵ *Ibid* at 297.

⁴⁵⁶ *Ibid*.

⁴⁵⁷ *Ibid*. These developments, however, have happened on a case by case basis. As a result, there are still intimate relationships that are not afforded full legal protection or satisfied with the status afforded to their relationships. For instance, same-sex domestic partners are unhappy with the fact that the Civil Union Act 17 of 2006 is regarded by society as less important than a marriage, while the Recognition of Customary Marriages 120 of 1998 allows only for heterosexual polygynous marriages to be registered. The current regulation of family law in South Africa is insufficient (Scott "From an exclusion law of husband and wife to an inclusionary law of personal unions in South Africa: Is everyone now satisfied" 2012 In confronting the frontiers of family and succession law-*Liber-Amicorum*, Walter Pintens (ed) Verbeke, Scherpe, Declerk, Helms and Sinaeve 1281-1298).

⁴⁵⁸ See 2.1 above.

⁴⁵⁹ Meyerson n 364 at 298.

⁴⁶⁰ Meyersfield 2010 CCR 289.

⁴⁶¹ Meyerson 2010 CCR 298.

⁴⁶² Act 81 of 1987.

⁴⁶³ Act 27 of 1990.

⁴⁶⁴ See par 2.1 above.

constitutional court that they chose not to marry while in *Volks* the “choice argument” was used not to recognise Mrs Robinson as a surviving spouse in terms of section 2(1) of the Maintenance of Surviving Spouses Act.⁴⁶⁵ Meyerson⁴⁶⁶ argues that the reason used to justify the formal approach is based on moral and religious principles. She argues that the law is being used to encourage people to get married by denying those who are not married spousal benefits even when their intimate relationships functions similar to marriage. Religious and moral principles are furthered despite the fact that they are not shared by everyone in a diverse and pluralistic society such as South Africa.

She argues that there are no sufficient reasons to justify the superior status afforded to marriage.⁴⁶⁷ As a result marriage should not be recognised in order to achieve neutrality and treat all intimate relationships equally.⁴⁶⁸ Extending spousal benefits to intimate relationships in certain circumstances shows progress to identify evolving forms of intimate relationships, however this is only a short term solution. A more appropriate solution is to extend all the consequences of marriage to intimate relationships that function similar to marriage.⁴⁶⁹

Coetzee and Louw⁴⁷⁰ note that the functional approach will provide extensive protection to domestic partners. However they oppose the approach on the strength that proving a family nexus is a challenge that may cause the functional approach not to be a success.⁴⁷¹ They pose the question whether a family nexus should be proved before or after determining the existence of a domestic partnership?⁴⁷² The functional approach may not be accepted by everyone who values the institution of marriage for moralistic, religious views and its public commitment, after all marriage creates certainty of proof from the moment it is concluded.⁴⁷³ Thus a functional approach may raise uncertainties with regard to the type of domestic partnership, length of time or the level of commitment and the criteria that should be used to determine whether an intimate relationship is worthy of legal protection.⁴⁷⁴ However it is contended that certainty is not an issue with a functional approach. Functions such as maintaining the household, sharing a home, the duration of a domestic partnership, dependence and the existence of children and any other relevant function should point

⁴⁶⁵ Act 27 of 1990.

⁴⁶⁶ Meyerson 2010 CCR 302.

⁴⁶⁷ *Ibid* at 303.

⁴⁶⁸ Meyerson 2013 AJ 397-400

⁴⁶⁹ Meyerson 2010 CCR 313.

⁴⁷⁰ Coetzee and Louw “Domestic partnerships and “the choice argument” *Quo va dis?* 2014 *PELJ* 2950-2981.

⁴⁷¹ *Ibid* at 2966.

⁴⁷² *Ibid* at 2968.

⁴⁷³ Meyerson 2010 CCR 313-314; Meyersfeld 2010 CCR 289.

⁴⁷⁴ *Ibid* at 292.

towards a family that is worthy of legal protection.⁴⁷⁵ However there are circumstances where a functional approach may not be used, such as where family functions are not performed. An example, is where two or more people are merely sharing a home without being in an intimate relationship.⁴⁷⁶

Intimate partners who want to marry owing to the significance attached to marriage and certainty of proof can still get married. However the state should not confer any status on marriage or have any role in protecting marriage as more important than other intimate relationships.⁴⁷⁷ Religious organisations can be responsible for regulating marriages and have their own rules. Intimate partners can still decide the form of their marriages, such as same-sex or heterosexual, monogamous or polygamous. Partners can further choose the religious or private organisations that endorse the form of marriage or ceremony they prefer. Meyerson's suggestion is supported in this study. The state should not control marriages, partners can still conclude ante-nuptial contracts or any other form of contract to regulate the consequences of their marriage. The marriage certificate or contracts partners conclude will be proof of the existence of an intimate relationship. The state will be involved when there are disputes concerning such contracts.

This approach will also accommodate the autonomy of those who do not want all the consequences of marriage in their relationships, parties should be able to opt out of what Meyerson⁴⁷⁸ refers to as the 'the levelling up regime' which extend all the consequences of marriage to all forms of intimate relationships. She notes that parties should still be free to enter into a contract stating how they would like their property to be divided upon termination of their intimate relationship.⁴⁷⁹ Parties can make provision for maintenance by signing an opt out contract. This will allow parties to preserve their autonomy while also protecting the interest of vulnerable parties who lack free choice to marry.⁴⁸⁰ However it should be clear to partners who have free choice to marry but fail to conclude an opt out contract that when a domestic partnership is started, the law will automatically attach consequences to their relationship even when such partners do not have the intention of committing to such a relationship. The functional approach may encroach on the autonomy of parties who do not want to attach consequences to their intimate relationships; however the encroachment

⁴⁷⁵ Smith 2003 *SALJ* 625.

⁴⁷⁶ Lind 2005 *AJ* 129.

⁴⁷⁷ Meyerson 2010 *CCR* 312-314.

⁴⁷⁸ Meyerson 2013 *AJ* 397; *Volks* par 154. Further see par 2.4.1 above.

⁴⁷⁹ Meyerson 2013 *AJ* 405.

⁴⁸⁰ *Ibid* at 398.

should be justified in order to achieve substantive equality for vulnerable partners in intimate relationships.⁴⁸¹

It is recommended that a functional approach should be adopted to afford domestic partnerships full legal protection. When it is clear that partners perform family functions, it should be an indication that partners are a family worthy of protection.⁴⁸² Courts should determine the existence of a domestic partnership from the functions partners perform within the relationship.⁴⁸³ There should no longer be a need to register or formalise intimate relationships. The approach used by the constitutional court has resulted in the enactment of the Civil Union Act⁴⁸⁴ and the Recognition of Customary Marriages.⁴⁸⁵ However the approach cannot be supported, it only extend marital benefits to other intimate relationships while the status of marriage as an important social institution is kept despite the lack of sufficient reason to do so.⁴⁸⁶

The law should not differentiate between civil marriage and other intimate relationships. If domestic partners love and support each other, there is affection and all the elements of *consortium omnis vitae*⁴⁸⁷ are present, then there is no reason for differentiating between domestic partnerships and a civil marriage.⁴⁸⁸ Heterosexual marriage should not be the hallmark of all intimate relationships in modern South African family law. South African family law should be regulated by the law of general application with similar consequences for all intimate relationships including domestic partnerships.⁴⁸⁹ The decision in *Volks* is not the solution. The current state of family law in South Africa has to be challenged and developed in order to afford equal protection to all intimate relationships. Failure to develop family law would imply that things have stayed the same for intimate relationships such as domestic partnerships in the post-1994 era despite the progress that has been made to develop many areas of family law.⁴⁹⁰

If we take the case of Mrs Robinson in *Volks*, it was clear that Mrs Robinson had been in a domestic partnership with the deceased for a period of 16 years and the facts thereof were

⁴⁸¹ *Ibid* at 407.

⁴⁸² Robinson "The evolution of the concept of marriage in South Africa: The influence of the Bill of Rights in 1994" 2005 *Obiter* 488-504.

⁴⁸³ Goldblatt 2000 *THRHR* 143.

⁴⁸⁴ Act 17 of 2006.

⁴⁸⁵ Act 120 of 1998.

⁴⁸⁶ Meyerson 2013 *AJ* 400.

⁴⁸⁷ in *Grobbelaar v Havenga* 1964 (3) SA 522 (W) at 525D the court referred to the concept of *consortium omnis vitae* as "an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses in a marriage".

⁴⁸⁸ Lind 2005 *AJ* 129.

⁴⁸⁹ Goldblatt 2003 *SALJ* 628.

⁴⁹⁰ Kruger "Appearance and reality: Constitutional protection of the institution of marriage and the family" 2003 *THRHR* 285-291.

not disputed. Mrs Robinson should have been identified as a surviving spouse and afforded the benefits of the Maintenance of Surviving Spouses Act.⁴⁹¹ It would have been preferable had the court not focused on the free choice of the domestic partners to marry when determining whether Mrs Robinson should be identified as a surviving spouse.⁴⁹²

It would have been preferable for the court to follow a functional approach as the court would have focused on the functions Mrs Robinson performed in the relationship. By following a functional approach, the court would have identified that Mrs Robinson and the deceased lived together as man and woman who loved, supported and shared a common home, in a permanent domestic partnership. This should have been sufficient to afford Mrs Robinson legal protection as a surviving spouse in terms of the Maintenance of Surviving Spouses Act.⁴⁹³ This should be the way forward for affording domestic partnerships legal protection. A functional approach should be developed guided by legal pluralism, cultural diversity, a tolerance of difference and social values.⁴⁹⁴ A functional approach will recognise that the choice to marry or register a domestic partnership is difficult to make in South Africa.

4.3 Conclusion

This study has been undertaken with the purpose of answering the question whether domestic partnerships should be afforded full legal recognition in South African law. In light of the fact that there is currently no legislation regulating domestic partnerships while most intimate relationships are regulated by designated legislation. The reasoning for the lack of legal recognition is the fact that domestic partners form relationships outside the law and as a consequence domestic partners are not afforded protection by the law.⁴⁹⁵ It is argued, however, that domestic partnerships resemble marriage in so far as responsibilities, obligations, dependencies and duties of support arise from domestic partnerships.⁴⁹⁶ The problem is that, during and after breakdown of domestic partnerships, partners have no automatic legal protection. Domestic partners are left with no automatic rights to maintenance, duty of support, property, inheritance or any legal recourse against the estate of the other partner.

In Chapter 2, attention was paid to the current regulation of domestic partnerships. In the South African context, there are fewer households that consist of a nuclear family owing to factors that force people into domestic partnerships. Domestic partnerships are seen as

⁴⁹¹ Act 27 of 1990.

⁴⁹² Par 100. See par 1.1 above.

⁴⁹³ Act 27 of 1990.

⁴⁹⁴ De Vos 2004 *SAJHR* 191-192.

⁴⁹⁵ See par 1.1 above.

⁴⁹⁶ See par 2.4.1 above.

immoral by some members of society. Same-sex domestic partners are regulated by specific legislation despite the fact that the choice to marry is open to them in light of the enactment of the Civil Union Act.⁴⁹⁷

The issue of affording protection to domestic partners has come before the Constitutional Court in *Volks*. The approach of the Constitutional Court has been to protect the freedom of a person to make choices about his or her intimate relationship without the law infringing on that choice.⁴⁹⁸ The Constitutional Court in *Volks* has set the precedence that discriminating between married and unmarried people is not unconstitutional.⁴⁹⁹ However this precedence should not be accepted where it affects many vulnerable families in need of legal protection. International instruments refer to the importance of family life and marriage without any preference for marriage.⁵⁰⁰ As a result, it would be preferable that a system that places family life as a foundation and cornerstone of society is developed.

In chapter 3, the draft Domestic Partnerships Bill was analysed to ascertain whether it is the best platform to regulate domestic partnerships. The drafting of the Bill is a positive step towards affording domestic partners legal protection. However the draft Bill has not been promulgated. It is not clear when or whether the draft Bill will become an Act of parliament.

One of the reasons for the drafting of the Bill was to achieve a measure of equality for domestic partners and to afford domestic partners protection similar to other intimate relationships such as civil marriage.⁵⁰¹ Equality has not, however, been achieved. The draft Bill in its current form will not address all of the problems faced by domestic partners neither will it treat registered and unregistered domestic partners equally. It will, however, go a long way towards protecting vulnerable domestic partners.

In chapter 4, recommendations were made on how best to regulate all forms of intimate relationships in South Africa. It was stated that the current regulation of family law in South Africa is unsatisfactory owing to its reliance on contracts. As a result, the solution to the crisis created by comparing all intimate relationships to civil marriage needs to be sought. It is not fair to regulate intimate relationships through a system that does not properly reflect their challenges.

Some of the problems faced by domestic partners such as inequality are not of their own making but are forced on them. The problem in South Africa is that many families want to be

⁴⁹⁷ Act 17 of 2006. See par 2.1 above

⁴⁹⁸ *Volks* par 154.

⁴⁹⁹ See par 1.1 above.

⁵⁰⁰ See par 2.5 above.

⁵⁰¹ See par 3.1 above.

part of a nuclear family and make free choices regarding their intimate relationships. That is, however, made difficult owing to factors mentioned in chapter two.⁵⁰² It is the responsibility of the law to find ways to respond to challenges faced by the vulnerable in society, especially where particular people have been victims of past injustices. The current reaction of the law has been to protect marriage and the autonomy of parties to make choices regarding their intimate relationships.⁵⁰³

In the process, the law has neglected the plight of the vulnerable in a society highly characterized by inequalities. As a result, justice is denied to domestic partners who do not have free choice to marry.⁵⁰⁴ If a person is unable to make a choice to marry, what is the purpose of telling that person they have chosen not to marry and the law cannot protect them?

The conclusion reached in this study is that domestic partnerships should be afforded protection based on the functions they serve. The criteria in South Africa to afford any intimate relationship should, thus, be determined by the functions families serve.⁵⁰⁵ Any enquiry into the marital status or the ability of domestic partners to marry should not form part of the criteria at all. Neither should the law seek to protect the autonomy of individual domestic partners at the expense of ignoring the more compelling plight of vulnerable domestic partners.⁵⁰⁶ South African family law has shown a willingness to acknowledge the diversity, legal pluralism and discrimination faced by South African families with the enactment of the Civil Union Act⁵⁰⁷ and the Recognition of Customary Marriages Act.⁵⁰⁸ In the process, they showed that the concept of marriage is not stagnant but can be evolutionary. There is no argument that should be used to protect marriage at the expense of excluding domestic partnerships.⁵⁰⁹ Domestic partnerships have to be protected, and the answer to challenges faced by domestic partnerships and many vulnerable partners in South Africa is the functional approach. I therefore conclude that the judgment of the Constitutional Court in *Volks* was incorrect. The diversity and plurality of the South African society does not allow for legal protection of intimate relationships to be determined based on the choice argument and the importance attached to marriage.

⁵⁰² See par 2.4 above.

⁵⁰³ See par 1.1 and n 127-128.

⁵⁰⁴ See par 2.4.

⁵⁰⁵ See par 4.2.

⁵⁰⁶ See par 1.1 above

⁵⁰⁷ Act 17 of 2006.

⁵⁰⁸ Act 120 of 1998.

⁵⁰⁹ See n 372.

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Moola v Aulsebrook 1983 (1) SA 687 (N)

Muhlman v Muhlman 1981 (4) SA 632 (T)

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Paxiao v Road Accident Fund 2012 (4) All SA 130 (SCA)

Ponelat v Schrepfer 2012 (1) SA 206 (SCA)

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Pretoria City Council v Walker 1998 (2) SA 363 (CC)

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Snyman v Snyman 1984 (4) SA 262 (W)

S v Makwanyane 1995 (3) SA 391 (CC)

V (also known as L) v De Wet 1953 (1) SA 612 (O)

Venter v Venter 1949 (4) SA 123 (D)

Verheem v Road Accident Fund 2012 2() SA 409 (GNP)

Volks v Robinson 2005 (5) BCLR 446 (CC)

Zulu v Zulu 2008 (4) SA 12 (D)