



COHABITATION RELATIONSHIPS IN SOUTH AFRICA

1 Introduction:

In today's day and age, you will find that more couples are living together without ever formalizing their relationship by way of a marriage ceremony concluded in terms of the Marriage Act¹, Civil Union Act² and the Recognition of Customary Marriages Act³. Instead they elect to cohabit. The traditional nuclear family is no longer the universal norm. Despite a cohabitation relationship looking almost identical to that of a marriage relationship, they do not enjoy any noteworthy recognition or protection by the South African law, irrespective of the duration of the relationship.

Some pieces of legislation, such as the Domestic Violence Act⁴, the Medical Schemes Act⁵, the Compensation for Occupational Injuries and Diseases Act⁶, the Income Tax Act⁷ and the Estate Duty Act⁸ recognises cohabitation as a relationship with legal implications. This is however where the legal recognition ends.

¹ 25 of 1961.

² 17 of 2006.

³ 120 of 1998.

⁴ 116 of 1998

⁵ 131 of 1998

⁶ 130 of 1993

⁷ 58 of 1962

⁸ 45 of 1955

2 Consequences of cohabitation

From the abovementioned it is clear that simply because parties choose not to get married, for whatever reason, they are at a disadvantage. There are several consequences of cohabitation, which will be discussed in greater detail below:

2.1 Maintenance

During the cohabitation relationship, and even upon the termination of a such a relationship, the parties have no maintenance obligation towards each other, other than for maintenance for the children born from the relationship. Upon the death of a party in a cohabitation relationship, the surviving party can also not rely on the provisions of the Maintenance of Surviving Spouses Act⁹ which allows the surviving spouse to institute a claim for maintenance against the estate of the first dying spouse for his or her reasonable maintenance needs until his or her death or remarriage. This stands in stark contrast to a marriage relationship being terminated by either death or divorce as the Divorce Act¹⁰ makes provision for a spouse to claim maintenance upon divorce.

2.2 Intestate Succession

The rules of intestate succession as set out in the Intestate Succession Act are very clear. In the event of there being no valid will, the beneficiaries are, in the first instance, a spouse or descendants or both. In the event of there being neither spouse nor descendants, the estate devolves upon other more distant members of the bloodline. Therefore, when a party in a cohabitation relationship dies without leaving a valid will, his or her partner has no right to inherit in terms of the Intestate Succession Act.¹¹ A partner is not automatically regarded as an heir or a dependant.

⁹ 27 of 1990.

¹⁰ 70 of 1979.

¹¹ 81 of 1987

2 3 *Banking*

In usual circumstance South African banks do not allow parties in a cohabitation relationship to open a joint account. Consequently, an account will have to be opened in one partner's name, only giving the other partner co-signing rights. Therefore, the partner in whose name the bank account is will be liable for any monies owed to the bank in the case of an overdraft or loan, and the monies in the account will be considered to be the asset of that party only.

2 4 *Property rights*

Upon separation of the couple in a cohabitation relationship, the basis for division is strictly according to ownership of the property and the courts have no overriding power to divide it equitably as they may do on divorce. Therefore, the partner who is the owner of the immovable property the parties were living in, is permitted to evict the other partner from the immovable property, and even sell such property without prior notification to the other party.

From the abovementioned it is clear that the law as it currently stands is disappointing, as it does not place cohabitants on the same footing as partners in a marriage or civil union. It must be highlighted that a Domestic Partnership Bill that was published in January 2008, however not yet promulgated. In terms of this Bill, where two people have entered into a domestic partnership agreement, the survivor will be included in the definition of "survivor" in terms of the Maintenance of Surviving Spouses Act, and will also be able to inherit in terms of the Intestate Succession Act. However, until the bill is promulgated, the status of cohabitants in South Africa will remain significantly different from spouses in a marriage and partners in a civil union.

3 Conclusion

The choice not to formalize your relationship does not have to mean that you are unprotected by the law. In order to protect yourself it is advisable to enter into a cohabitation agreement setting out how to regulate various aspects of your relationship, for example the rights and obligations of each party and also the consequences of termination of the relationship. There is no specific requirement regarding what to include in a cohabitation agreement, and consequently the agreement can be drafted in accordance with your needs and ideals.

If you are in a cohabitation relationship without a cohabitation agreement, contact Malan Lourens Viljoen Inc who will be able to assist.

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