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COHABITATION AND LIVING TOGETHER

A family law eBOOK

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This booklet was made possible with funding from Bertus Preller & Associates Inc.

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COHABITATION AND LIVING TOGETHER

1. Cohabitation

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

Cohabitation generally refers to people who, regardless of gender, live together without being validly married to each other. In the past, these relationships were called extramarital cohabitation. Put simply, men and women living together do not have the rights and duties married couples have.

Because their relationship is not recognised by the law as a marriage, the rights and duties that marriage confers do not apply. This is the case irrespective of the duration of the relationship. Therefore contrary to popular belief, the assumption that if you stay with your partner for a certain amount of time a common law marriage comes into existence whereby you will obtain certain benefits is incorrect. In South Africa, cohabitation has become more common over the past few years and the number of cohabitants increases by almost 100 per cent each year.

2. Cohabitation and Legislation

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

Furthermore, there is no obligation on cohabitants to maintain each other and they have no enforceable right to claim maintenance. South African banks normally do not allow joint accounts for cohabitants. An account will usually be opened in one partner's name, but 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 case of an overdraft or loan.

The law as it stands is unsatisfactory, simply because it does not place cohabitants on the same footing as partners in a marriage or civil union. Fortunately, the South African law on cohabitation will soon be rectified by the draft Domestic Partnerships Bill that was published in January 2008. Until the Bill is adopted into legislation, however, the status of cohabitants in South Africa will remain significantly different from spouses in a marriage and partners in a civil union.

3. Universal Partnerships

Although legally cohabitants do not have the same rights as partners in a marriage or civil union, the South African courts have on occasion come to the assistance of couples by deciding that an express or implied universal partnership exists between them.

A universal partnership exists when parties act like partners in all material respects without explicitly entering into a partnership agreement. In these cases, where the relationship breaks down, the court awards a share of the assets acquired during the relationship to each party. To prove a universal partnership is very difficult and certain requirements must be satisfied:

- the aim of the partnership must be to make a profit;
- both parties must contribute to the enterprise;
- the partnership must operate for the benefit of both parties; and
- the contract between the parties must be legitimate.

To succeed with a universal partnership claim, it must be proved that:

- both partners contributed to a specific joint venture in some form or other through their labour, capital or skill;
- the venture was conducted for the benefit of both partners;
- the venture was conducted for profit; and
- a universal partnership came into existence.

In one matter before the Supreme Court of Appeal, it was held that the man and woman in question, who had lived together as husband and wife for nearly twenty years, had tacitly entered into a universal partnership in which the female partner had a 30 per cent interest. She was thus awarded an amount equal to 30 per cent of her partner's net asset value as at the date when the partnership came to an end.

4. Legislation Applicable To Cohabitation

Universal partnerships aside, there is some legislation that places cohabitation and marriage on an equal footing:

- Cohabitation is recognised under the Domestic Violence Act.
- The Medical Schemes Act 131 of 1998 defines a dependant to include a 'partner'.
- In terms of the Income Tax Act and the Estate Duty Act, cohabitants are treated as spouses for the purposes of tax legislation, and the word 'spouse' is defined to include a permanent same-sex or heterosexual relationship.
- Either partner in a cohabitation relationship may name the other as a beneficiary in a life-insurance policy. The nomination will, however, have to be clear, because a clause in an insurance policy that confers benefits on members of the insured's 'family' may cause problems. And if a policy, for instance a car insurance policy, covers/excludes passengers who are members of the insured's family, this provision does not operate to the benefit/detriment of the insured's partner.
- The law does not distinguish between married and unmarried parents in regard to the obligation to maintain children. Decisions regarding care and contact are based on what is in the best interests of the child. Children are protected if the couple is not married since both biological parents are responsible for the maintenance of their children. The father and mother are both still liable for maintenance if the couple splits up. This will not apply to same sex couples as both cannot share a biological link with the child.
- A domestic partner may receive pension fund benefits as a nominee. A domestic partner may also receive pension benefits as a factual dependant if he/she qualifies as such under the definition of 'dependant' in the regulations or conditions of that particular fund. A domestic partner will, however, not be entitled to their partner's pension interest on termination of their relationship.
- Under the South African Compensation for Occupational Diseases Act, 1997, a surviving domestic partner may claim for compensation if their partner died as a result of injuries received during the course of work, if at the time of the employee's death they were living as 'husband and wife'.

5. The draft Domestic Partnerships Bill, 2008

The Law Reform Commission conducted research and the draft Domestic Partnerships Bill was published in January 2008. When the Bill comes into operation it will:

- recognise the legal status of domestic partners;
- regulate their respective rights and obligations;
- protect their interests and those of third parties on termination of the cohabitation partnership; and
- set out how the financial relationship between the domestic partners must be resolved when the relationship comes to an end.

In terms of the Bill, there is a differentiation between a registered domestic partnership and an unregistered domestic partnership. Both options are available to opposite-sex and same-sex partners.

A registered domestic partnership is a relationship between two adults that has been registered as a domestic partnership under the (future) Act.

Partners entering into such a partnership make a formal commitment, which gives them some of the benefits that married couples have in conjunction with legal certainty as to their rights and obligations.

They will have to comply with certain formalities in order to terminate the partnership.

An unregistered domestic partnership is where two adults, not related by family, live together as a couple (cohabit) but do not register their relationship under the (future) Act. At the moment, the law does not protect such relationships, no matter how long the parties have lived together.

The Bill, however, will give some help to couples whose unregistered domestic partnership ends as a result of separation. In such cases, an unregistered partner can apply to a court for a maintenance order, an intestate succession order or a property division order.

Such an application must be made within two years from the date when the relationship ended.

As mentioned, unregistered partners do not have a legal duty to maintain each other. A court may, however, make an order for the payment of maintenance by one partner to the other for a specified period.

The court will look at:

- the age of the partners;
- the length of the domestic partnership;
- the standard of living of the partners before separation;
- the applicant's ability to support him/herself adequately where he/she also has custody of a minor child of the domestic partnership, where 'child of a domestic partnership' includes:
 - any child born from the relationship;
 - any child of either domestic partner;
 - any child adopted by the domestic partners jointly; and
 - any other child who was a dependant of the domestic partners;
- the personal contributions of each partner to the domestic partnership, where 'contribution' means:
 - direct or indirect financial and non-financial contributions; and
 - contributions made to the welfare of the other partner and the family;
 - the current and future income of each partner;
 - the earning capacity, future financial needs and obligations of each partner; and
 - whether there is another existing unregistered domestic partnership or unregistered customary marriage.

6. Cohabitation Agreements

Life partners (regardless of their sex) are permitted to enter into a contract similar to an antenuptial contract that regulates their respective obligations during the subsistence of their union and the (patrimonial) consequences of the termination thereof. Such agreements are sometimes referred to as cohabitation contracts or domestic partnership agreements.

It's becoming more common for partners in a cohabitation relationship to draw up a contract. Such an agreement will usually contain regulations regarding finances during the existence of the cohabitation relationship and deal with the division of property, goods and assets upon its termination. Parties may even include an express provision for the payment of maintenance upon termination. If one partner refuses to follow the agreement, the other partner can approach a court for assistance. In most cases, a court will enforce the agreement. Cohabitants who fail to draw up a cohabitation agreement or contract will have no legal protection, unless they can prove the existence of a universal partnership.

The contents and nature of a cohabitation agreement will depend on the needs of the parties. The parties may include any provision in the agreement that is not illegal, against the morals of society or contrary to public policy.

7. When the relationship ends

7.1 Claiming back

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

Cohabitants cannot reclaim monies that they spent on maintaining their partner during the relationship, unless they can make out a case for unjust enrichment. Similarly, donations made between partners in a cohabitation relationship cannot be claimed back by the donor.

There is no law that allows for a person's pension assets to be transferred in a cohabitation partnership. A cohabitation agreement will have no effect either, as it would not be enforceable against the pension fund. Even those who are able to prove the existence of a universal partnership and a joint estate cannot share in their partner's pension assets on termination of the relationship, as is the case with people who have registered their unions in terms of the Marriage Act or the Civil Union Act. It still needs to be decided by our courts whether or not this amounts to discrimination on the basis of marital status, especially since cohabitants can be awarded these assets on the death of their partners.

Cohabitants also cannot bind their partners to contracts with third parties for household goods.

7.2 Property

A partner may apply to court for an order to divide the property of the other partner in a fair manner. The partner who applies for the order must be able to show that he/she contributed, directly or indirectly, to the maintenance or increase in the other partner's separate property during the relationship.

7.3 Owned property

In the absence of a cohabitation agreement or a proven universal partnership, private property acquired by the cohabitants prior to their relationship belongs to the partner who originally acquired it and no community of property can be established. It therefore follows that a cohabitant who is not the owner of the property has no special right to occupy the common home. Cohabitation per se does not give rise to automatic property rights, but the ordinary rules of the law of contract, property and unjustified enrichment might be invoked by cohabitants to enforce their rights.

In terms of the Domestic Violence Act, a right of occupation is conferred upon a cohabitant. The Act speaks of 'parties to a marriage' but deems this expression to include men and women living together as husband and wife. The Act also provides remedies for violence, including orders preventing the owner of the common home from entering or living in it, and from ejecting the non-owning partner.

Similarly, if there is no cohabitation agreement or proven universal partnership between the cohabitants, property bought during the relationship will belong to the purchaser thereof, unless it can be proven otherwise.

When a property is co-owned and registered in both cohabitants' names, they each have an undivided share in the property and are joint legal owners of the property. They are also both liable for the expenses and losses associated with the running and upkeep of the property. The mortgage bond will be in both their names, thus they will be jointly and severally liable for paying the bond. If one of the cohabitants paid more than his/her share of the expenses, the difference may be recovered from his/her partner.

If one partner defaults on his/her share of the monthly bond installments, the bond holder can either obtain a judgment against both cohabitants for the full amount outstanding on the mortgage bond, or a court order to force sale of the property to cover the debt.

If partners who are separate homeowners decide to live together, usually one will sell his/her home and move in with the other. If one partner gives up his/her property and over the years pays the proceeds of the sale towards the other partner's property or the new family, or invests in the new joint household in any way, when they split up, the other partner will be entitled to keep the house and, in the absence of an agreement, the non-property owning partner may be left with no home. A partner may claim against the other on the basis of unjustified enrichment if he/she made a genuine financial contribution, for example where both contributed jointly to the purchase of a house but it was registered in only one of their names. Unjustified enrichment is the general principle that one person should not be able to benefit unfairly at the expense of another.

When the property is in both partners' names, neither can evict the other from the property. One cohabitant may, however, approach the court to terminate the joint ownership and divide the property in cases where the cohabitants can't agree. The court will normally appoint a receiver or liquidator who will dispose of the property by way of a private sale or public auction.

The proceeds from the sale, minus the receiver or liquidator's costs and expenses and those of the auctioneer or estate agent, will be divided between the cohabitants according to their respective shareholding. If one partner can prove that he/she contributed towards any improvements and should therefore receive a greater share, he/she may claim unjustified enrichment.

So if one partner contributed more towards the maintenance and upkeep of the property, then he/she will be able to claim such payments in addition to his/her share. The court has a wide discretion and may even award the property to one partner subject to the payment of compensation to the other. If, however, the property is registered in only one cohabitant's name, the other partner has no claim or right to the property, and may be evicted, although is entitled to reasonable notice. In addition, the cohabitant who owns the property can sell it without notifying the other.

In a similar vein, if the cohabitants acquired goods together, they both have a legal right to such goods. Upon termination of the relationship, if the couple is unable to agree how to divide the goods, either may approach the court to institute a division of the assets. In such cases, the court will normally appoint a receiver or liquidator to sell the assets and pay the proceeds to the parties. The court normally has a wide discretion and will make an order that is fair and equitable under the circumstances.

7.4 Leased property

If cohabitants enter into a joint lease, they will be jointly liable for the rent. Each of the cohabitants is only liable for his/her share of the rent. If the lease agreement states that they are both jointly and severally liable, then they each may be liable for the whole amount of the rent. Where the relationship is terminated before the lease has expired, the parties will have a deadlock if they cannot decide who is to remain in the home. In this event, they both have a right to remain in the home.

If they do decide, and the lease agreement creates joint and several liability, if the cohabitant who remains defaults on rent payments, the lessor will have a claim for full payment against both parties. Where the cohabitants decide between themselves that one partner will be indemnified from further liabilities to pay rent, such an agreement will only be valid and binding between the two of them. The lessor may still hold both of them liable for rent payment.

In cases where the lease agreement is signed by only one partner, the non-tenant partner has no legal rights and responsibilities, and is therefore not liable to pay rent. However, he/she also has no security of tenure and can be evicted by the tenant partner if the relationship fails. Note that where the lease agreement contains a clause prohibiting occupation of the premises by any person other than the tenant, the lessor has the right to terminate the lease if he/she discovers that the tenant is cohabiting.

8. Cohabitation and death

8.1 Inheritance

There is no right of intestate succession (when someone dies without a will) between domestic partners, no matter how long they have lived together. A partner is not automatically regarded as an heir or dependant. The rules of intestate succession as set out in the Intestate Succession Act, 1987, are 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 no spouse or descendants, the estate devolves upon other more distant members of the bloodline.

If the surviving partner is not named in a will, he/she will be faced with the monstrous task of having to prove his/her specific contribution to the joint estate before entitlement will be forthcoming. Proving actual contribution is often extremely difficult, especially when a partner has died. Litigation is usually lengthy, costly and unwelcome, particularly at a time already fraught with emotional trauma. This problem is exacerbated if the deceased had not divorced a previous spouse. In law, the first spouse clearly has the leverage to proceed and claim the entire estate. There is no obstacle to making specific provision for a domestic partner in a will. A person is entitled to leave his/her estate to a partner even to the exclusion of his/her spouse. The testator will, however, have to make it plain that he/she wants to benefit the domestic partner.

8.2 When property is involved

When the cohabitants are joint tenants, a cohabitant has the right to remain in the leased property after the death of his/her partner for the duration of the lease. The surviving partner will be liable for the entire rent. When a property is registered in both cohabitants' names and one of the partners dies, his/her share in the property will form part of his/her estate. It is advisable that partners each bequeath their share to the other in their will. If one of the partners dies without a valid will or bequeaths his/her share to someone else, the surviving partner will have no claim on the deceased's share of the property.

8.3 In the absence of a valid will

When a cohabitant dies without leaving a valid will, the surviving partner will have absolutely no right to inherit under the Intestate Succession Act. In such a case, the deceased's estate will devolve to his/her children. If there are no children, the estate will go to his/her parents or to the nearest blood relative if the parents are deceased.

8.4 Accidental workplace death

In terms of the Compensation for Occupational Injuries and Diseases Act 113 of 1993, a cohabitant may have a claim if his/her partner dies as a result of injuries sustained during the course of his work or employment, if the surviving cohabitant can prove that he/she was wholly or partly financially dependent on the deceased. This claim can only succeed if it is lodged at the time of the accident, and in the absence of a legal spouse.

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