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**KNOW YOUR RIGHTS**

**A simplified guide to  
marriage and relationships**

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WOMEN'S LEGAL CENTRE

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## INTRODUCTION

In a diverse society like South Africa there are many forms of relationships between people. People enter into civil marriages, customary marriages, same sex marriages, and domestic partnerships (living together).

While civil marriages have always been recognised and fully protected by the law, this was not true for all types of relationships. Recently customary and same sex marriages have been recognised by the law. Religious marriages have been recognised by the courts in some situations, and domestic partnerships have no legal protection. Many people are in relationships that have no legal protection, and others are in relationships that are recognised by the law but they do not know what their rights are. This can lead to economic hardship, particularly for women, when the relationships end.

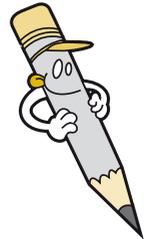
This booklet is intended to provide basic information on the different types of marriages and relationships and the law that goes with those marriages or relationships. We hope the information in this booklet will make it possible for people to assert their rights and decide what kind of relationship they want to enter into.

## HOW TO USE THIS BOOKLET

**From the Press:** Throughout this booklet we use news clips to illustrate the everyday realities of disputes when relationships and marriages end. We hope these examples will help you to realise the importance of taking steps to protect yourself when you decide to enter into a marriage or a domestic partnership. News clips will be highlighted by this picture of a talking newspaper.



**Comments:** We use comments when a piece of information is very important or easy to misunderstand. Important information will be highlighted by this picture of a pencil.



**Definitions:** You will find definitions of legal words on the side of each page. If a word is unfamiliar to you, please read the explanation. Definitions will be highlighted by this picture of a lightbulb.



## USE THIS BOOKLET TO

1. Learn about your relationship rights.
2. Learn your rights when a marriage or domestic partnership ends.
3. Know where to go for help.
4. Help a friend, relative, neighbour or colleague by sharing the information in this booklet or lending them a copy to read.

# **CHAPTER 1:**

## **Civil Marriages**

### **What is a civil marriage?**

A civil marriage is a marriage that is entered into in terms of the Marriage Act. Civil marriages are often entered into at churches, the Department of Home Affairs and other places too. There are three types of civil marriages: marriage in community of property; marriage out of community of property; and marriage out of community of property with accrual. We explain more about these different types of civil marriage below.

### **What are the requirements for entering into a civil marriage?**

Both people who are getting married must consent to entering the marriage and should both be 18 years of age. If they are under 18 years of age they need to have the permission of their parents or guardians. If their parents or guardians refuse to consent they can apply to the High Court for consent.

### **Who can preside over a marriage ceremony?**

Many different people are authorised to preside over wedding ceremonies in terms of the Marriage Act. These include ministers of religion, or any person holding a responsible position in any religious denomination or organisation and designated officials from the Department of Home Affairs.

### **How do I choose the best type of marriage for me?**

Most women have some fears when they are about to get married but few take the time to understand the legal consequences of the marriage they are entering. To choose the right kind of marriage for yourself, you need to understand the different types of marriage and different legal consequences they have. On the next page, we give you some more information about the different types of civil marriages.

# Marriage in Community of Property



## What does it mean to be married in community of property?

Marriage in community of property, creates one joint estate for the persons in the marriage. This means that everything that a husband and wife own, including their debts before they got married is combined into one joint estate. This is the most common type of marriage and is automatically applied by the law unless the parties do a contract to change it.

**Insolvent:** when you owe more money than you earn and someone that you owe money to applies to court to sell your property.

## What happens if my husband becomes insolvent?

A marriage in community of property can be risky if your husband does not pay his debts. If there is a court order against him, your joint estate can be lost.

**Spouse:** one of the parties to a marriage

**Joint estate:** the combined property and debts of the spouses

## If I buy property with my own money, is that still part of the joint estate?

Even if you buy a property on your own and carry all the financial responsibility for it, that does not change the legal status of the marriage you entered. If you are married in community of property the other spouse is automatically entitled to a 50% share of the asset.

## Do all the assets form part of the joint estate?

Certain assets may not be included into the joint estate. For example, if you receive an inheritance and the will that gives you the inheritance says that it should not form part of the joint estate, then that property cannot become part of the joint estate.



## Marriage out of Community of Property

### **Out of community of property:**

Each party keeps their individual property and is responsible for their own debt. Commonly referred to as “what is mine is mine and what is yours is yours”

### **Ante-nuptial contract:**

Is the contract that parties sign before they get married where they say that they don't want to have a joint estate.

### **Creditors:**

People that you owe money to.

### **Interpleading procedures:**

Where you ask the court to let you join in the case to prove that your property should not be taken to pay your spouse's debts.

### **Attach:**

The Sheriff of the court takes your property to be sold to pay your debts.

### **What is marriage out of community of property?**

In this kind of marriages the partners sign an ante nuptial contract that stipulates what each party's estate consists of when they first get married. After the marriage, the estates of the parties remain separate.

### **Does this type of marriage protect my estate if my husband does not pay his debts?**

If you are married out of community of property, your estate is your own. No creditors or other third parties can make any claim on your estate for your husband's debts.

### **What happens if my husband fails to pay maintenance to his ex-wife and they attach my assets?**

You must inform the sheriff that the property belongs to you and enter interpleading procedures in the magistrates court where the order to attach the goods was made. You must prove to the court that the attached goods belong to you, by giving a sworn statement to the court. You also need to prove what you say in your affidavit, by giving receipts, contracts, or other paperwork.

# Marriage out of Community with Accrual



## What is accrual and when does it apply?

Accrual is a way to ensure both parties in a marriage are entitled to a fair share of the estate once the marriage comes to an end, through divorce or death of a spouse.

The accrual system in South Africa basically operates as follows:

1. At the beginning of the marriage the financial value of each party's estate is established and recorded;
2. At the date of divorce or death, the growth value of the estate is recorded;
3. The total difference in value between the larger and smaller estate is recorded; and
4. The larger estate must pay out to the smaller estate half of the difference.

The accrual system does not apply automatically to marriages contracted out of community of property. If you want the accrual system to apply to your marriage, it is very important that you say this before the marriage is performed.

## Is it possible to change the system of property governing a marriage?

Yes, spouses can apply to court to have the proprietary consequences of their marriage changed. This application must be made by both parties, and should set out good reasons why the parties are bringing the application. The applicants must prove that they have notified all their creditors, and show that no one will be disadvantaged by the court's decision to change the proprietary consequences of the marriage.

## Is it expensive to change the matrimonial property system?

This application is generally fairly expensive. You will have to pay court fees, lawyers fees and the costs of advertising your intention to change matrimonial property system in the newspapers and Government Gazette (the official government newspaper).

### **Accrual:**

When the spouses keep their own property but agree to share what they acquire together in the marriage.

### **Proprietary:**

Involving property



### **What happens when a marriage ends in divorce?**

When a couple no longer wants to live together as husband and wife, they can file for a divorce. A divorce is a legal process by which a court dissolves the marriage so that it no longer exists in law.

#### **Irretrievably:**

Means the marriage cannot be saved.

#### **Habitual criminal:**

A person who regularly commits crime

### **What are the grounds for a divorce?**

When the marriage has broken down irretrievably and there is no reasonable chance of reconciliation between the partners.

### **How do I prove to the court that my marriage has broken down irretrievably?**

Any of the following counts as proof of the irretrievable breakdown of a marriage.

1. The couple is no longer living together as husband and wife for a period of time.
2. Where one of the spouses has had an intimate (sexual) relationship with a third party;
3. One of the spouses has deserted the marital home;
4. The relationship has broken down due to physical , verbal and/or psychological abuse by one of the spouses;
5. Where a spouse suffers from an alcohol or drug addiction;
6. If one spouse is imprisoned, after being declared a “ habitual criminal”
7. There is no longer love, affection and care between the spouses.

### **If my spouse is mentally ill or is continuously unconscious can I divorce him?**

Yes, you would have to prove to the court that he was admitted to a mental institution for two years without any hope of recovery.

If your spouse is unconscious, you need to show that he or she was continuously unconscious for a period of six months without any hope of recovery.

### **Where should I go to obtain a divorce?**

Most of the time, individuals go to the High court to obtain a divorce. More recently the government has created the Family Court to make it easier for people to get legal services.

### **Do I need legal representation in the family court?**

No, a couple can decide to do without legal representation. If the parties do this, the costs of the divorce are less. Because the procedures are less complicated, a divorce can be finalized quite quickly. However, if there are children involved, the process may take longer to complete because the court has to look after the welfare of the children.

### **Where are the family courts based?**

1. At Cape Town and Mitchell's Plain, in the Western Cape;
2. At King Williams Town and Port Elizabeth, in the Eastern Cape;
3. At North East Divorce Court in Durban; and
4. At the General Divorce court in Ferreirasdorp, Gauteng.

The contact details of the family courts are printed at the back of this booklet.

### **What documents do I need, when going to the family court?**

1. Certified copy of your marriage certificate;
2. Certified copy your identity document ;
3. Certified copy of your spouse's identity document ;
4. Certified copy of the birth certificates of your children; and
5. R20 for a revenue stamp to be stuck on your divorce summons.

### **Will the court make a finding on custody and maintenance issues in respect of the children?**

Yes, the family court is mandated to decide cases concerning family law, including maintenance, child custody and access to the children.



#### **Custody:**

Physical control over the child, supervising the child's daily life

#### **Access:**

The right to spend time with the child

#### **Guardian:**

The right to take legal decisions for the child. Both parents have guardianship of a legitimate child born of the marriage. some decisions require both parents consent such as adoption, the removal of a child from the country, selling the immovable property of a child (such as a house).

#### **Certified copy:**

A copy that a police officer or commissioner of oaths has stamped to confirm that it is a true copy of the original document.

# Table Of Rights For Civil Marriages

Law	Marriages in community of property	Marriages out of community of property
Privacy	Spouses do not have to testify against one another in criminal proceedings.	Spouses do not have to testify against one another in criminal proceedings.
Common Home and Other Property	Spouses are entitled to some portion of the joint home, and during the marriage can only be evicted in exceptional circumstances.	Spouses are entitled to whatever assets they have brought into the marriage – this may or may not include some portion of the joint home. During the marriage spouses can only be evicted from the shared home in exceptional circumstances.
Pension schemes	Pension schemes often provide benefits to the spouses.	Pension schemes often provide benefits to the spouses.
Medical schemes	Medical schemes are required to cover spouses.	Medical schemes are required to cover spouses.
Insurance	Insurance coverage automatically covers spouses of the insured.	Insurance coverage automatically covers spouses of the insured.
Duty of support	Spouses have a duty to support each other.	Spouses have a duty to support each other.
Children	Both parents are equal guardians of the child.	Both parents are equal guardians of the child.
Immigration	Both spouses are given the same benefits under immigration law.	Both spouses are given the same benefits under immigration law.
Inheritance	If a spouse dies without a will, the surviving spouse is entitled to a share in the property of the deceased.	If a spouse dies without a will, the surviving spouse is entitled to a share in the property of the deceased.
Maintenance	If a spouse dies, her/his will must sufficiently provide for the surviving spouse according to her/his means. If this is not the case, the surviving spouse can claim maintenance from the estate.	If a spouse dies, her/his will must sufficiently provide for the surviving spouse according to her/his means. If this is not the case, the surviving spouse can claim maintenance from the estate.
Occupational injury or disease	Spouses are entitled to compensation.	Spouses are entitled to compensation.
Protection against violence	Spouses are protected against domestic violence.	Spouses are protected against domestic violence.

## CHAPTER 2: Customary Marriages



### What is a customary marriage?

A customary marriage is one according to the traditional customs and culture of South Africa's indigenous people.

#### **Implementation:**

The date the law came into effect.

### Are customary marriages legally recognised?

In terms of the Recognition of the Customary Marriages Act of 1998, Parliament provided for the legal recognition and protection of customary marriages. This Act came into effect on 15 November 2000.

#### **Legally valid:**

Recognised and protected by the law

### What if I got married before the law was passed?

Your marriage will still have legal recognition and protection if it complies with the customary law and was still in existence after the implementation of the Act. If your spouse died or you got divorced before the Act came into force, your marriage is not protected by this Act.

#### **Monogamous:**

There are only two parties to a marriage, neither spouse has another husband or wife.

#### **Perpetual minor:**

Like a child forever in law, you need your spouse to enter into a contract for you



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### FROM THE PRESS

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#### SCA victory for women in customary marriages

The Supreme Court of Appeal has ruled that the Road Accident Fund treat women who have been married in customary marriages the same as those married under the Marriage Act. According to a report on the *Legalbrief Today* site, the SCA ordered the state to review provisions still existing in SA law that preclude support claims. Seven years ago, the applicant – who lost her husband in a road accident – lodged a claim for loss of support with the Road Accident Fund. **Her claim was refused by the fund on the basis that her husband had previously married another woman in terms of the Marriage Act, thereby nullifying her own marriage.** She challenged this decision in the Cape High Court and lost on the basis of remnants of apartheid legislation still on the statute books. The Recognition of Customary Marriages Act came in effect in 2000, only months after her husband's death. Jennifer Williams, Director of the Women's Legal Centre, an *amicus curiae* in the proceedings, said the ruling was 'a victory for women married in terms of customary law'. The matter also throws into sharp relief the moral reasoning behind the tendency to give civil marriages primacy over customary marriages. This approach impacts negatively on women married under customary law as they are deprived of the rights that spouses married under civil law have.' The President of the SCA, Judge Craig Howie, said the agreement had 'tied up all the loose ends'

Legalbrief 22 November 2007



**Polygynous marriage:**

Where a man may marry more than one woman

**Equitably:**

Fairly and equally

**What are the requirements for entering into a customary marriage in terms of the Act?**

There are three conditions for a customary marriage to be legally valid. First, both the people getting married must be over 18. Second, they must both agree to be married under customary law. Third, their marriage must be celebrated according to the prevailing customary law of their community.

**Does the law distinguish between customary marriages entered before and after the implementation of the act?**

Yes, there are different legal implications. Women married before the implementation of the Act fall under the customary law prevailing at the date the marriage was concluded. This may mean that these women are not afforded equal status and capacity in law. As a result these women are not able to own or control property and are treated as perpetual minors. The Women's Legal Centre is advocating for this to be changed in line with the Constitution.

**Women married after the implementation of the Act, are automatically afforded equal status and capacity. They cannot be subjected to the husband's control and may exercise their autonomy, as they desire.**

Monogamous customary marriages are automatically in community of property unless the parties do a contract stating otherwise. If a man wishes to enter into another customary marriage (polygynous marriages) he must apply to court with a written contract stating how the property in all the marriages will be regulated. The court can order the immediate division of the property of the first marriage.

**May a women married before the implementation of the Act, have her customary marriage governed by the provisions of the Act?**

Yes, the Act makes provision for these women to change the legal consequences of their marriage in order to create equal status and capacity for both the husband and wife. The parties must apply to court stating good reasons for the change and show that no third person will be prejudiced.

### **Does the act make provision for polygynous marriages? If my husband wants to take another wife, how will the law protect me?**

The Act does allow a man to enter into multiple marriages. However, this has to be done in accordance with the provisions of the Act. The Act stipulates that in the event that a man wishes to enter into a polygynous marriage he has to apply to the court for permission. In his application he must set out the property systems for all of his wives. All interested parties must be represented in the application, particularly the existing and future wives. The court must consider the circumstances of the existing spouse(s) and family members and ensure that the contract fairly divides the existing marital property. The court has the power to accept, add a condition or refuse to accept the contract. This provision is intended to protect all wives, children and family members.

### **How do I go about terminating my customary marriage?**

Initially customary marriages were dissolved by a negotiated agreement between the spouse's families. Where the families could not reach a resolution, the traditional leaders and the courts intervened with a limited role of achieving a satisfactory outcome.

With the implementation of the Act, courts have unfettered power to dissolve customary marriages. Women now have the same rights as men to institute divorce proceedings. The courts must be very careful when they dissolve polygynous marriages. The court must ensure that property is divided fairly and must take into account all other family members involved. The court must pay particular attention to the fact that what appear to be the assets of the husband, may indeed be the assets of the wives, children or family members.

### **What powers do the courts have?**

The court has the power to determine the custody of the children and order the payment of their maintenance. Additionally, the court has the power to divide the marital assets and order the payment of maintenance to a vulnerable spouse.

## Table Of Rights for Customary Marriages

Law	Rights given to spouses in civil marriages	Rights given to customary marriages entered into before Recognition of Customary Marriages Act (RCMA)	Rights given to customary marriages entered into after RCMA
Privacy	Spouses do not have to testify against one another in criminal proceedings.	Same as civil marriage	Same as civil marriage.
Common Home and Other Property	Spouses are entitled to some portion of the joint home, and during the marriage can only be evicted in exceptional circumstances.	Customary law will apply.	Same as civil marriage.
Pension schemes	Pension schemes often provide benefits to the spouses.	Same as civil marriage.	Same as civil marriage.
Medical schemes	Medical schemes are required to cover spouses.	Same as civil marriage.	Same as civil marriage.
Insurance	Insurance coverage automatically covers spouses of the insured.	Same as civil marriage.	Same as civil marriage.
Duty of support	Spouses have a duty to support each other.	Customary law will apply. The duty of support in polygynous marriages has been recognised by the courts at least in respect of claims against the Road Accident Fund.	Same as civil marriage.
Children	Both parents are equal guardians of the child.	Same as civil marriage.	Same as civil marriage.
Immigration	Both spouses are given the same benefits under immigration law.	Same as civil marriage.	Same as civil marriage.
Inheritance	If a spouse dies without a will, the surviving spouse is entitled to a share in the property of the deceased.	Customary inheritance scheme will apply. However, the courts have ruled that inheritance rules that exclude women are unconstitutional.	Same as civil marriage.

<b>Maintenance</b>	If a spouse dies, her/his will must sufficiently provide for the surviving spouse according to her/his means. If this is not the case, the surviving spouse can claim maintenance from the estate.	Customary maintenance scheme will apply.	Same as civil marriage.
<b>Occupational injury or disease</b>	Spouses are entitled to compensation	Same as civil marriage.	Same as civil marriage.
<b>Protection against violence</b>	Spouses are protected against domestic violence.	Same as civil marriage.	Same as civil marriage.

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## **CHAPTER 3:** **Religious Marriages**

Religious marriages are marriages done in terms of religious rites, such as Islamic and Hindu marriages. Only Islamic marriages have been given some recognition by the courts and we will discuss these marriages in more detail. There is no law in place recognizing religious marriages.

### **What is an Islamic marriage?**

An Islamic marriage is a marriage entered into in accordance with Islamic religious rites.

### **Is an Islamic marriage recognized in South African law?**

No.

### **What are the property consequences of an Islamic marriage?**

The marriage is regarded as being out of community of property. The husband and the wife's estate remain separate after the date of marriage. Since the law does not recognize the marriage the accrual system does not apply.



**De facto:**

In fact

**Intestate:**

Dying without leaving a will

**Deceased estate:**

The property of the person who died

**Is there any legal protection for people entering into Islamic marriages?**

There is limited protection. For instance, spouses in an Islamic marriage may call upon a maintenance court to obtain maintenance from the other spouse. However, this duty of support ends if the spouse gets divorced.

**Can I claim maintenance if I am involved in a polygynous marriage?**

Yes, the court case supporting this position in law was decided in the then Transvaal High Court. The applicable case is *Farida Khan v Dr Yusuf Khan*.

**But is there any protection regarding the property consequences of the marriage?**

Yes, but very limited. In the *Rylands v Edros* case the Cape High court recognized a marriage solemnized in accordance with Islamic rites as a valid contract under the Constitution. As such, the court can be called upon to ensure that the parties to a Muslim marriage comply with the terms of the contractual engagement.

For example in the case of *Amod v Multilateral Motor Vehicle Accidents Fund* a widow claimed damages for loss of support after the death of her husband. The Supreme Court of Appeal decided that, in the spirit of tolerance, equality and pluralism under the new Constitution, parties to a *de facto* monogamous Muslim marriages should be awarded the same damages as parties to a civil marriage.

**Do I have any protection in law if my husband should die?**

Yes. In the case of *Daniels v Campbell No* and others the Constitutional Court interpreted the word “spouse” in the Intestate Succession Act and “survivor” in the Maintenance of the Surviving Spouses Act to include parties to Muslim marriages. As a result, the surviving spouse may:

1. inherit in terms of the law of Intestate Succession; and
2. bring a maintenance claim against the deceased estate.

If you want to bring such a claim you must prove that your husband supported you during the marriage and that you need this maintenance to continue.



## FROM THE PRESS

(“Business Day,” March 12, 2004.)

“Muslim Widows Can Now Inherit”

by Chantelle Benjamin

South Africa - A Muslim woman, whose husband dies without leaving a will, is now entitled to inherit from his estate, following a decision by the Constitutional Court to recognise unions under Muslim religious rites. The decision is retrospective, and will provide widows and widowers, deprived of their inheritance, an opportunity to claim from the estate, even if it had been wound up. The court recognised that this could tax an already overburdened court system, but felt the rights of widows, in particular, were a more urgent consideration. Justice Albie Sachs said in his majority judgment: “Should problems concerning retrospectivity arise, they stand to be dealt with on a case-by-case basis.” The judgment, while seen as a victory for Muslim widows, does not extend to those in polygynous marriages.

This may, however, change if the Constitutional Court decides to recognise polygynous marriages under customary law. The court is examining the issue of polygyny. The court yesterday ruled that, in the Intestate Succession Act, the word spouse, and the word survivor in the Maintenance of Surviving Spouses Act, “includes the surviving partner to a monogamous Muslim marriage”.

### What happens when the marriage is dissolved?

Upon divorce all rights and duties are terminated, and the only maintenance that the spouse is entitled to in law, is the three-month Iddah period.

Furthermore as the estates of the parties are separate there will not be any distribution of one party’s estate to the other. Thus the law affords greater protection when a spouse in a Muslim marriage dies than on divorce.



**Iddah period** is a three month waiting period after the divorce

### If I contributed to my husband’s estate, can I ask the court to decide how the estate should be distributed?

Yes, you can bring an application to the court based on contract or if you can show that a universal partnership existed. You will have to prove your contributions. The court can be asked to make your husband pay back your contributions while you were married, subject to a three year cut off period. You can also claim for maintenance for the three month Iddah period. Universal partnerships are discussed in more detail in the chapter on domestic partnerships.

**Universal partnership:**  
Where the parties agreed to work together for the profit of both

### Who is entitled to custody of the children?

As the marriage is not recognized, the mother is afforded sole custody and guardianship. The husband must apply to the High court if he wants access rights or if he wishes to have custody of the children. The court will always put the best interests of the child first.

## Table Of Rights for Muslim Marriages

Law	Rights given to Civil Marriages	Rights given to Muslim Marriages
Privacy	Spouses are do not have to testify against one another in criminal proceedings.	Same as civil marriages, religious marriages are recognized as valid marriages for the purposes of the law of evidence.
Common Home and Other Property	Spouses are entitled to some portion of the joint home, and during the marriage can only be evicted in exceptional circumstances.	Generally this does not apply to religious marriages. The law of contract, unjustified enrichment and universal partnership might be used to assist partners in a dispute about property.
Pension schemes	Pension schemes often provide benefits to the spouses.	Some schemes provide benefits to a nominee of the contributor, and a growing number also recognize “partners,” which could include parties to Muslim marriages.
Medical schemes	Medical schemes are required to cover spouses.	Medical schemes are required to cover partners, which could include parties to Muslim marriages.
Insurance	Insurance coverage automatically covers spouses of the insured.	Partners may include each other on their insurance coverage - however, they must specifically ask for this. It does not happen automatically.
Duty of support	Spouses have a duty to support each other.	Muslim partners do not have a duty to support each other.
Children	Both parents are equal guardians of the child.	<ul style="list-style-type: none"> <li>Both parents have a duty to support the child according to their means.</li> <li>The mother is given guardianship of the child.</li> </ul>
Immigration	Both spouses are given the same benefits under immigration law.	Muslim partners are given the same benefits under immigration law.
Inheritance	If a spouse dies without a will, the surviving spouse is entitled to a share in the property of the deceased.	The courts have given a spouse to a Muslim marriage the same rights as a spouse in a civil marriage.
Maintenance	If a spouse dies, their will must sufficiently provide for the surviving spouse according to their means. If this is not the case, the surviving spouse can claim maintenance from the estate.	The courts have extended the claim of a surviving spouse for maintenance from the deceased spouse’s estate to partners to include monogamous Muslim marriages.

Occupational injury or disease	Spouses are entitled to compensation	Partners in Muslim marriages are entitled to compensation if they were living together as husband and wife at the time of disease, injury or death.
Protection against violence	Spouses are protected against domestic violence.	Partners in Muslim marriages are protected against domestic violence.

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## Chapter 4: Same Sex Marriages

According to the law the definition of marriage has been extended to include marriage between people of the same sex.

### Are gay and lesbian marriages recognized in law?

In the case of the *Minister of Home Affairs and Another v Fourie and Another*, the court recognized that the exclusion of gay and lesbian couples from the status of marriage reinforces the prejudice that same sex partners are social outcasts. It also suggests that their intimate relations are not worthy of the same legal protection as heterosexual relationships.

The court gave Parliament a period of one year to resolve this matter from 1 December 2005.



**Heterosexual:**  
Opposite sex




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### FROM THE PRESS

Same-sex marriage approved in South Africa  
Afrol News, 1 December -

South Africa's Constitutional Court today ruled that same-sex marriages are allowed and gave the Pretoria government 12 months to adjust its marriage legislation to the ruling and the constitutional rights given gays and lesbians. A spokesperson of South Africa's Department of Home Affairs today said government would accept the ruling and take necessary legal steps.

As a result of the Fourie case, parliament introduced the Civil Union Act 17 of 2006, which affords legal recognition to same sex marriages.

### **What are the legal implications if I choose to marry in terms of the Civil Union Act?**

Spouses who marry in terms of the Civil Union Act receive the same protections as spouses married in terms of the Marriage Act of 1961. They can choose to be married in community of property; out of community of property including accrual; or out of community of property excluding accrual.

### **The Civil Union Act refers to a civil partnership and a marriage, what is the difference?**

There is no difference. The Act uses both terms so that same or different sex partners can choose to call their relationship a 'civil partnership' or a 'marriage'. But whatever name a couple chooses for their union, the same legal protections and benefits apply.

### **What happens if we choose to terminate the relationship?**

The same law and procedures apply as for the termination of a marriage concluded under the Marriage Act (see page 10).



#### **Domestic partnership:**

Commonly known as "living together" or life partners

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## **CHAPTER 5: Domestic Partnership**

### **What is a domestic partnership?**

There can be many forms of domestic partnerships. Usually, the term refers to a permanent and stable monogamous relationship between two people who choose not to or are not able to marry but share the same responsibilities and obligations of a married couple

### **If I live with my partner for five years, is this a common law marriage?**

No, there is no such thing as a common law marriage in South Africa. This is a legal term primarily used in the United States and does not apply in South Africa.

### **What protection do I have in law?**

Domestic Partnerships are not recognized in law and there are no legal duties attaching to these relationships.



## FROM THE PRESS

Michelle O'Sullivan: Nothing but the knot

Last Monday, the Constitutional Court handed down judgement in the case of Ethel Robinson and dealt a blow to the 2,3-million South Africans who described themselves as life partners in the most recent census. Robinson was in a monogamous life partnership for 15 years and sought to claim maintenance from her deceased partner's estate. Justice Thembile Skweyiya, writing for the majority, ruled that it is not unfair discrimination to make a distinction between the survivors of marriage on the one hand and survivors of heterosexual life partnerships on the other in the context of maintenance claims.

The Mail and Guardian, 1 March 2005 01:59

### Are domestic partnerships recognized in terms of the Civil Union Act?

After Ethel Robinson's failed attempt to have her domestic partnership recognised, the Civil Union Bill was introduced. The first draft of the Civil Union Bill made reference to registered and unregistered domestic partnerships. However, when the Civil Union Act was passed the final version excluded any reference to domestic partnerships. That means domestic partnerships remain unrecognised. For instance there is no duty of support between the parties and each party's estate remains separate from the other party's estate. Should one of the parties die without leaving a will the domestic partner is not legally entitled to inherit, or to claim maintenance from the deceased's estate.

### How do I protect myself in a domestic partnership?

Domestic partners can create a contract governing the terms of their relationship and can call upon the courts to enforce the terms of the agreement.

### What are the legal consequences if we fail to enter into a contract and the relationship comes to an end?

If you do not enter into a contract the law does not provide any protection. Where parties fail to enter into a contract, the law will deem there to be no legal relationship that existed between the two parties. However, there are legal remedies available such as if you can prove the existence of a universal partnership. In terms of a universal partnership agreement the court is obliged to make an equitable distribution of the estate, in proportion to the contribution made by each partner.

#### **Express:**

Is stated in writing or verbally

#### **Tacit:**

Can be implied from the circumstances

### How does one define a universal partnership?

A universal partnership is an agreement, either express or tacit, where parties choose to bring their present and future assets into



community of property. In other words, all of the property is owned jointly during the relationship.

To have a universal partnership declared, four legal requirements must be met:

1. The aim is to make a profit;
2. Both the parties must contribute;
3. It operates to the benefit of both parties; and
4. The contract is legitimate.

A universal partnership is difficult to prove in court, especially the contributions made by each party.

### **What other remedy is there to protect me?**

The law of unjustified enrichment protects one partner from profiting at the expense of another. Domestic partners often combine their resources to purchase an asset such as a car or a house, and then register that asset in one partner's name. But when the relationship ends, if your house is registered in your partner's name you have no right to it, even if you helped to pay for it. If you want to get back any of the money you paid, or get a share of the value of the house, you will have to prove that you did not donate the money to your partner. This can be difficult to prove.

## **Table Of Rights for Domestic Partnerships**

Law	Rights given to married partners	Rights given to domestic partners
Privacy	Spouses don't have to testify against one another in criminal proceedings.	Partners may have to testify against each other in criminal proceedings
Common Home and Other Property	Spouses are entitled to some portion of the joint home, and during the marriage can only be evicted in exceptional circumstances.	Generally this does not apply to domestic partnerships. The law of contract, unjustified enrichment and universal partnership might be used to assist partners in a dispute about property.

<b>Pension schemes</b>	Pension schemes often provide benefits to the spouses.	Some schemes provide benefits to a nominee of the contributor, and a growing number also recognize “partners”.
<b>Medical schemes</b>	Medical schemes are required to cover spouses.	Medical schemes are required to cover partners.
<b>Insurance</b>	Insurance coverage automatically covers spouses of the insured.	A partner may include her/his partner in her/his insurance coverage; however, this must be specifically asked for. It does not happen automatically.
<b>Duty of support</b>	Spouses have a duty to support each other.	Domestic partners do not have a duty to support each other.
<b>Children</b>	Both parents are equal guardians of the child.	<ul style="list-style-type: none"> <li>• Both parents have a duty to support the child according to their means.</li> <li>• The mother is given guardianship of the child.</li> </ul>
<b>Immigration</b>	Both spouses are given the same benefits under immigration law.	Both partners are also given the same benefits under immigration law.
<b>Inheritance</b>	If a spouse dies without a will, the surviving spouse is entitled to a share in the property of the deceased.	If a partner dies without a will, the surviving partner has no automatic right to the property of the deceased. It is best to create a will to ensure that partners can inherit property from each other.
<b>Maintenance</b>	If a spouse dies, her/his will must sufficiently provide for the surviving spouse according to her/his means. If this is not the case, the surviving spouse can claim maintenance on the estate.	No such protection exists for domestic partners.
<b>Occupational injury or disease</b>	Spouses are entitled to compensation	Partners are entitled to compensation if they were living together as husband and wife at the time of disease, injury or death.
<b>Protection against violence</b>	Spouses are protected against domestic violence.	Partners are protected against domestic violence.

## USEFUL CONTACT DETAILS

### DIVORCE COURTS

Office Province	Tel No.	Fax No.	Postal Address	Physical Address
Durban North East Divorce Court	031 3327576 031332 9034	031 3320594 031 3326590	The Registrar Private Bag X 54304 Durban 4000	Cnr Stanger & Somtseu Durban 4001
Ferreirasdorp Central Divorce Court, Gauteng	011 6390434 011 8364730	011 836 0671	Central Divorce Court Private Bag X 1 Ferreirasdorp 2048	15 Market Street Ferreirasdorp 2048
King William's Town Southern Divorce Court	043 6422842	043 6423037	The Registrar Private Bag X 7481 King Williams Town 5600	Cnr Reserve Road & Oak Streets King Williams Town 5600
Cape Town Southern Divorce Court	021 4011503	021 465 3593	The Registrar Divorce Court Private Bag X9017 Cape Town 8000	7-11 Parade Street, Cape Town 8000
Mitchell's Plain satellite office	021 3704200	021 391 3063	The Registrar Divorce Court Private Bag X1 Mitchell's Plain 7785	Town Centre Mitchell's Plain

High Courts	Telephone	Fax
Bisho	040 609 2958	040 6352140
Bloemfontein	051 447 8837	051 430 7041
Cape Town	021 480 2411	021 423 0412
Durban	031 3625800	031 305 4550
Grahamstown	046 602 5000	046 636 2374
Johannesburg	011 332 8000	011 336 6183
Kimberley	053 833 1441	053 831 1320

High Courts	Telephone	Fax
Mmbatho	018 3928200	018 3921908
Pietermaritzburg	033 345 8211	033 345 3815
Port Elizabeth	041 502 6600	041 582 2625
Pretoria	012 315 7711	012 326 1995
Thohoyandou	015 962 0348	015 962 0364
Umtata	047 531 2441	047 531 2459

### MAIN OFFICES OF THE DEPARTMENT OF HOME AFFAIRS

Region	Contact Person	Telephone No.	Fax No.	Physical Address
EC	H M S Fotoyi	043 643 4608/9	043 643 3003	7 Taylor Street, The Arches Bldg., King Williams Town
EC	Mr M Mene	041 487 1026	041 487 3354	Cnr. Stone & Lavinia Street, North End, Port Elizabeth
EC	Mr Mbokwana	047 531 1955	047 531 2060	Old Elata Bldg., Cnr. Owen & Leeds Roads, Umtata
FS	Ms L Rametse	051 403 9100	051 430 8814	L T Trust Bldg., 108 Maitland Street, Bloemfontein
FS	Mrs H J Erasmus	057 355 1325/7	057 355 1325	133 Koppie-Alleen Road, Welkom
GE	Ms H Ntantiso	012 324 1860/74	012 323 4783	3rd Floor Sentrakor Bldg., Pretorius Street, Pretoria

GE	Mr T F J Schoeman	011 825 8370	011 873 3292	Cedar Bldg., Cnr. Webber & Power Street, Germiston
GE	Mr T A Ndebele	011 811 3475	011 811 2862	Welgedacht Road, Springs
GW	Mr J L J Van Vuuren	011 693 5284/7	011 693 1039	2 Main Reef Road, Fountain Plaza, Randfontein
GW	Ms M Moeketsi	011 639 4000	011 834 6623	New Government Bldg., Cnr. Harrison & Plein Street, Johannesburg
GW	Ms L P Sithole	011 936 5666/9	011 936 5753	Cnr. Armitage & Khumalo Roads, Orlando West, Soweto
GW	Mr G Coetzer	016 421 3793	016 455 1601	San Roan Bldg., Voortrekker Street, Vereeniging
KZN	Mr T W Dlamini	031 308 7900/32	031 308 7936	Price City, 350 Umgeni Road, Greyville
KZN	Mr S Biyase	035 787 1478/82	035 787 2121	25 Ngwelezane, Empangeni Rail
KZN	J H Riekard	033 845 5011/4	033 345 5079	2nd Floor United Bldg., 181 Church Street, Pietermaritzburg
KZN	Mr T Kotze	039 682 1186/8	039 682 4089	1st Floor Bank House, 2 Robinson Street, Port Shepstone
KZN	Ms M Terblanche	03431 25637/49	03431 27305	Helenic Trust Bldg., Shop 10, 67 Scott Street, Newcastle
KZN	Mr J H Riekart	035 780 8000	035 789 1369	Ground Floor Arboretun, CBD net to First National Bank, Kruger Rand Street, Richards Bay
LMP	Ms T Khuvutlu	015 812 0339	015 812 0338	Section A, (Next to Police Station), Giyani
LMP	Ms M Segoele	015 633 5188/91	015 633 5193	Old Lebowa Parliament Bldg., between Zone B and F, Lebowakgomo
LMP	Ms M Molapo	015 290 4600	015 291 5104	Library Gardens, Cnr. Grobler & Schoeman Street, Polokwane
LMP	Mr N Moshapo	0159 31134/74	0159 31195	Makwanela Government Complex, Shumela Street, Sibasa, Thohoyandou
MP	Mr E Mashiloane	013 753 3131	013 752 5250	Cnr. Henshall & Brander Street, Nelspruit
MP	Ms M Du Plessis	013 656 6416	013 656 4834	Justisie Avenue, Witbank
NC	Mr S Mohapelwa	053 839 5400	053 831 4836	4th Floor New Public Bldg., Knight Street, Kimberley
NC	Mr N Makay	054 332 3117/8	054 332 4799	22 Scott Street, Upington
NW	Ms M Mantlatsi	018 469 1231/4	018 469 2704	2 Mercury Road, Uraniaville, Klerksdorp
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NW	Mr A Modimakwane	014 592 0406/8	014 592 4712	63 Van Staden Street, Rustenburg
WC	Mr F Joubert	021 462 4970	021 461 7686	Faircape Building, 56 Barrack Street, Cape Town
WC	Ms S D Constance	044 873 6087	044 874 7210	2nd Floor York Park Bldg., St John Street, George
WC	Ms E Martins	021 386 2310	021 386 2317	Montreal Avenue, Sturrock Bldg., International Airport, Industrial Site, Cape Town
WC	Ms J Britz	021 872 3031/3	021 872 4212	4 Alkmaar Street, Daljosafat, Paarl



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