

DOMESTIC PARTNERS AND THE “CHOICE ARGUMENT”: *QUO VADIS?*

by

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Table of contents

Declaration of originality	i
Acknowledgements	ii
Abstract	iii
Chapter 1: Introduction	
1.1 Context	1
1.2 Motivation	5
1.3 Aims of research	7
1.4 Research methodology	7
1.5 Chapter layout	8
Chapter 2: Domestic partnerships: The legal matrix	
2.1 Introduction	10
2.2 Definition of domestic partnership	10
2.3 Terminology pertaining to domestic partnerships	13
2.3.1 Introduction	13
2.3.2 Terminology employed by courts	13
2.3.3 Terminology employed by legislature	14
2.3.4 Terminology employed by academic commentators	15
2.3.5 Terminology adopted in this study	16
2.4 Establishing a domestic partnership	18
2.4.1 Introduction	18
2.4.2 Guidance provided by judiciary	18
2.4.3 Guidance provided by legislature	20
2.4.4 Guidance provided by academic commentators	21
2.4.5 Proposed requirements	24
2.5 Conclusion	25

Chapter 3: Historical development and *ad hoc* recognition of domestic partnerships in South Africa

3.1	Introduction	26
3.2	Traditional approach to domestic partnerships	26
3.2.1	Introduction	26
3.2.2	Moral and legal disregard of extra-marital cohabitation	27
3.2.3	Summary	31
3.3	Current recognition of domestic partnerships	32
3.3.1	Introduction	32
3.3.2	Impact of the Constitution	32
3.3.3	Development and <i>ad hoc</i> recognition of “heterosexual life partnerships”	35
3.3.3.1	Introduction	35
3.3.3.2	<i>Volks v Robinson</i> : Constitutionality of non-recognition	36
3.3.3.3	Recent extension of dependant’s action to heterosexual domestic partners	38
3.3.4	Development and <i>ad hoc</i> recognition of “same-sex life partnerships”	41
3.3.4.1	Introduction	41
3.3.4.2	Same-sex life partnerships: An alternative form of life partnership	42
3.3.4.3	<i>Minister of Home Affairs and Another v Fourie</i> : Providing same-sex life partners with a choice	45
3.3.4.4	Background to enactment of Civil Union Act 17 of 2006	48
3.3.4.5	General provisions and impact of the Civil Union Act 17 of 2006: Legislature’s response to <i>Fourie</i>	49
3.3.5	Summary	50
3.4	Possible future recognition and regulation of domestic partnerships	51
3.4.1	Introduction	51
3.4.2	SALRC’s response to domestic partnerships	51
3.4.3	Draft Domestic Partnerships Bill	53
3.5	Conclusion	54

Chapter 4: Regulatory measures and spousal benefits: Options open to domestic partners in absence of formal legal recognition

4.1	Introduction	56
4.2	Specific statutory recognition	56
4.3	Other regulatory measures	59
4.3.1	Introduction	59
4.3.2	Contractual regulation	60
4.3.3	Universal partnerships	61
4.3.4	Trusts	63
4.3.5	Unjustified enrichment	64
4.3.6	Estoppel	65
4.3.7	Adequacy of alternative regulatory measures	66
4.4	Spousal benefits currently available to domestic partners	66
4.4.1	Introduction	66
4.4.2	Maintenance rights	67
4.4.3	Succession rights	67
4.4.4	Proprietary rights	68
4.4.5	Parental rights	70
4.4.6	Dependant's action	72
4.5	Conclusion	72

Chapter 5: Traditional justification for lack of legal recognition and the “choice argument”

5.1	Introduction	74
5.2	Choice argument: A theoretical overview	74
5.2.1	Introduction	74
5.2.2	Meaning of choice argument	75
5.2.3	Limitation of choice argument	76
5.3	Influence of recent case law and legislation on choice argument	78
5.3.1	Introduction	78
5.3.2	<i>Gory v Kolver</i>	78
5.3.3	Responses to <i>Gory v Kolver</i>	80
5.3.3.1	Introduction	80
5.3.3.2	Majority opinion	80

5.3.3.3	Textual (positivist) opinion	82
5.3.3.4	Dissenting opinion	82
5.4	Flaws of choice argument	86
5.5	Conclusion	88

Chapter 6: Theoretical basis for recognition and regulation of domestic partnerships in future

6.1	Introduction	89
6.2	Model of contextualised choice: A restrictive (less invasive) approach	90
6.2.1	Introduction	90
6.2.2	General principles	90
6.2.2.1	Women and contextualised model of choice	91
6.2.2.2	Same-sex couples and contextualised model of choice	93
6.2.3	Implications of adopting contextualised approach to choice	93
6.2.4	Extent of recognition of contextualised model of choice	97
6.2.4.1	International recognition	97
6.2.4.2	National judicial recognition	99
6.2.4.3	Academic recognition	100
6.3	Function-over-form approach: A broader (more invasive) approach	101
6.3.1	Introduction	101
6.3.2	What does this approach entail?	102
6.3.3	Criteria for applying approach	103
6.3.4	Extent of recognition of function-over-form approach	105
6.3.4.1	International recognition	105
6.3.4.2	National judicial recognition	107
6.3.4.3	Other recognition	108
6.4	Smith model	109
6.4.1	Introduction	109
6.4.2	General principles and effect of Smith model	109
6.4.3	Extent of recognition of Smith model	112
6.5	Some concluding remarks on the way forward	112
6.6	Conclusion	117

Chapter 7: Extent of accommodation of contextualised model of choice in Draft Domestic Partnerships Bill

7.1	Introduction	119
7.2	Draft Domestic Partnerships Bill	119
7.2.1	Introduction	119
7.2.2	Scope of application of the Draft Domestic Partnerships Bill	120
7.2.3	Registered domestic partnerships	122
7.2.3.1	Introduction	122
7.2.3.2	Need-based claims	123
7.2.3.3	Non need-based claims	124
7.2.3.4	Additional provisions	126
7.2.4	Unregistered domestic partnerships	126
7.2.4.1	Introduction	126
7.2.4.2	Need-based claims	127
7.2.4.3	Non need-based claims	128
7.2.5	Concluding remarks on Draft Domestic Partnerships Bill	129
7.3	Contextualised model of choice and Draft Domestic Partnerships Bill	132
7.3.1	Introduction	132
7.3.2	Draft Domestic Partnerships Bill: Unregistered domestic partners and proprietary claims	132
7.4	Conclusion	134

Chapter 8: Conclusion and recommendations

8.1	Conclusion	137
8.2	Recommendations	141
	Bibliography	143

Declaration of originality

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3. I have not used work previously produced by another student or any other person to hand in as my own.
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SIGNATURE

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Abstract

In the absence of formal legal recognition, domestic partners (i.e. persons who cohabit outside of marriage) are required to regulate the consequences of their relationship by utilising alternative regulatory measures and remedies which are, for the most part, inadequate. The traditional justification used to differentiate between domestic partners and spouses is known by some as the “choice argument”. The choice argument is based on the rationale that persons who choose not to marry cannot claim spousal benefits. It understands choice narrowly as it only takes into account an objective legal impediment to marriage. As such, it has been the driving force behind the non-recognition of heterosexual domestic partnerships. Same-sex domestic partners have, however, been able to sidestep the choice argument considering that their sexual orientation has until recently been an objective legal impediment against marriage. According to the majority of legal commentators the enactment of the Civil Union Act 17 of 2006 has removed the objective legal impediment against same-sex marriage. As such, they argue that the choice argument should now be applied to both heterosexual and same-sex domestic partners equally. The Constitutional Court has, however, held that unless the legislature intervened the benefits accrued by same-sex domestic partners prior to the enactment of the Civil Union Act 17 of 2006 should be available to them exclusively. As the legislature has not yet done so, the legislature does not appear to view the choice argument as being equally applicable to heterosexual and same-sex couples. Taking into consideration the choice argument’s narrow understanding of choice, together with the possible unfair discrimination caused by its application, an alternative theoretical basis for the future recognition and regulation of domestic partnerships has to be found. Three possible solutions will be investigated in this study, namely, the model of contextualised choice, the function-over-form approach, and finally, the Smith model. Because of the invasive effect of the latter two approaches, the study advocates for the adoption of the model of contextualised choice. If adopted it will imply that the subjective considerations of domestic partners will be taken into account and they will be afforded a minimum degree of protection based on need. If this approach is adopted it must be determined to what extent it is supported in proposed legislation. Accordingly, it has to be investigated whether proposed legislation provides domestic partners with need-based claims while still

upholding the established differences between domestic partnerships and formalised relationships. It is ultimately concluded that the proposed legislation will have the effect of blurring the differences insofar as registered domestic partnerships are concerned. The reason for this is that such a partnership comes into existence through a public expression of the partners' commitment and, as such, does not really fall within the ambit of the definition of a domestic partnership in the narrow sense of the word. With regard to unregistered domestic partners, it is concluded that the proposed legislation goes too far in protecting unregistered partners' proprietary rights (even if only on an *ex post facto* basis) as these claims are not based on need. As such, it is recommended that the proposed legislation be redrafted. If not redrafted the proposed legislation can possibly have the effect of not only infringing on the autonomy of one or both of the partners but also create a regulatory system which does not fully appreciate the differences between marriage and domestic partnerships.

Chapter 1: Introduction

1.1 Context

Prior to the enactment of the Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”), only one form of marriage was recognised in South Africa, namely civil marriages solemnised in terms of the Marriage Act.¹ Marriage was generally understood to mean “... the legally recognised voluntary union for life of one man and one woman to the exclusion of all others while it lasts”.² As such, only heterosexual monogamous couples could formalise their relationship and enjoy all the benefits this entailed.

The Bill of Rights³ entrenches certain fundamental rights into South African law. Due to the inclusion of the rights to, *inter alia*, equality, dignity and religious freedom,⁴ it became apparent that the legal position (as described above) would not withstand constitutional scrutiny. The adoption of the Recognition of Customary Marriages Act⁵ and the Civil Union Act⁶ has partially addressed this problem by recognising monogamous and polygynous customary marriages as well as same-sex marriages, respectively.⁷

Evidently the Constitution has been the driving force behind the creation of matrimonial pluralism in South Africa.⁸ To accommodate all the forms of marriage that are currently recognised in South Africa, Van Schalkwyk has proposed the

¹ 25 of 1961.

² *Ismail v Ismail* 1983 1 SA 1006 (A) at 1019H.

³ In ch 2 of the Constitution.

⁴ See ss 9(1), 9(3) and 15 of the Constitution.

⁵ 120 of 1998.

⁶ 17 of 2006.

⁷ See s 2(3) of the Recognition of Customary Marriages Act 120 of 1998 and s 1 of the Civil Union Act 17 of 2006, respectively.

⁸ Legal pluralism (at least in a broad sense) refers to the factual situation where various legal systems are observed in a particular society: see Rauntenbach *et al* (2010) at 4. If this is applied to matrimonial law it would mean that different matrimonial systems are recognised within a particular jurisdiction: see Bakker 2004 *THRHR* at 631 and Van Schalkwyk (2011) at 331.

following umbrella definition of marriage: “Marriage is the legally recognised voluntary union(s) between spouses”.⁹

This study, however, does not concern itself with the legal position of persons who have already formalised their relationships and enjoy protection as spouses or civil union partners. Instead, this study is concerned with the underlying basis for the (non) recognition of persons who have, for whatever reason, chosen not to formalise their union.

As far as informal relationships are concerned, a distinction can be made between what is generally referred to as domestic partnerships, on the one hand, and religious marriages, on the other. In *Fraser v Children’s Court, Pretoria North and Others*¹⁰ religious marriages (within the context of Muslim marriages) were described as “[u]nions which have been solemnised in terms of the tenets of the Islamic faith ... [and] are not recognised in our law”. Although religious marriages and domestic partnerships have both received *ad hoc* judicial recognition, the basis for such recognition differs.¹¹ The recognition afforded to religious marriages has thus had little or no influence on the law pertaining to domestic partnerships.¹²

Apart from legislation specifically including domestic partnerships within its ambit or definition of marriage, South African law does not formally recognise or regulate domestic partnerships.¹³ As such, no *ex lege* protection is afforded to partners in

⁹ Van Schalkwyk (2011) at 7.

¹⁰ *Fraser v Children’s Court, Pretoria North and Others* 1997 2 SA 261 (CC) at par 21 ([] my addition). Also see *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) at par 20.

¹¹ For the instances where *ad hoc* recognition has been granted to religious marriages: see *Ryland v Edros* 1997 2 SA 690 (C); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) and *Daniels v Campbell NO and Others* 2004 5 SA 331 (CC) in relation to monogamous Muslim marriages. More recently, the Constitutional Court also extended the application of the Intestate Succession Act 81 of 1987 to partners in a polygynous Muslim marriage: see *Hassam v Jacobs NO and Others* 2009 11 BCLR 1148 (CC) at par 46. Recognition was also extended to monogamous Hindu marriages in *Govender v Ragavayah NO and Others* 2009 3 SA 178 (D). It would appear that the basis for the recognition of these types of marriages was to ensure non-discrimination on the basis of religion and cultural beliefs. *Ad hoc* recognition of same-sex domestic partnerships, on the other hand, was provided to ensure non-discrimination on the basis of sexual orientation and marital status: see eg *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC); *J and Another v Director General; Department of Home Affairs and Others* 2003 5 BCLR 463 (CC) and *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA).

¹² Smith LLD Thesis (2009) at 153.

¹³ The *ad hoc* recognition of domestic partnerships will be analysed in chs 3 and 4 below.

such a relationship and they are compelled to regulate their relationship by means of alternative regulatory measures and remedies. These alternative regulatory measures are, however, unsatisfactory in a family law context as they appear to ignore the *consortium* between the domestic partners in question.¹⁴

Since same-sex couples were prevented from marrying in terms of the Marriage Act,¹⁵ they could not marry even if they had wanted to. Based on the fact that an impediment based on the sexual orientation of the parties constituted a violation of their right to equality and human dignity, same-sex domestic partners received certain *ad hoc* recognition after the enactment of the Constitution.¹⁶ Conversely, heterosexual domestic partners were not accommodated as nothing prevented them from marrying.¹⁷ This so-called “choice argument”¹⁸ has played a central role in the recognition of same-sex domestic partnerships on the one hand, and the non-recognition of heterosexual domestic partnerships, on the other.

After the enactment of the Civil Union Act¹⁹ it was anticipated that the rationale for the continued conferral of spousal benefits on same-sex domestic partnerships would fall away, as sexual orientation was no longer a legal impediment to marriage. The judgment in *Gory v Kolver*,²⁰ however, clouded the issue by implying that spousal benefits could still be relied on by same-sex domestic partners despite the fact that the legal impediment to same-sex marriage had been removed. According to this judgment the extension of spousal benefits will continue to persist until legislation is enacted which would *specifically* address the issue.²¹

¹⁴ Heaton (2010) at 243; Skelton & Carnelley (2010) at 208-209; Van Schalkwyk (2011) at 359 and Schwellnus “Cohabitation” in Clarke (ed) *Family Law Service* at 2. Also see ch 4 par 4.3 below for a comprehensive analysis of, *inter alia*, universal partnerships, trusts, estoppel and unjustified enrichment.

¹⁵ 25 of 1961.

¹⁶ See, *inter alia*, *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC); *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC); *J and Another v Director General; Department of Home Affairs and Others* 2003 5 BCLR 463 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA), and finally, *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC).

¹⁷ See eg *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 154.

¹⁸ The term “choice argument” should be read as if it is contained in inverted commas for the remainder of the text.

¹⁹ 17 of 2006.

²⁰ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 28.

²¹ See ch 5 par 5.3.3 below.

Since the choice argument is premised on the existence of an objective legal impediment to marriage, it has been suggested that it fails to take into account the subjective legal or social realities of partners in a domestic partnership.²² It therefore, arguably, fails to take into consideration that choice can be rendered irrelevant by social or economic hardships.²³ This creates a serious legal dilemma as many partners, but especially women²⁴ and homosexuals,²⁵ may have little or no choice when it comes to the enforcement of their choice to marry.

The past and current application of the choice argument has thus created two unsatisfactory legal problems. Firstly, it has created doubt as to the existence of equality between same-sex and heterosexual domestic partners, and secondly, it is conceptually flawed as it fails to take into account obstacles to marriage other than objective legal impediments.

Legal scholars have proposed several possible solutions to the problems caused by the application of the choice argument.²⁶ While these solutions differ from one another, they all have the same point of departure, namely, that choice should be understood within the context it is made. This means that it should be recognised that not only objective legal impediments can prevent two persons from marrying, but also subjective circumstantial impediments. Considering the inadequacy of the choice argument, it is not surprising that many authors suggest that a contextualised approach to choice must underlie the future recognition of domestic partnerships.

The future of domestic partnership regulation has already, to some extent, been investigated by government. Thus far, and as a result of a request by the Department of Home Affairs in 1997, the South African Law Reform Commission (hereinafter “the SALRC”) has proposed two pieces of draft legislation. The first was a draft Bill attached as annexure E to the 2006 SALRC Report on Domestic Partnerships²⁷ and the second, more recent proposal, was the publication of the

²² Schäfer 2006 *SALJ* at 640-641.

²³ Schäfer 2006 *SALJ* at 641.

²⁴ See Sinclair (1996) at 3-71 as well as Goldblatt 2003 *SALJ* at 611 and 614-615.

²⁵ For a detailed exposition of the social realities faced by specifically women and same-sex couples, see ch 6 par 6.2.2 below. This discussion mostly relates to the rampant sexism and homophobia that currently exist in South Africa.

²⁶ See ch 6 below.

²⁷ See annexure E “Domestic Partnerships Act of 2006” attached to the SALRC Report on *Domestic Partnerships* 2006.

Draft Domestic Partnerships Bill of 2008.²⁸ The more recent Bill provides one with a realistic indication as to how the legislature aims to recognise domestic partnerships in future.²⁹ This Bill intends to regulate registered as well as unregistered domestic partnerships.³⁰ Although the enactment of this Bill has not been forthcoming,³¹ it would appear that its enactment is inevitable (albeit in a possibly amended form).³² When it is enacted it will provide registered and unregistered domestic partners with claims relating to intestate succession, maintenance and property division.³³ Registered domestic partners will have to register their relationship in order to receive these benefits, while unregistered domestic partners will be able to claim these benefits on an *ex post facto* (judicial discretionary) basis.³⁴ Whether, or to what extent, this Bill adopts a contextualised approach to choice will have to be investigated.

1.2 Motivation

The preceding discussion provides a brief overview of the uncertainty in relation to the past, current and prospective recognition of domestic partnerships in South Africa. Legal research is, however, not only necessitated by uncertainty but also by the increasing prevalence of cohabitation.³⁵ While South Africa has traditionally reported lower numbers of domestic partners,³⁶ the most recent Census Report estimates that 3.16 million people are currently "... living together as husband and wife" without having formalised their relationship.³⁷ This upwards trend is not only present in South Africa but is also noticeable in foreign jurisdictions, such as

²⁸ GN 36 of 2008 GG 30663 dated 14-01-2008.

²⁹ Smith LLD Thesis (2009) at 464.

³⁰ See chs 3 and 4 of the Draft Domestic Partnerships Bill of 2008.

³¹ See Meyersfeld 2010 *CCR* at 273, where she states that the current legislative process (pertaining to domestic partnerships) has become stagnated.

³² For a detailed discussion of the proposed amendments to the Draft Domestic Partnerships Bill of 2008: see Smith LLD Thesis (2009), specifically chs 10-12.

³³ See cls 9, 19-20, 22-23 (with reference to registered domestic partnerships) and cl 26 (in relation to unregistered domestic partnerships).

³⁴ See cls 6 and 26 of the Draft Domestic Partnerships Bill of 2008, respectively.

³⁵ See generally Sinclair (1996) at 269-271; Goldblatt 2003 *SALJ* at 610-611; Lind 2005 *Acta Juridica* at 111; SALRC Report on *Domestic Partnerships* (2006) at 20; Heaton (2010) at 243 and Skelton & Carnelley (2010) at 207.

³⁶ See eg the SALRC Report on *Domestic Partnerships* (2003) at 5 and Schwelnus "Cohabitation" in Clarke (ed) *Family Law Service* at 2 that attributes this slower growth to South Africa's Calvinistic background.

³⁷ See Statistics South Africa 2011 Census Report available at <http://interactive.statssa.gov.za/superweb/loadDatabase.do> (last accessed on 23 February 2013).

Canada, England and the United States of America.³⁸ When the increase of cohabitation is considered in conjunction with the uncertainty relating to the recognition and regulation of domestic partnerships it becomes evident that the Napoleonic adage of “cohabitants ignore the law, and the law ignores them” can no longer be accepted.³⁹

While it is clear that there is a dire need to regulate domestic partnerships by way of comprehensive and robust legislation,⁴⁰ it is less certain how this legislation must be enacted in order to ensure its future constitutional viability. Formal legislative recognition will revolve around two contradicting constitutional rights, namely the right to human dignity (which includes the protection of individual autonomy)⁴¹ and the right to equal protection before the law. This study will, on the one hand, attempt to provide an understanding of the hardships suffered by women and same-sex couples within the framework of domestic partnership regulation, while on the other, attempt to emphasise the importance of dignity and party autonomy. The vulnerability and prejudice that is suffered by women and same-sex couples cannot be overstated, as proclaimed in *Volks v Robinson* by Sachs J in his dissenting judgment:⁴²

“Yet there can be no doubt that many of the prejudices of the past linger on, particularly against women who are seen as not conducting their lives in a manner befitting their culture or religion. A certain degree of conventional disdain coupled with moral disapproval is still directed at unmarried couples. By the very nature of their unconventional relationship they are regarded as either immoral, irresponsible or defiant. This will be irrespective of the actual degree of commitment, seriousness and stability of their family relationships.”

³⁸ Sinclair (1996) at 269-270. This global increase was also acknowledged in the SALRC Report on *Domestic Partnerships* (2006) at 20-21. According to this report, 45 per cent of all couples in the United States of America live together without being married. In other countries, such as Sweden, nine out of every ten couples who marry already lived together, in Denmark more than a third of women in their twenties cohabit without being married and finally, in France it is reported that 2,5 million heterosexual couples cohabit without having concluded a valid marriage. More recently, Sanders 2013 *ICLQ* at 630 reported that in 2010, 11 per cent of couples cohabitated in Germany without formalising their relationship while as much as 15 per cent of couples who cohabitated in England were unmarried.

³⁹ See Hutchings & Delpont 1992 *De Rebus* at 122.

⁴⁰ Bonthuys 2004 *SALJ* at 879; Heaton (2010) at 243; Skelton & Carnelley (2010) at 206-207 and Smith 2011 *SALJ* at 560.

⁴¹ See ch 5 par 5.2.1 below for an exposition of the interplay between human dignity and personal autonomy.

⁴² *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 203.

This prejudice, however, cannot be used to justify a disproportionate infringement of a person's autonomy as protected by their right to human dignity. Necessity, therefore, dictates that in order to ensure the constitutionality of prospective legislation, the principles of autonomy (as understood within the right to human dignity) and the constitutional duty to provide protection to vulnerable minorities, should be in harmony. The impetus for this study is to identify, discuss and make proposals to ensure the continued equilibrium between these two contradicting constitutional values within the context of domestic partnership regulation.

1.3 Aims of research

In light of the context of and motivation for the study, the following will have to be determined:

- How has the law of domestic partnerships developed?
- What is the underlying theoretical basis for the (non) recognition of domestic partnerships?
- Should this theoretical foundation, namely, the choice argument, continue to serve in its current role?
- If not, what theoretical foundation should replace it?
- Finally, does the Draft Domestic Partnerships Bill of 2008 sufficiently provide for the future regulation of domestic partners in a manner that is consistent with a contextualised approach to choice (in whatever form)?

1.4 Research methodology

In order to achieve the study objectives a theoretical approach will be adopted. Due to the nature of this research, the study objectives will be determined by providing a critical analysis of the various primary and secondary sources of law.

In addition to the proposed study's theoretical approach, it may occasionally be apposite to compare the South African position to the position that currently prevails in other jurisdictions, such as Canada and the United Kingdom. This is due to the fact that foreign law may possibly provide alternative solutions to legal problems that continue to persist in relation to the recognition (or non-recognition) of domestic

partnerships in South Africa. The main thrust of this comparative argument will take place in the course of the discussion of the possible theoretical bases which should underlie the recognition and regulation of domestic partnerships in future.⁴³

1.5 Chapter layout

The chapters will be structured in a manner that mimics the research aims as described in paragraph 1.3 above. As such, the study will consist of eight chapters which can for practical purposes be divided into two parts. Part one, which will consist of chapters two to four, will investigate the *de lege lata* with regards to domestic partnerships. Part two, which will consist of chapters five to seven will be focussed on the theoretical foundation that should underlie the recognition and regulation of domestic partnerships in future.

Chapter two will commence by describing the legal matrix within which the research is to be conducted. Attention will be drawn to the difficulties encountered when trying to define a domestic partnership with some degree of certainty, to choose the most suitable term to refer to such an informal relationship, and lastly, to determine the essential characteristics of a domestic partnership.

Having set the parameters of the study, the following chapter will commence by explaining the historical development and *ad hoc* recognition of domestic partnerships. It will essentially describe the development of domestic partnerships in three distinct eras, namely, how domestic partnerships were traditionally regarded, the manner in which they are currently recognised, and lastly, the possible future recognition of such partnerships. In addition to describing the historical development of domestic partnerships, this chapter will also provide one with a sense of the changing social mores that have influenced our law of domestic partnerships to date.

In chapter four, the study will determine if, and in what manner, domestic partners can regulate their relationships in the absence of formal legal recognition. It will describe the various different statutes and other regulatory measures and remedies to which they can avail themselves. Finally, it will conclude with a summary of the spousal benefits which domestic partners can rely on in the absence of formal legal

⁴³ See ch 6 par 6.2-6.3 below.

recognition. Dedicating an entire chapter to this analysis is justified as it will indicate that the alternative measures and remedies referred to above are insufficient to address the needs of domestic partners in the absence of formal legal recognition.

Chapter five will mark the beginning of the second part of the study. This chapter will in great detail discuss the traditional justification used not to equate domestic partners with spouses. It will cover several topics, *inter alia*, the general principles regarding the choice argument, its underlying considerations and its existing limitations. Most importantly, the chapter will determine whether it is, especially in light of the controversial decision of *Gory v Kolver*,⁴⁴ prudent for the choice argument to continue to serve as the underlying theoretical foundation for the (non) recognition of domestic partnerships.

If the choice argument is to be removed, the study will determine if there are any other theoretical arguments that could underpin the recognition of domestic partnerships in future. It will investigate three possible solutions, namely, the model of contextualised choice, the function-over-form approach, and finally, the Smith model. The chapter will conclude with a recommendation as to the solution that would best suit the South African family law.

The penultimate chapter will determine whether the Draft Domestic Partnerships Bill of 2008 sufficiently adopts the recommended solution referred to in the previous chapter. Equally important, it will have to be determined if the Draft Domestic Partnerships Bill, by adopting a particular theoretical approach to the recognition of domestic partnerships, creates a regulatory system which adequately recognises the established differences between married spouses and domestic partners.

Finally, chapter eight will conclude with certain proposals for the improvement of the Domestic Partnerships Bill of 2008. These proposals will attempt to ensure that the future recognition and regulation of domestic partnerships will be in line with the underlying approach advocated for in this study.

⁴⁴ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC).

Chapter 2: Domestic partnerships: The legal matrix

2.1 Introduction

Before embarking on an investigation into the influence of choice on the recognition of domestic partnerships, it is important to describe the basic legal matrix within which the research will be conducted. For this purpose the chapter will firstly have to formulate a definition for a domestic partnership, thereafter, justify the usage of the term “domestic partnership” itself, and finally, attempt to determine the essential characteristics of a domestic partnership.

2.2 Definition of domestic partnership

Most aspects relating to the law of domestic partnerships are plagued by vagueness, contradiction and uncertainty. Defining the term “domestic partnership” is no exception. Despite the challenges faced when attempting to define a domestic partnership, it is essential to do so in order to ensure clarity and to avoid conceptual confusion. Defining the term domestic partnership with some certainty will also serve to facilitate an understanding of the more complex arguments raised in the chapters to follow.¹

Domestic partnerships were traditionally defined as the stable and monogamous living together of two unmarried persons.² This term had both a broad and a narrow meaning.³ It broadly referred to two types of relationships, namely, a domestic partnership where the partners never attempted to marry (although nothing prevented them from doing so) and secondly, to a domestic partnership where the partners went through a marriage ceremony but the ceremony was, for some or other reason, invalid. The significance of the broad understanding was that it included both religious and putative marriages within its ambit.⁴ In contrast to this, the narrow

¹ See specifically chs 5, 6 and 7 below.

² See eg Thomas 1984 *THRHR* at 455; Van der Vyver & Joubert (1985) at 449 and Hutchings & Delpont 1992 *De Rebus* at 122.

³ Hahlo 1972 *SALJ* at 321. Also see Kahn (1983) at 244 and Hutchings & Delpont 1992 *De Rebus* at 122.

⁴ Religious marriages are unions concluded in terms of religious tenets and are not recognised as valid marriages in terms of South African law. See eg *Fraser v Children’s Court, Pretoria North and*

meaning only referred to the former type of relationship namely, a domestic partnership where the parties never chose to marry although nothing prevented them from doing so.⁵

It would appear as though this differentiation between the broad and narrow meaning is still adhered to.⁶ The scope of this study will be limited to an evaluation of domestic partnerships in the narrow sense of the word only. Religious and putative marriages will, therefore, not be included within the ambit of this study.

The traditional narrow definition, provided above, refers explicitly to the stable and monogamous cohabitation of two *unmarried persons* who have never *chosen to marry*. The emphasis placed on marriage was undoubtedly based on the fact that cohabitative relationships could in the past only be formalised by concluding a civil marriage in terms of the Marriage Act.⁷ Partners in a monogamous cohabitative relationship are now, however, also allowed to formalise their relationship by concluding a civil union in terms of the Civil Union Act.⁸ This implies that the traditional definition of a domestic partnership, as it existed prior to the enactment of the Civil Union Act,⁹ must be modified so as to reflect this change in the law.

Neither the legislator nor the judiciary has defined domestic partnerships in a manner that takes cognisance of the enactment of the Civil Union Act.¹⁰ Some authors have,

Others 1997 2 SA 261 (CC) at par 21 and *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) at par 20. For a general discussion see Heaton (2010) at 231-239. Putative marriages refer to the situation "... when one of the parties (or both of them) enters into a civil marriage while being unaware that there is a defect which renders the marriage void" (Heaton (2010) at 39). Generally: see Smith LLD Thesis (2009) at 175-182; Heaton (2010) at 36-40 and Van Schalkwyk (2011) at 140-145. Also see Smith 2011 *SALJ* at 560-591 for a critical analysis of the current law relating to putative marriages.

⁵ Some authors, such as Hutchings & Delport 1992 *De Rebus* at 122, further dissect the narrow definition. According to them one can further differentiate between two types of cohabitative relationships in the narrow sense. Firstly, persons who want to get married but are prohibited by law from doing so, and secondly, persons who plainly choose not to marry.

⁶ Smith LLD Thesis (2009) at 151. According to Smith LLD Thesis (2009) at 153-154 this differentiation is adhered to considering that religious marriages, putative marriages and domestic partnerships (in the narrow sense) have developed independently from each other. As such, they have their own individual set of legal principles applicable to them. He is, therefore, of the opinion that "absurdities" may arise if the differentiation is not adhered to.

⁷ 25 of 1961.

⁸ 17 of 2006.

⁹ 17 of 2006.

¹⁰ 17 of 2006. This is presumably owing to the fact that South African courts have, since the enactment of the Civil Union Act 17 of 2006, rarely been confronted with the issue of domestic partnerships. The few exceptions to this have been instances where the courts have been approached to determine whether heterosexual domestic partners should be included within the ambit

however, adopted a definition of domestic partnerships which is in accordance with this particular change in law.¹¹ Smith,¹² who enjoys the support of Skelton and Carnelley,¹³ has defined domestic partners as persons who live together in a permanent relationship without having concluded either a marriage¹⁴ or a civil union.¹⁵ Although permanent and stable, their relationship is devoid of any formal legal recognition in terms of either the Marriage Act,¹⁶ the Recognition of Customary Marriages Act¹⁷ or the Civil Union Act.¹⁸ This revised definition adopted by Smith and others,¹⁹ to be referred to as the modern narrow definition, will be adhered to in the remainder of this study. This is because it is best aligned with the current South African family law in that it recognises that the formalisation of relationships is no longer limited to the Marriage Act.²⁰

of the dependant's action. See specifically *Meyer v Road Accident Fund* (Unreported case no 29950/2004 (T) delivered on 2006-03-28); *Verheem v Road Accident Fund* 2012 2 SA 409 (GNP) and *Paixao and Another v Road Accident Fund* 2012 6 SA 377 (SCA). In these cases the courts seem to have focussed on extending the common law principles of the dependant's action rather than providing authority for the regulation of domestic partnerships *per se*. For a discussion of the dependant's action as well as the aforementioned cases, see ch 3 par 3.3.3.3 below.

¹¹ See eg Smith LLD Thesis (2009) at 183.

¹² Smith LLD Thesis (2009) at 183 and 2013 *SALJ* at 537. Although Smith makes mention of religious marriages in his definition, it is not included within the current context as religious and putative marriages fall outside the ambit of the narrow understanding of domestic partnerships as explained above.

¹³ Skelton & Carnelley (2010) at 208. This definition is basically a shortened version of the one Smith formulated in his thesis: see Smith LLD Thesis (2009) at 183.

¹⁴ Concluded either in terms of the Marriage Act 25 of 1961 or the Recognition of Customary Marriages Act 120 of 1998.

¹⁵ In terms of the Civil Union Act 17 of 2006.

¹⁶ 25 of 1961.

¹⁷ 120 of 1998. The Recognition of Customary Marriages Act 120 of 1998 is mentioned owing to the fact that it is another form of marriage provided for in South African law. Although one of the main reasons it was enacted was to provide for polygynous customary marriages, it is possible to conclude a monogamous customary marriage which will imply that a person is "married" for purposes of the definition provided by Smith LLD Thesis (2009) at 183.

¹⁸ 17 of 2006.

¹⁹ Smith LLD Thesis (2009) at 183 and Skelton & Carnelley (2010) at 208.

²⁰ 25 of 1961. It is suggested that this definition should also specify that engaged persons are not included within the narrow meaning of domestic partnerships. Engagement is defined as the agreement between two persons to marry one another on a specific or determinable date in the future: see eg Sinclair (1996) at 313; Heaton (2010) at 5; Skelton and Carnelley (2010) at 20 and Van Schalkwyk (2011) at 70. This exclusion should be made considering that an engagement is a *sui generis* contractual agreement which is regulated by its own set of legal rules and principles: see eg Sinclair (1996) at 315; Visser & Potgieter (1998) at 25; Heaton (2010) at 5 and Van Schalkwyk (2011) at 71. This exclusion is based on the same rationale used above to exclude religious and putative marriages from the ambit of the narrow understanding domestic partnerships. For a general discussion on the law of engagement: see Sinclair (1996) at 313-333; Heaton (2010) at 3-14; Skelton and Carnelley (2010) at 19-32 and Van Schalkwyk (2011) at 69-100.

2.3 Terminology pertaining to domestic partnerships

2.3.1 Introduction

There is at present no uniformity in the legal terminology used in relation to persons who live together without having formalised their relationship. Probably owing to the fragmented manner in which the law relating to such relationships has developed²¹ various terms, such as “cohabitation”, “same-sex life partnership”, “heterosexual life partnership” and “domestic partnership”, have all been used haphazardly by the judiciary, legislature and legal commentators. Although the different terms could well be used interchangeably, it is contended that the lack of uniformity creates unnecessary confusion. Most of the confusion is caused by the fact that many of the terms have a context-specific meaning which implies that they cannot be used *in general* to refer to informal cohabitative relationships.

2.3.2 Terminology employed by courts

The judiciary has routinely employed the term “life partnership” when referring to unmarried cohabitants.²² The courts have usually qualified the term by prefixing the term with the adjective “heterosexual” or “same-sex” depending on the type of partnership concerned. According to Ackermann J in *National Coalition*,²³ the term life partnership refers to a relationship that is “intimate and mutually interdependent”. As

²¹ For a comprehensive analysis of the legal development of domestic partnerships: see ch 3 below.

²² See eg *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC); *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC); *Satchwell v President of the Republic of South Africa and Another* 2003 4 SA 266 (CC); *J and Another v Director General, Department of Home Affairs and Others* 2003 5 SA 621 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) and *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC). See also more recently the use of the term in *Paixao and Another v Road Accident Fund* 2012 6 SA 377 (SCA). The use of this term has in some instances been qualified by the word “permanent”: see eg *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 1 where Ackermann AJ refers to a “permanent life partnership”. The use of the word “permanent” is according to Schäfer “Same-sex life partnerships” in Clarke (ed) *Family Law Service* at 1 and Van Schalkwyk (2011) at 361 unnecessary as the term life partnership already indicates its perpetual nature.

²³ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 17.

a result of such judicial endorsement the term “life partnership” is frequently preferred by authors.²⁴

2.3.3 Terminology employed by legislature

The legislature has thus far failed to enact any piece of legislation that provides formal legal recognition to unmarried cohabitants in the sense of comprehensive and dedicated national legislation dealing with the relationship status of such partners.²⁵ A recommended Domestic Partnerships Act of 2006 was, however, proposed in annexure E of the SALRC Report on Domestic Partnerships.²⁶ Whether it is correct for the SALRC to call annexure E an “Act” is questionable as it is merely proposed legislation contained in the aforementioned Report. For this reason the Domestic Partnerships Act of 2006 will be referred to as the “Domestic Partnership Bill of 2006” for the remainder of this study. This proposed Bill of 2006 was followed up two years later by the publication, for comment, of a Draft Domestic Partnerships Bill of 2008.²⁷ For the remainder of this study it can be accepted that any reference to the “Domestic Partnerships Bill” refers to the Domestic Partnerships Bill of 2008, unless expressly stated otherwise.

Both Bills adopt the term “domestic partnership”.²⁸ According to clause 1 of the Domestic Partnerships Bill the term refers to “... a registered or unregistered domestic partnership between two persons who are both 18 years of age or older and includes a former domestic partnership”. Although the draft legislation does not

²⁴ See eg Schäfer “Same-sex life partnerships” in Clarke (ed) *Family Law Service* at 1, who describes it as a “term of art”.

²⁵ It has, however, enacted certain pieces of legislation which provides unmarried cohabitants with some spousal benefits. For a more detailed discussion of this issue, see ch 3 par 3.2.2 and ch 4 par 4.2 below. The terminology used in these instances varies between the use of the term “partner” (see eg the Employment Equity Act 55 of 1998) and the use of the term “spouse” (see eg the National Health Act 61 of 2003 as well as the Older Persons Act 13 of 2006).

²⁶ SALRC Report on *Domestic Partnerships* (2006).

²⁷ GN 36 of 2008 GG 30663 dated 14-01-2008.

²⁸ See eg the preambles to both Bills. Although these two Bills appear to be similar, one would be mistaken to think that they are identical. One of the most obvious differences between these two Bills is that the recommended Domestic Partnerships Bill of 2006 defines an “unregistered domestic partnership” as “a relationship between two adult persons who live as a couple and who are not related by family”, while the Draft Domestic Partnerships Bill of 2008 defines an “unregistered domestic partnership” as “a partnership that has not been registered as a domestic partnership under chapter 3 of this Act”. This change in definition has an enormous impact on the scope of the Draft Domestic Partnerships Bill of 2008 as this definition would appear to accommodate not only non-intimate domestic partnerships but also polygynous domestic partnerships. For a further analysis of these issues, see chs 2 par 2.4.4 below.

differentiate between heterosexual or same-sex domestic partnerships, it does differentiate between registered and unregistered domestic partnerships.²⁹

2.3.4 Terminology employed by academic commentators

Authors have employed different terminology in the various stages of the development of the law of domestic partnerships. Owing to the *nexus* between the historical development of domestic partnerships and the terminology used during those periods, it is for practical purposes possible to separate the terminology in this context into three distinct categories, namely, traditional terminology, terminology used prior to the enactment of the Civil Union Act³⁰ and finally, terminology employed after the enactment of the Civil Union Act.³¹

Traditional terminology used prior to the enactment of the Constitution included terms such as “shacking-up”, “living together”, “concubinage”, “extra-marital cohabitation”, “association *libre*”, “common-law marriage”, “*de facto* marriage”, and “putative marriage”.³² Owing to a variety of reasons these terms have all been rendered unsuitable.³³ Most of these terms, such as common-law marriage, *de facto* marriage and putative marriage, have simply been used incorrectly as they refer to legal institutions which are unfamiliar in the narrow understanding of domestic partnerships. Other terms have been made unsuitable by social or legal change. The term “concubinage”, for example, has been made inappropriate by changing social mores.³⁴ Considering that the moral and social stigma attached to cohabitation has substantially been diminished,³⁵ Smith is of the opinion that the term concubinage has been made unsuitable as it “... appears to be derogatory and invites the inference that it refers to a mistress outside of marriage”.³⁶ In addition to the changing *boni mores* several changes in law have also rendered certain terms, such as “extra-marital cohabitation” unusable. The reference to “marital” in the term has been made

²⁹ For a thorough analysis of the Draft Domestic Partnerships Bill, see ch 3 par 3.4.3 and ch 7 below.

³⁰ 17 of 2006.

³¹ 17 of 2006.

³² See eg Kahn (1983) at 244 and Sinclair (1996) at 267-268.

³³ See Smith LLD Thesis (2009) at 149-150 and 161-182 where he explains why terms such as “extra-marital cohabitation”, “common-law marriage”, “concubinage”, “*de facto* marriage” and “putative marriage” are no longer appropriate.

³⁴ See eg Sinclair (1996) at 271.

³⁵ Sinclair (1996) at 271.

³⁶ Smith LLD Thesis (2009) at 174.

inappropriate by the enactment of the Civil Union Act³⁷ which allows for the formalisation of a relationship by concluding a civil union. As a civil union can be called either a marriage or a civil partnership,³⁸ the specific reference to marriage renders the term too narrow to be suitable for general use as it strictly speaking disregards civil partnerships as a type of formalised relationship.³⁹

The period prior to the enactment of the Civil Union Act⁴⁰ was arguably the period which was most important for the recognition and development of same-sex life partnerships.⁴¹ For this reason many authors⁴² used the term “life partnerships” when referring to domestic partnerships. Among the most prominent supporters of this term is Smith,⁴³ who argues that the term is not only gender neutral but also flexible and, as such, “avoids” difficulties in relation to the terminology traditionally employed.

The period after the enactment of the Civil Union Act⁴⁴ saw the publication of the Draft Domestic Partnerships Bill.⁴⁵ In accordance with the terminology adopted in the Bill, many contemporary authors⁴⁶ have adopted the term “domestic partnership”.

2.3.5 Terminology adopted in this study

It is evident from the discussion above that there is ample authority for the adoption of either the term “life partnership” or “domestic partnership”. In light of the fact that this study advocates for the use of uniform terminology, only one can be adopted. The following paragraphs will investigate which term would best be suited for the purposes of this study.

³⁷ 17 of 2006.

³⁸ See s 1 of the Civil Union Act 17 of 2006.

³⁹ Smith LLD Thesis (2009) at 149.

⁴⁰ 17 of 2006.

⁴¹ For a comprehensive discussion of the development of domestic partnerships prior to the enactment of the Civil Union Act 17 of 2006, see ch 3 par 3.2 below.

⁴² See eg Cooke 2005 *SALJ* 542-557; Schäfer 2006 *SALJ* 626-647; De Ru 2009 *Speculum Juris* 111-126; Smith LLD Thesis (2009) at 150-151; Heaton (2010) at 243 and Manyathi 2012 *De Rebus* at 94-97.

⁴³ Smith LLD Thesis (2009) at 150.

⁴⁴ 17 of 2006. For a detailed discussion of the law relating to domestic partnerships after the enactment of the Civil Union Act 17 of 2006, see ch 3 par 3.4 below. This period can also be referred to as the current law in relation to domestic partnerships.

⁴⁵ GN 36 of 2008 *GG* 30663 dated 14-01-2008.

⁴⁶ See eg Clarke 2002 *SALJ* at 634-648; Goldblatt 2003 *SALJ* at 610-629; Lind 2005 *Acta Juridica* at 108-130; Wildenboer 2005 *SAPL* at 459-467; Barnard & De Vos 2007 *SALJ* at 795-826; Kruuse 2009 *SAJHR* at 380-391 and Meyersfeld 2010 *CCR* at 271-294.

Apart from the manner in which the term “life partnership” is most frequently used, that is, to refer to a heterosexual or same-sex domestic partnership (in the narrow sense), it also has a wider meaning. This wider meaning refers to all instances of what Schäfer calls “intimate cohabitation”.⁴⁷ In this wide sense intimate cohabitation refers not only to informal domestic partnerships but also to all other forms of formalised intimate cohabitation, such as civil marriages, customary marriages and civil unions. This wider meaning of the term “life partnership” was also employed in the *National Coalition* case,⁴⁸ where Ackermann J held that “... marriage represents *but one form* of life partnership”.⁴⁹ It is suggested that one should differentiate between formal life partnerships and informal life partnerships. This differentiation is necessitated by the fact that the term “formal life partnership” refers to all formalised forms of intimate cohabitation, while the term “informal life partnership” can only refer to heterosexual or same-sex domestic partnerships (in the narrow sense) as explained in paragraph 2.2 above. It is contended that if this differentiation is not adhered to, the term “life partnership” can possibly be interpreted to have two meanings.

However, the use of the term “domestic partnership”, as opposed to “life partnership”, is also not without its difficulties. Smith,⁵⁰ for example, is opposed to the use of the term “domestic partnership” owing to the fact that it is a context-specific term which narrowly refers to registered and unregistered domestic partnerships as they stand to be regulated by the Draft Domestic Partnerships Bill. It is, however, contended that Smith’s argument⁵¹ is unpersuasive since “life partnership”, the term which he prefers, suffers from the same shortcoming. “Life partnership”, as will be shown below,⁵² was specifically used and developed to address the lack of legal recognition afforded to same-sex couples and could therefore be regarded as equally context-specific.

While adopting either the term “life partnership” or “domestic partnership” would thus seem to have its difficulties, the term “domestic partnership” appears to diminish the

⁴⁷ Schäfer 2006 *SALJ* at 626-627.

⁴⁸ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 36.

⁴⁹ Own emphasis added.

⁵⁰ Smith LLD Thesis (2009) at 160-161.

⁵¹ Smith LLD Thesis (2009) at 160-161.

⁵² See ch 3 par 3.3.4.2.

chance of confusion as it is susceptible to only one meaning. Despite Smith's criticism the term domestic partnership is therefore adopted in this study in accordance with the Draft Domestic Partnerships Bill as it is the term least likely to cause confusion.

2.4 Establishing a domestic partnership

2.4.1 Introduction

The proof of the existence of a domestic partnership has been a prerequisite in all instances where specific spousal benefits have been awarded to unmarried couples on an *ad hoc* basis.⁵³ However, determining whether such a partnership has been in existence is not an easy matter since no formalities are attached to the formation of such a partnership.⁵⁴ One of the main points of contention relates to the weight, if any, that should be attached to the existence of a reciprocal duty of support between the parties.⁵⁵ The judiciary has given guidance in this regard by providing some criteria deemed essential for the existence of a domestic partnership.⁵⁶

2.4.2 Guidance provided by judiciary

According to the court in *National Coalition*,⁵⁷ the “core quality”⁵⁸ of a domestic

⁵³ Schäfer 2006 *SALJ* at 630. Also see ch 3 par 3.3.4.2 below, where the general development of same-sex life partnerships is outlined.

⁵⁴ Schäfer 2006 *SALJ* at 630.

⁵⁵ For a general discussion on the role of the reciprocal duty of support: see Schäfer 2006 *SALJ* at 626-647; Wood-Bodley 2008(a) *SALJ* at 259-273; Smith 2010 *PELJ* at 238-294 and Schäfer “Same-sex life partnerships” in Clarke (ed) *Family Law Service* at 5-6.

⁵⁶ These criteria were specifically developed in relation to same-sex domestic partnerships: see eg *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 53. According to Schäfer 2006 *SALJ* at 630 and Smith LLD Thesis (2009) at 155 there is no reason why these requirements or criteria cannot be applied in relation to heterosexual domestic partnerships as well.

⁵⁷ See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 53. This was the first case in which spousal benefits were awarded to same-sex life partners. For a discussion of the case, see ch 3 par 3.3.4.2 below. Also see Schäfer 2006 *SALJ* at 629; De Ru 2009 *Speculum Juris* at 116-119; Louw 2011 *Juridikum* at 238 and Schäfer “Same-sex life partnerships” in Clarke (ed) *Family Law Service* at 4.

⁵⁸ A term used by Schäfer to identify the most important requirement for the existence of a domestic partnership: see Schäfer “Same-sex life partnerships” in Clarke (ed) *Family Law Service* at 4. Smith LLD Thesis (2009) at 309-315 also analyses the role of the *consortium omnis vitae* within the context of domestic partnerships. He (at 309-310) objects to Schäfer describing *consortium* as the “core quality” of a same-sex life partnership as “... an analysis of case law reveals that the ability of a same-sex couple to establish a community of life does not without more appear to have been sufficient to justify the extension of the consequences of marriage to same-sex life partnerships”. Ch 2 pars 2.4.4-

partnership is the existence of a *consortium omnis vitae*⁵⁹ between the parties. The result thereof was that the court only extended the particular spousal benefits⁶⁰ to “... permanent same-sex life partners”.⁶¹ Permanence, according to Ackermann J in the *National Coalition* case,⁶² means the “... established intention of the parties to cohabit with one another permanently”. According to this judgment, it is determined by taking into consideration certain factors, such as the duration of the relationship, whether the parties actually cohabit and how the partnership is viewed by friends and family.⁶³

The cases that followed *National Coalition*⁶⁴ also adhered to the requirement of permanence.⁶⁵ This is presumably owing to the fact that it was regarded as a *sine qua non* for the establishment of a *consortium omnis vitae*.⁶⁶ Some cases, such as *Satchwell*,⁶⁷ *Du Plessis*⁶⁸ and *Gory v Kolver*,⁶⁹ however, in addition required that a reciprocal duty of support exist between the parties before the spousal benefits in question could be awarded to them.⁷⁰

2.4.5 below will argue that to adopt the so-called “proportionality principle” will create certainty regarding the role of *consortium* between the domestic partners in question.

⁵⁹ A *consortium omnis vitae* has been described in *Peter v Minister of Law and Order* 1990 4 SA 6 (E) 9F as “... an umbrella word for all the legal rights of one spouse to the company, affection, services and support of the other”. For other cases on the definition of *consortium*, see *Grobbelaar v Havenga* 1964 3 SA 522 (N) at 525D-E and *Wiese v Moolman* 2009 3 SA 122 (GNP) at 126B-C. Jacobs 2011 *Fundamina* at 65-95 provides a comprehensive analysis of not only the historical development of the *consortium omnis vitae*, but also its future relevance.

⁶⁰ In this particular case the spousal benefits pertained to certain rights in terms of s 25(5) of the Aliens Control Act 96 of 1991. For a case discussion see ch 3 par 3.3.4.2 below.

⁶¹ See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 86 (own emphasis added).

⁶² *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 86.

⁶³ For a non-exhaustive list of these factors, see *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 88.

⁶⁴ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC).

⁶⁵ See eg *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) at par 37; *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) at par 44; *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC) at par 28; *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) at par 42 and *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 66.

⁶⁶ See Van Schalkwyk (2011) at 362.

⁶⁷ *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) at par 37.

⁶⁸ *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) at par 42.

⁶⁹ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 66.

⁷⁰ *Wood-Bodley* 2008(a) SALJ at 259-273 questions the appropriateness of requiring a reciprocal duty of support to establish a domestic partnership. He (at 272) states that such a requirement can be criticised due to the fact that it is not only discriminatory but also too readily inferred by our courts. He does however (at 270) acknowledge that this requirement has become embedded in South African law.

This discrepancy has elicited much speculation and will be discussed in more detail below.⁷¹

2.4.3 Guidance provided by legislature

The legislature has not, as indicated above,⁷² enacted any piece of legislation which provides for the formal recognition⁷³ of domestic partnerships as a particular category of relationship status. It has, however, gazetted the Draft Domestic Partnerships Bill.⁷⁴ While this Bill provides for a detailed registration procedure for registered domestic partnerships,⁷⁵ it fails to provide any express guidance as to what would constitute an unregistered domestic partnership.⁷⁶ According to clause 26(2) the court must decide *ex post facto* whether such a partnership existed with “regards to all the circumstances of the relationship”. The Bill then continues by providing an open list of factors which the court must take into account for such purposes. These factors include, but are not limited to, the duration of the relationship, the degree of mutual commitment and the performance of household duties.⁷⁷ It is, however, in express terms clear from the clause that none of these factors are essential for the existence of an unregistered domestic partnership.⁷⁸ As a result thereof, it would be fair to conclude that the Draft Domestic Partnerships Bill does not provide any substantive

⁷¹ See ch 3 pars 3.3.4.2 below.

⁷² See ch 2 par 2.3.3 above.

⁷³ Formal legal recognition should, for the purposes of this study, be differentiated from *ad hoc* legal recognition. The former term should be understood to mean the legal recognition of domestic partnerships by way of national legislation (such as the Domestic Partnerships Bill) which aims to regulate domestic partnerships as a whole. In contrast to this, *ad hoc* legal recognition should be understood to mean the instances where either the legislature or the judiciary has recognised a domestic partnership for a specific purpose. This *ad hoc* legal recognition refers mostly to the instances where spousal benefits were specifically awarded to “same-sex life partnerships” prior to the enactment of the Civil Union Act 17 of 2006. *Ad hoc* legal recognition is, however, not limited to these instances as heterosexual domestic partners have also received *ad hoc* recognition after the enactment of the Civil Union Act 17 of 2006.

⁷⁴ GN 36 of 2008 GG 30663 dated 14-01-2008.

⁷⁵ See ch 7 par 7.2.3.1 below. Registered domestic partnerships are not relevant to the current discussion as the Bill provides for express requirements as to how a relationship must be registered. Both registered and unregistered domestic partnerships will be discussed comprehensively in ch 7 below.

⁷⁶ See cl 26 of the Draft Domestic Partnerships Bill.

⁷⁷ See cl 26(2) of the Draft Domestic Partnerships Bill.

⁷⁸ See cl 26(3) of the Draft Domestic Partnerships Bill.

indication of the criteria that would be required for an unregistered domestic partnership to be formed.⁷⁹

2.4.4 Guidance provided by academic commentators

Most academic authors recognise the importance of permanence as a prerequisite for the existence of a domestic partnership.⁸⁰ However, these authors do not focus on what permanence is, or what it entails, but rather try to explain why the courts occasionally required the additional proof of a reciprocal duty of support before they extended spousal benefits to domestic partners. According to Schäfer,⁸¹ the reason for this additional requirement is based on what he terms the “proportionality principle”. This principle is based on the rationale that “... there should be a broad measure of proportionality between the extent to which the state and third parties are expected to underwrite a life partnership and the extent to which its participants have elected to assume binding legal obligations towards one another”.⁸² The proportionality principle has led some authors to conclude that the requirements needed to prove the existence of a domestic partnership are dependent on the type of relief sought.⁸³ If this view is accepted it would mean that domestic partners would be required to prove both a *consortium* as well as a reciprocal duty of support if the claim has financial implications. Conversely, if the claim has no such implications they would merely have to prove the existence of a *consortium omnis vitae*.

Some authors also express the view that other factors such as cohabitation, dependence, monogamy and sexual intimacy may possibly play a role in determining

⁷⁹ Smith LLD Thesis (2009) at 657-668 severely criticises this *lacuna* in the Draft Domestic Partnerships Bill. In an attempt to address the problem he suggests (at 667-668) a possible amendment to the Bill which will recognise the importance of the requirement of permanence.

⁸⁰ See eg Schäfer “Same-sex life partnerships” in Clarke (ed) *Family Law Service* at 7; Wood-Bodley 2008(a) SALJ at 271; De Ru 2009 *Speculum Juris* at 117-118; Heaton (2010) at 252-253; Louw 2011 *Juridikum* at 238 and Van Schalkwyk (2011) at 362.

⁸¹ Schäfer 2006 SALJ at 630.

⁸² Schäfer 2006 SALJ at 630.

⁸³ Schäfer 2006 SALJ at 630; Schäfer “Same-sex life partnerships” in Clarke (ed) *Family Law Service* at 7; Wood-Bodley 2008(a) SALJ at 271; De Ru 2009 *Speculum Juris* at 117; Heaton (2010) at 252-253 and Louw 2011 *Juridikum* at 239. According to Wood-Bodley 2008(a) SALJ at 271 this “two-tier” approach to domestic partnerships was also accepted, to some extent, in *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC) at par 24 where it was held that: “The precise parameters of relationships entitled to constitutional protection will often depend on the purpose of the statute. For instance in *Satchwell* where the issue was pensions and related benefits, a mutual duty of support was an essential element. In the present case, where the rights of children are implicated, this was not an essential element”.

whether a domestic partnership has come into existence.⁸⁴ The relevance of these factors was also highlighted in *National Coalition*,⁸⁵ where Ackermann J recommended that these factors may be used to determine whether a domestic partnership is sufficiently permanent.⁸⁶ The following paragraphs will investigate the extent to which these factors may have an impact on the proof of the existence of a domestic partnership.

(a) Cohabitation

It is somewhat surprising that cohabitation has not authoritatively been identified as a requirement for a domestic partnership,⁸⁷ given the fact that permanent cohabitation is often a feature of such a relationship and, as such, implied in the existence thereof.⁸⁸ The current view on cohabitation, that is the sharing of a common abode, is that it is merely one of several factors to be taken into account when the permanence of a domestic partnership is considered.⁸⁹ According to Wood-Bodley it is possible to prove the existence of a domestic partnership even though the parties do not live together, provided that there are "... sufficient other *indicia* of their permanent relationship".⁹⁰

⁸⁴ See eg Schäfer "Same-sex life partnerships" in Clarke (ed) *Family Law Service* at 7-8; Wood-Bodley 2008(a) *SALJ* at 261-265; De Ru 2009 *Speculum Juris* at 117-118; Smith LLD Thesis (2009) at 154-163 and Louw 2011 *Juridikum* at 238.

⁸⁵ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 88.

⁸⁶ The court provided certain other factors, *inter alia*, whether there is a partnership agreement, if the partners included one another in their wills, if they made provision for each other in relation to medical, pension or related matters and how the relationship is viewed by the partners' friends and family. The court did, however, expressly decide that none of these factors were "indispensible" when determining the permanence of a domestic partnership.

⁸⁷ See eg Wood Bodley 2008(a) *SALJ* at 261-268; Smith LLD Thesis (2009) at 156 and Schäfer "Same-sex life partnerships" in Clarke (ed) *Family Law Service* at 7.

⁸⁸ Smith LLD Thesis (2009) at 156. Schäfer "Same-sex life partnerships" in Clarke (ed) *Family Law Service* at 7 remarks that permanent cohabitation has indeed been an explicit attribute of most domestic partnerships although "... their nature and durations have varied considerably".

⁸⁹ See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 88. Also see Wood Bodley 2008(a) *SALJ* at 261-263 and Smith LLD Thesis (2009) at 156 who support this view.

⁹⁰ Wood Bodley 2008(a) *SALJ* at 263.

(b) Dependence

According to the SALRC,⁹¹ dependence implies that the parties are “... co-operating in the meeting of expenses”.⁹² It would thus seem as though dependence, like cohabitation, is not an essential requirement for a domestic partnership⁹³ but merely one of the *indiciae* proving the existence thereof.⁹⁴ Financial dependence should, moreover, not be confused with a reciprocal duty of support which will be discussed later in this paragraph.⁹⁵

(c) Monogamy

Considering that South African family law allows for the solemnisation of polygynous marriages,⁹⁶ it is uncertain whether or not domestic partnerships must be monogamous.⁹⁷ According to Smith,⁹⁸ the fact that South African law recognises polygynous marriages implies that the law could possibly recognise polygynous domestic partnerships. However, such a partnership could only exist if it is permitted in terms of either customary law or an established and recognised religion. If the polygyny cannot be accommodated in terms of either customary law or a recognised religious system, the relationship in question would have to be monogamous.⁹⁹ In such cases the existence of one domestic partnership will automatically prevent the simultaneous existence and recognition of a second domestic partnership.

⁹¹ SALRC Report on *Domestic Partnerships* 2006 at 13-14.

⁹² SALRC Report on *Domestic Partnerships* 2006 at 14.

⁹³ Smith LLD Thesis (2009) at 158-159.

⁹⁴ Smith LLD Thesis (2009) at 158-159.

⁹⁵ See eg Wood Bodley 2008(a) *SALJ* at 264. See ch 2 par 2.4.5 below.

⁹⁶ See the Recognition of Customary Marriages Act 120 of 1998.

⁹⁷ Wood-Bodley 2008(a) *SALJ* at 266-268 attempts to determine the meaning of monogamy. According to him (at 267) monogamy refers to the scenario where a person is involved in a single relationship at a time. He further submits that sexual fidelity should not be confused with monogamy as “... the fact that either or both of the parties to a marriage or domestic partnership engage, or have engaged, in a sexual activity outside of the relationship during its subsistence does not mean that the marriage partnership is not monogamous”. It is contended that this differentiation between monogamy and sexual fidelity is correct and should be adhered to.

⁹⁸ Smith LLD Thesis (2009) at 156-158. It is interesting to note that cl 26(4) of the Draft Domestic Partnerships Bill also adopts this stance in relation to unregistered domestic partnerships, see ch 7 par 7.2.2 below.

⁹⁹ See Smith LLD Thesis (2009) at 157 and Wood-Bodley 2008(a) *SALJ* at 267.

(d) Sexual intimacy

The legal requirement of sexual intimacy boils down to the question whether “care partnerships”¹⁰⁰ should also qualify as domestic partnerships. The SALRC¹⁰¹ opposed the legal recognition of care partnerships because of the possibility of abuse. In contradistinction to this view, Smith¹⁰² contends that care partnerships should be included within the understanding of domestic partnerships provided that the partners have never participated in a marriage ceremony, nor does the law prevent them from marrying one another. It is evident from these contradictory opinions that there is no certainty as to whether domestic partners should be sexually intimate.

In an attempt to determine the relative weight of the aforementioned factors, Smith concludes:¹⁰³

“... in order to qualify as a life partnership in the narrow sense, a union must be permanent, although this need not imply permanent cohabitation. The partners must simply unequivocally regard their union to be permanent, irrespective of whether or not they cohabit on a permanent basis. The union should be monogamous unless an ‘established cultural or religious [system]’ permits otherwise. Dependence should not be viewed as an indispensable criterion for a union to qualify as a life partnership in the narrow sense, but where a statute indeed requires proof of the same, a flexible approach should be adopted”.

2.4.5 Proposed requirements

An approach that adopts the proportionality principle, as described above,¹⁰⁴ would seem to be best suited for the purposes of this study. Adopting such an approach would mean that there should be a direct correlation between the requirements needed to prove the existence of a domestic partnership and the type of relief sought by the partner or partners. As such, only the existence of a *consortium omnis vitae* would have to be proven if the relief sought has no financial implications for the partners. If the relief sought does, however, have financial implications, the partners would need to prove the existence of a reciprocal duty of support in addition to a

¹⁰⁰ A care partnership is defined by the SALRC as a non-conjugal, but close personal relationship based on emotional or economic interdependency as opposed to sexual intimacy: see SALRC Report on *Domestic Partnerships* 2006 at 314.

¹⁰¹ See eg SALRC Report on *Domestic Partnerships* 2006 at 386-387.

¹⁰² Smith LLD Thesis (2009) at 159-160.

¹⁰³ Smith LLD Thesis (2009) at 160 ([] my addition).

¹⁰⁴ Ch 2 par 2.4.4 above.

consortium omnis vitae. Examples of claims which would have financial implications include the dependant's claim, claims regarding intestate succession and claims regarding maintenance. In contrast to this, claims which will not have financial implications relate to claims that, for example, alter the legal status of domestic partners or claims concerning the acquisition or exercise of parental responsibilities and rights. The reason why this approach is adopted in this study is owing to the fact that it appears to give expression to the intention of the partners involved. Moreover, it emphasises the informal nature of domestic partnerships and recognises that some partners may desire fewer consequences to attach to their relationship than others.

2.5 Conclusion

The purpose of this chapter was to describe what a domestic partnership is, how it should be referred to, and finally, how it is established. Determining the aforementioned at this early stage was necessary not only to limit the scope of the study, but also to ensure a logical presentation of the subject-matter.

A domestic partnership should, for purposes of this study, be understood to mean a permanent and stable relationship between two persons who have chosen not to formalise their relationship. The requirements needed to prove the existence of such a relationship should depend on the type of relief sought, as explained in the previous paragraph. Consequently, if the relief sought has financial implications the domestic partners will be required to prove not only the existence of a *consortium omnis vitae*, but also that there was an established reciprocal duty of support between them. Conversely, if the relief sought has no financial implications the domestic partners will only have to prove the existence of a *consortium omnis vitae* between them.

Finally, the aforementioned type of relationship is to be referred to as a “domestic partnership” rather than a “life partnership” as it avoids the unnecessary confusion which can result from the dual meaning of the term “life partnership” as explained in paragraph 2.3.5 above.

Chapter 3:

Historical development and *ad hoc* recognition of domestic partnerships in South Africa

3.1 Introduction

The central aim of this chapter will be to provide an historical overview of the development and *ad hoc* recognition of domestic partnerships in South Africa. The importance of choice in the development and *ad hoc* recognition of domestic partnerships will be accentuated throughout and, as such, provide a theoretical foundation for the remainder of this study. The structure of the chapter has been aligned with the chronological development of domestic partnerships. This is demarcated by three distinguishable eras, namely, the traditional approach to domestic partnerships, the current recognition of domestic partnerships, and lastly, the possible future recognition and regulation of domestic partnerships. Adhering to this methodology will not only enable the achievement of the central aim of this chapter, but also, by implication, provide an introduction to the legal reasoning, policy considerations and social realities that have influenced the law of domestic partnerships to date.

3.2 Traditional approach to domestic partnerships

3.2.1 Introduction

The historical development of domestic partnerships will be introduced by investigating whether, how and to what extent such partnerships were recognised at common law. This era will trace the development of domestic partnerships until the enactment of the Constitution. Of importance to this exposition is not only the reflection on the legal position of domestic partners but also the deeper, more ingrained social mores prevalent in this time period.

3.2.2 Moral and legal disregard of extra-marital cohabitation

Concubinage was socially accepted in early Roman society.¹ The social acceptance (or rather indifference)² to concubinage did not translate into any significant legal regulation until Justinian acknowledged such relationships as second-class marriages.³ As a result of this recognition, concubines could enjoy legal protection in a manner not too different from spouses, provided they complied with certain requirements.⁴ According to Labuschagne,⁵ concubinage was tolerated largely owing to certain socio-economic realities, such as the decline of lawful Roman citizens.⁶ Roman recognition of concubinage was, however, ended by Leo VI in his 91st *Novellae*.⁷ The resultant legal opprobrium⁸ attached to cohabitants turned into social condemnation when the Catholic Church, between the 11th and 13th century, claimed dominion over marriage by declaring it a holy sacrament.⁹ This social disapproval, which was reflected in Roman-Dutch law, endured and led to Hahlo remarking as late as 1972:¹⁰

“No doubt because South Africans are a moral people, there are not many cases on concubinage in our law.”

¹ D.23.2.59 and 25.7.1.3 as per Thomas (1976) at 433 (fn 5). Also see Schultz (1954) at 137; Labuschagne 1989 *SALJ* at 649 and Jacobs 2004 *Fundamina* at 60. According to Labuschagne (at 650) concubinage was not accepted in all social circumstances but only if the relationship was entered into by two unmarried “freeborns” or, alternatively, between an unmarried “freeborn” and a slave. For a comprehensive analysis of the recognition and regulation of concubinage in Roman law: see Schultz (1954) at 137-141; Thomas (1976) at 433-435; Labuschagne 1989 *SALJ* at 649-662; Grubbs (1995) at 294-300 and Jacobs 2004 *Fundamina* at 59-83.

² Jacobs 2004 *Fundamina* at 67.

³ D.25.7.1.1 as per Schultz (1954) at 139-140. These second-class marriages were known as *inaequale coniugium*: see Schultz (1954) at 139; Labuschagne 1989 *SALJ* at 649 and Jacobs 2004 *Fundamina* at 74-75.

⁴ One of the most significant requirements was that the relationship had to be monogamous: see D 25.7.1.4 as per Thomas (1976) at 433 (fn 6). For a discussion of the other requirements: see Thomas (1976) at 433; Labuschagne 1989 *SALJ* at 658-661 and Jacobs 2004 *Fundamina* at 74-75.

⁵ Labuschagne 1989 *SALJ* at 661.

⁶ Thomas (1976) at 433 remarks that concubinage was the result of the various bans on marriage in classical Roman law. He states “... [t]he numerous bans on marriage made it inevitable that there should be many who wished to intermarry but knew that they were unable to do so”. These bans were applicable to, *inter alia*, officials of the provinces and soldiers: see Schultz (1954) at 138 and Thomas (1976) at 433.

⁷ Labuschagne 1989 *SALJ* at 661.

⁸ See eg Schultz (1954) at 137 who describes such unions as “... allowed but illegitimate”.

⁹ Witte 2004 *EC* at 6.

¹⁰ Hahlo 1972 *SALJ* at 321.

In the pre-Constitutional era concubinage¹¹ narrowly referred to a stable and monogamous relationship between a cohabitating man and woman who had never gone through a wedding ceremony.¹² Some, if not most pre-Constitutional authors, did not include same-sex couples within their definitions of concubinage.¹³ This is probably due to the fact that homosexual desire was regarded as tainted, defiant and perverse (not to mention illegal).¹⁴ As a result of this, the homosexual community, as a whole, was considered to be "... bent, queer [and] repugnant".¹⁵ Notwithstanding this sentiment, some authors began to include same-sex cohabitants within their understanding of extra-marital cohabitation by the mid-1980s.¹⁶

Although legally defined,¹⁷ extra-marital cohabitation was not legally recognised or regulated. In fact, apart from a small number of statutes which provided express recognition, concubines were for the most part ignored by the legal system.¹⁸ Most

¹¹ Also referred to as extra-marital cohabitation. For the justification of this strict adherence to terminology, see ch 2 par 2.3 above.

¹² Hahlo 1972 *SALJ* at 321.

¹³ See eg Hahlo 1972 *SALJ* at 321; Kahn (1983) at 244; Hutchings & Delpont 1992 *De Rebus* at 121. Reference to this (heterosexual definition) can still be found in more recent authorities: see Sinclair (1996) at 268. Sinclair (1996) at 268 does, however, hasten to add a definition which includes same-sex partners as well.

¹⁴ See eg the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) at pars 4 and 109, discussing the attitude towards homosexual desire as well as the abolishment of the common law crime of sodomy.

¹⁵ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) at par 109 ([] my addition).

¹⁶ See Thomas 1984 *THRHR* at 455; Van der Vyver & Joubert (1985) at 449 and Hutchings & Delpont 1992 *De Rebus* at 122, who propose a definition which refers to the traditional elements of monogamy and stability but which is gender neutral. See eg Thomas 1984 *THRHR* at 455 who defines concubinage as "'n duursame, monogame samewoning as man en vrou van partye wat nie met mekaar wil, kan of mag trou nie" (own emphasis added).

¹⁷ See eg Hahlo 1972 *SALJ* at 321; Kahn (1983) at 244; Thomas 1984 *THRHR* at 455; Van der Vyver & Joubert (1985) at 449 and Hutchings & Delpont 1992 *De Rebus* at 121-122.

¹⁸ Thomas 1984 *THRHR* at 456. Kahn (1983) at 248-250 provided a non-exhaustive list of statutes that provided limited recognition to cohabitative relationships at that time. See eg s 4(1) of the Workmen's Compensation Act 30 of 1984; s 21(13) of the Insolvency Act 24 of 1936 and s 9(1)(c) of the Aliens Act 1 of 1937 (since repealed). According to Hahlo 1972 *SALJ* at 332 these legislative exceptions were not based on the need to provide recognition to cohabitative couples but rather to further the purpose or policy considerations behind the legislation in question. For a detailed analysis of statutes which currently recognise domestic partnerships, see ch 4 par 4.2 below. The judiciary also acknowledged the existence of cohabitation. See eg *Drummond v Drummond* 1979 1 SA 161 (A). In this case a divorced husband and wife had entered into a divorce agreement in terms of which the wife would cease to receive maintenance if the husband could prove that "... she was living as man and wife with a third person on a permanent basis". This clause (known as a *dum casta* clause) was enforced by the court after it was satisfied that the husband had indeed proven the existence of such a cohabitative relationship (see par 170B-F). A *dum casta* clause stipulates that a maintenance order may be rescinded if the partner (in whose favour it operates) leads an unchaste life. For further analysis of such cases: see Schweltnus LLD Thesis (1994) at 13 and Heaton (2010) at 53. Kahn (1983) at 250 opined that cohabitation did not necessarily or automatically (in the absence of a *dum casta* clause) deprive a person of court ordered maintenance. This opinion was (and is) also held by

authors of the day agreed that no automatic legal consequences were attached to cohabitation.¹⁹ This implied, *inter alia*, that the parties were not obliged to maintain one another,²⁰ were not regarded as heirs in terms of the Intestate Succession Act,²¹ could not contractually bind one another for household necessities,²² were precluded from claiming in terms of the dependant's action,²³ could not apply for property division,²⁴ were not automatically entitled to each other's pension benefits²⁵ and finally, that children born from the cohabitative relationship were regarded as being illegitimate.²⁶

The already precarious position in which cohabitants found themselves was exacerbated by the fact that the courts were unwilling to enforce contracts which purported to regulate the *inter partes* relationship between two cohabitants.²⁷ Such

the South African courts: see eg *Schlesinger v Schlesinger* 1968 1 SA 699 (W) at 701E-H. The fact that another person (presumably a new concubine) provided an ex-spouse with maintenance would, however, have been considered a good ground for the rescission, variation or suspension of the maintenance order: Kahn (1983) at 250. For a general discussion of the effect of extra-marital cohabitation on post-divorce maintenance orders: see Heaton (2010) at 157-158 and Van Schalkwyk (2011) at 288-289.

¹⁹ Hahlo 1972 SALJ at 324; Kahn (1983) at 245; Thomas 1984 THRHR at 456; Labuschagne 1985 TSAR at 219 and Hutchings & Delpont 1992 *De Rebus* at 122.

²⁰ Hahlo 1972 SALJ at 324; Kahn (1983) at 246; Thomas 1984 THRHR at 456; Hutchings & Delpont 1992 *De Rebus* at 122.

²¹ 81 of 1987. See eg Hahlo 1972 SALJ at 324; Kahn (1983) at 246 and Hutchings & Delpont 1992 *De Rebus* at 122. Nothing of course precluded the parties from making each other beneficiaries in terms of a valid will: see eg *Millward v Glaser* 1949 4 SA 931 (A). Hahlo (1975) at 36 noted that when a testator left property to his "wife" or "children" there was a rebuttable presumption that he referred to his legal wife and legitimate children.

²² Hahlo 1972 SALJ at 324 and Kahn (1983) at 246.

²³ Thomas 1984 THRHR at 456 and Hutchings & Delpont 1992 *De Rebus* at 122.

²⁴ Hahlo 1972 SALJ at 326; Thomas 1984 THRHR at 456 and Hutchings & Delpont 1992 *De Rebus* at 122. Thus, according to Hahlo 1972 SALJ at 326, all property acquired by one of the parties remained the exclusive property of that party. This property would not automatically become subject to property division at the termination of the relationship (except if one of the parties could prove the existence of a universal partnership as discussed in fn 27 below). The parties could, however, acquire joint-ownership of property.

²⁵ Hutchings & Delpont 1992 *De Rebus* at 122.

²⁶ Hahlo 1972 SALJ at 329 and Hutchings & Delpont 1992 *De Rebus* at 123. According to the latter this implied that the father of the illegitimate child was placed in the unenviable position of not acquiring any automatic parental authority (as it was then called) while still being under the legal obligation to maintain the child. The fact that an unmarried father has the obligation to maintain his illegitimate child was confirmed in cases such as *Lamb v Sack* 1974 2 SA 670 (T) and *Tate v Jurado* 1976 4 SA 238 (W). See also Van Schalkwyk (2011) at 59. For a more comprehensive analysis of cohabitants as parents, see ch 4 par 4.4.5 below.

²⁷ Hahlo 1972 SALJ at 324; Thomas 1984 THRHR at 456; Van der Vyver & Joubert (1985) at 450 and Hutchings & Delpont 1992 *De Rebus* at 123. It would appear that this bar to contractual regulation was, to some extent, relaxed in the case of *Ally v Dinath* 1984 2 SA 451 (T). In this case (at 454F-H) the court held that two cohabitants could indeed contractually create a universal partnership. According to authors such as Thomas 1984 THRHR at 456; Labuschagne 1985 TSAR at 219 and Hutchings & Delpont 1992 *De Rebus* at 123 this implied that domestic partners could at least to this narrow extent regulate their own relationships. The ability to create a universal partnership did not,

agreements, referred to at the time by some as “money-for-sex” agreements,²⁸ were at least until the mid-1980s regarded as initiating and/or furthering sexual immorality.²⁹ As such, they were considered to be illegal, *contra bonos mores*, and inevitably, unenforceable.³⁰ Hahlo³¹ was of the opinion that not all contracts between cohabitants were necessarily unenforceable but only those that related to the cohabitants’ “illicit relationship”. Other agreements which did not pertain to their “illicit relationship” would, as such, still have been legally enforceable.³²

Legal scholars initially saw no legal justification for the alteration of the aforementioned *status quo*.³³ Even authors such as Hahlo,³⁴ for example, supported the *status quo* despite recognising both the higher incidence of concubinage as well as the fact that many people no longer regarded extra-marital cohabitation as inherently immoral. The two most prominent reasons for the lack of legal reform were seemingly based on the pre-eminence of the institution of marriage and the importance of individual autonomy.³⁵ Marriage was regarded as the cornerstone of a stable and moral society.³⁶ It was argued that any recognition of cohabitation would endanger the institution of marriage which would in turn facilitate the moral decline of

however, allow cohabitants to agree upon ancillary matters such as maintenance or the division of property which fell outside of the ambit of the universal partnership: see Van der Vyver & Joubert (1985) at 450.

²⁸ Hutchings & Delpont 1992 *De Rebus* at 123.

²⁹ Kahn (1983) at 246. Also see Labuschagne 1985 *TSAR* at 222; Hutchings & Delpont 1992 *De Rebus* at 123 and Schwellnus “Cohabitation” in Clarke (ed) *Family Law Service* at 20.

³⁰ Kahn (1983) at 246. Also see Labuschagne 1985 *TSAR* at 222; Hutchings & Delpont 1992 *De Rebus* at 123; Sinclair (1996) at 279-280 and Schwellnus “Cohabitation” in Clarke (ed) *Family Law Service* at 20.

³¹ Hahlo 1972 *SALJ* at 324. Also see Kahn (1983) at 246-247.

³² Kahn (1983) at 247.

³³ Hahlo 1972 *SALJ* at 330-332. Also see Kahn (1983) at 261-263; Thomas 1984 *THRHR* at 456-457 and Hutchings & Delpont 1992 *De Rebus* at 124-125.

³⁴ Hahlo 1972 *SALJ* at 330.

³⁵ See Kahn (1983) at 262; Thomas 1984 *THRHR* at 456 and Hutchings & Delpont 1992 *De Rebus* at 124.

³⁶ Hutchings & Delpont 1992 *De Rebus* at 124. Hutchings & Delpont (at 122) contend that concubinage had a sinister connotation and was regarded a threat to the institution of marriage, which was (and is) regarded as a cornerstone of a stable society. This is evident from statements such as people are “living in sin” or are involved in an “illicit liaison”: see Kahn (1983) at 245. The moral disapproval was not only evident in South Africa but also foreign jurisdictions such as Europe, North America, Australia and New Zealand: see Kahn (1983) at 245.

our society.³⁷ The societal importance of the institution of marriage has recently been reiterated in *Dawood and Another v Minister of Home Affairs and Others*:³⁸

“The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends.”

Despite the considerable social significance of marriage (as described in the *dictum* above), some authors began to argue that the non-recognition of cohabitative relationships was justified based on the significance of individual autonomy rather than the social importance of marriage.³⁹ According to Kahn,⁴⁰ for example, there was no justification for providing recognition to a cohabitative relationship in which the parties had specifically chosen to remain unmarried.

3.2.3 Summary

It would be permissible to conclude that, in the years prior to the Constitution, cohabitative partners were placed in the unenviable position of being not only morally disapproved of but also legally disregarded. It is evident that this unenviable position was mainly due to the social and legal significance attached to the institution of marriage.

³⁷ Thomas 1984 *THRHR* at 456.

³⁸ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) at pars 30-31.

³⁹ See eg Kahn (1983) at 262; Thomas 1984 *THRHR* at 456 and Hutchings & Delpont 1992 *De Rebus* at 124 who acknowledged that recognising cohabitation would not do more harm to the institution of marriage than divorce, adultery and illegitimate children. This line of reasoning led Thomas 1984 *THRHR* at 456 to conclude: “Daar kan egter op gewys word dat sedeloosheid, buite-egtelike kinders, egskeiding en owerspel eweneens beskou kan word as faktore wat die huwelik bedreig, maar desnieteenstaande nie deur die reg geïgnoreer word nie”.

⁴⁰ Kahn (1983) at 262. He describes them as lacking the *animus maritandi*.

3.3 Current recognition of domestic partnerships

3.3.1 Introduction

The second era of development will consider the impact of the Constitution, the Civil Union Act⁴¹ and case law on the law relating to extra-marital cohabitation. This exposition will differentiate between the development of heterosexual domestic partnerships, on the one hand, and same-sex domestic partnerships, on the other. Differentiation is necessitated by the different “... legal and factual issues” arising from the two forms of domestic partnership.⁴² Unlike heterosexual domestic partners, same-sex domestic partners were prohibited from concluding a valid marriage until the enactment of the Civil Union Act.⁴³ As such, same-sex domestic partners had no choice other than to live in extra-marital cohabitative relationships prior to the latter Act's enactment. Attempts to redress this lack of choice will consequently form the main focus of this era of development.

3.3.2 Impact of the Constitution

Considering the enormous impact of the Constitution, it seems appropriate at the outset to provide an overview of the fundamental principles relating to South Africa's constitutional dispensation. Because it would be practically impossible to establish the full extent to which the Constitution has affected the South African family law, the following discussion will focus only on the most important constitutional provisions which have had an impact on the law of domestic partnerships in particular.

South Africa became a constitutional democracy on 27 April 1994.⁴⁴ The Constitution is founded on certain constitutional values⁴⁵ (such as non-racialism, non-sexism and the rule of law) and entrenches in the Bill of Rights certain fundamental rights,⁴⁶ such

⁴¹ 17 of 2006.

⁴² *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) at par 16.

⁴³ 17 of 2006. For a detailed analysis of this legal dilemma see ch 3 pars 3.3.3-3.3.4 below.

⁴⁴ The Interim Constitution came into force on 27 April 1994 but was later replaced by the final Constitution after the *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 2 SA 97 (CC) case. The final Constitution came into law on 4 February 1997.

⁴⁵ See specifically the preamble and s 1 of the Constitution.

⁴⁶ Currie & De Waal (2005) at 23. Also see Bill of Rights: Ch 2 of the Constitution.

as the right to equality,⁴⁷ human dignity⁴⁸ and privacy.⁴⁹ The Bill of Rights is applicable not only to the state but also to natural and juristic persons.⁵⁰ All law or conduct which is inconsistent with the Constitution (which includes the Bill of Rights) is unconstitutional and consequently invalid.⁵¹ The rights to equality and human dignity are, owing to the nature of this research, most relevant and therefore warrant further discussion.

In its most basic form equality is based on the idea that people who are alike should be treated similarly.⁵² This ideology has been encapsulated in section 9(1) of the Constitution which stipulates: “Everyone is equal before the law and has the right to equal protection and benefit of the law”. Section 9(3) further contains the prohibition against unfair discrimination on any grounds, including as listed grounds, sex, gender, marital status, and sexual orientation. A particular method, referred to as the “*Harksen v Lane* test”,⁵³ has been developed to establish the existence of unfair discrimination.⁵⁴ The test provides for a three-stage enquiry which can be summarised as follows: First, it should be determined whether the particular provision differentiates between one person and another, or alternatively, between certain categories of persons. If it does so differentiate, one needs to determine whether such differentiation is based on any rational connection to a legitimate governmental purpose.⁵⁵ If such a rational connection to a legitimate governmental purpose is lacking, one can conclude that the particular provision does indeed discriminate. The second stage of enquiry is used to determine if the previously established discrimination is indeed unfair. In determining the fairness of the particular provision the complainant is assisted by a presumption of unfairness if the discrimination is

⁴⁷ S 9 of the Constitution.

⁴⁸ S 10 of the Constitution.

⁴⁹ S 14 of the Constitution.

⁵⁰ See ss 8(1) and (2) of the Constitution. In order to determine whether a natural or juristic person is bound by the Constitution one should take into account both the nature of the right and the nature of the duty imposed by the right.

⁵¹ S 2 of the Constitution.

⁵² Currie & De Waal (2013) at 210. Bonthuys & Albertyn (2007) at 83 refer to formal equality as the idea that “... likes should be treated alike, while those who are different should be treated differently in proportion to their difference”.

⁵³ *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) at par 53. See eg *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 32 where Ackermann J expressly refers to the principles established in *Harksen v Lane NO and Others* 1998 1 SA 300 (CC). For a generalised discussion of the *Harksen*-test: see Currie & De Waal (2013) at 215-217; Bonthuys & Albertyn (2007) at 98-99 and Rautenbach-Malherbe (2012) at 331-332.

⁵⁴ Currie & De Waal (2005) at 235.

⁵⁵ See *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) at par 53(a).

based on a ground listed in section 9(3).⁵⁶ If the presumption cannot be rebutted and is indeed found to be unfair one can move on to the last stage of the enquiry.⁵⁷ In this final stage one must determine whether this unfair discrimination can be justified in terms of section 36 of the Constitution.⁵⁸

In addition to the right to equality, the Constitution also guarantees the right to human dignity.⁵⁹ Although difficult to define, this right can be described as the source of a person's "innate rights".⁶⁰ Human dignity is inherently connected to the right to equality, and has been described by Currie and De Waal⁶¹ as the basis of the right to equality. Bonthuys and Albertyn⁶² agree with this statement as they are of the opinion that: "South African equality jurisprudence has generally used the value of dignity to guide its equality right". Human dignity may be infringed when other rights are infringed. This is owing to the fact that human dignity usually underlies the basis of such rights. According to Rautenbach-Malherbe,⁶³ the courts⁶⁴ will usually focus on the infringement of the other (more specific) right in case of such an "overlap".

The rights to equality and human dignity (and indeed all other rights contained in the Bill of Rights) can, as alluded to above, be limited in certain instances. This implies that none of the rights contained in the Bill of Rights are absolute.⁶⁵ Limitation or justified infringement may occur in terms of section 36 of the Constitution (also known as the "limitation clause").⁶⁶ The limitation can take place only if the potentially justifiable infringement is not only based on a general application of the law, but is also reasonable and justifiable in an open and democratic society.⁶⁷ In determining whether the limitation is reasonable, the court must take into account certain factors,

⁵⁶ See s 9(3) of the Constitution. Grounds contained in this list include race, gender, sex, sexual orientation, marital status, religion, disability and marital status.

⁵⁷ See *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) at par 53(b) and (c).

⁵⁸ See *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) at par 53(c).

⁵⁹ S 10 of the Constitution. For a general discussion of this right see Currie & De Waal (2013) at 250-257 and Rautenbach-Malherbe (2012) at 333-339. While equality and human dignity are specifically provided for in the Constitution as rights, it should be noted that both equality and human dignity are also constitutional values: see eg the preamble and s 1 of the Constitution.

⁶⁰ Currie & De Waal (2013) at 251. According to Rautenbach-Malherbe (2012) at 333 this right is not only the basis of the right to equality, but indeed the basis of all other rights.

⁶¹ Currie & De Waal (2013) at 251.

⁶² Bonthuys & Albertyn (2007) at 106.

⁶³ Rautenbach-Malherbe (2012) at 334.

⁶⁴ See eg *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC) at par 50.

⁶⁵ Currie & De Waal (2005) at 185.

⁶⁶ For a general discussion on the limitation clause: see Currie & De Waal (2005) at 163-188.

⁶⁷ S 36 of the Constitution.

such as the nature of the right, the importance of the purpose of the limitation, and finally, the nature and extent of the limitation.⁶⁸

The following paragraphs will investigate the extent to which the Constitution has affected the development and *ad hoc* recognition of domestic partnerships. This exposition will firstly analyse the apparent stagnation of heterosexual domestic partnerships after the enactment of the Constitution, and thereafter, focus on the manner in which the aforementioned constitutional principles have impacted on same-sex domestic partnerships.

3.3.3 Development and *ad hoc* recognition of “heterosexual life partnerships”

3.3.3.1 Introduction

The development of informal heterosexual life partnerships stagnated in the interval between the Constitution and the Civil Union Act.⁶⁹ Heterosexual life partners received none of the *ad hoc* recognition their same-sex counterparts enjoyed. Madala J in *Satchwell* (a case dealing with a same-sex life partnership) described the position as follows:⁷⁰

“Same-sex partners cannot be lumped together with unmarried heterosexual partners without further ado. The latter have chosen to stay as cohabiting partners ... without marrying although generally there is no legal obstacle to their doing so. The former cannot enter into a valid marriage. In my view it is [therefore] unnecessary to consider the position of heterosexual partners in this case.”

The same rationale was used to avoid considering the plight of heterosexual life partnerships in most instances where recognition was sought by their same-sex counterparts.⁷¹ It would seem as though a tendency developed to merely ignore heterosexual life partnerships until the courts were tasked to specifically decide on

⁶⁸ See s 36 of the Constitution for a list of all the factors which the court must take into consideration.

⁶⁹ 17 of 2006.

⁷⁰ *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) at par 16 ([] my addition).

⁷¹ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 60; *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) at par 16; *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC) at par 19; *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) at par 43 and *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 29. The effect of this rationale will be analysed in ch 5 of this study.

the matter. The awaited opportunity presented itself in the case of *Volks v Robinson*.⁷²

3.3.3.2 *Volks v Robinson*: Constitutionality of non-recognition

Section 2(1) of the Maintenance of Surviving Spouses Act⁷³ stipulates that a surviving may claim maintenance from a deceased spouse's estate if the former cannot provide for him- or herself. Heterosexual life partners are excluded from the scope of this Act as section 1 defines "survivor" as "the surviving spouse in a marriage dissolved by death". It was this narrow meaning of the word "survivor" that was challenged in *Volks v Robinson*.⁷⁴ The facts indicated that the applicant (Mrs Robinson) and the deceased had lived together in a permanent heterosexual life partnership for nearly 16 years.⁷⁵ After the deceased's death the applicant instituted a claim for maintenance from his estate. The executor rejected this claim considering that Mrs Robinson did not qualify as a "survivor" in terms of section 1 of the aforementioned Act.⁷⁶

The court *a quo*⁷⁷ had to determine whether this exclusion, which was based on the marital status of the parties,⁷⁸ infringed on the fundamental rights of the applicant. Davis J held that the key to this answer was whether "... there is any justification for distinguishing between the approach adopted to ... same-sex cohabitation and the kind of relationship between [the] first applicant and Mr Shandling [the deceased]".⁷⁹ In concluding that the impugned provision indeed unjustifiably infringed on the applicant's rights to equality and human dignity, the court stated that it would "... undermine the dignity of difference" and "... render the guarantee of equality somewhat illusory" to ignore the relationship between the applicant and the

⁷² *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC).

⁷³ 27 of 1990.

⁷⁴ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC). For a discussion of the case: see Lind 2005 *Acta Juridica* at 110-128; Cooke 2005 *SALJ* at 542-557; Wildenboer 2005 *SAPL* at 459-467; Schäfer 2006 *SALJ* at 626-647; Kruuse 2009 *SAJHR* at 380-390; Meyersfeld 2010 *CCR* at 271-294; Smith 2010 *PELJ* at 238-294 and 2011 *SALJ* at 573-576. Four separate judgements were delivered in the *Volks* case. The majority represented by Skweyiya J, one concurring but separate judgement by Ngobo J, and finally, two dissenting judgements, the first by Mokgoro J and O'Reagan J, and the second, by Sachs J. This case discussion only pertains to the majority judgement as it is the binding precedent. The rest of the judgements will be analysed later in this study, see chs 6 and 7 below.

⁷⁵ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 3.

⁷⁶ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at pars 9-10.

⁷⁷ *Robinson and Another v Volks NO and Others* 2004 6 SA 288 (C).

⁷⁸ *Robinson and Another v Volks NO and Others* 2004 6 SA 288 (C) at 299A-B.

⁷⁹ *Robinson and Another v Volks NO and Others* 2004 6 SA 288 (C) at 294G-H ([] my addition).

deceased.⁸⁰ As a result of this conclusion, the court read certain words into section 2(1) of the Maintenance of Surviving Spouses Act⁸¹ so as to include heterosexual life partners within its ambit.⁸² This was, however, not the end of the matter as section 172 of the Constitution requires the decision of the High Court to be confirmed by the Constitutional Court.

In the confirmation proceedings the Constitutional court focussed on the difference between heterosexual cohabitation and marriage, rather than the difference between same-sex and heterosexual cohabitation (as the High Court did). This shift of focus resulted in a completely different judgment with completely opposite results.

In coming to its conclusion the majority of the Constitutional Court found that there was a fundamental difference between heterosexual life partnerships and marriage,⁸³ one of the most important differences being that the former did not automatically create a reciprocal duty of support.⁸⁴ According to the court marriage served an important social function, which function was constitutionally and internationally recognised.⁸⁵ According to the majority it was, therefore, justifiable to differentiate between married and unmarried persons.⁸⁶ Skweyiya J further remarked that it would be unfair to oblige the estate to provide maintenance to Mrs Robinson when no such duty existed while the deceased was still alive.⁸⁷

With regards to the effect that the exclusion had on the human dignity of Mrs Robinson, the majority held that she was not being told that her dignity was worth less than that of someone who was married.⁸⁸ According to Skweyiya J, she was simply told that there was a fundamental difference between her relationship and a marital relationship in relation to maintenance.⁸⁹ The majority concluded that section

⁸⁰ *Robinson and Another v Volks NO and Others* 2004 6 SA 288 (C) at 299H-I.

⁸¹ 27 of 1990.

⁸² *Robinson and Another v Volks NO and Others* 2004 6 SA 288 (C) at 302E-J.

⁸³ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 55.

⁸⁴ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 55. For an exposition on these differences, see pars 55-56.

⁸⁵ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 52-54.

⁸⁶ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 54.

⁸⁷ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at pars 57 and 60.

⁸⁸ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 62.

⁸⁹ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 62.

2(1) of the Maintenance of Surviving Spouses Act⁹⁰ neither unfairly discriminated against heterosexual life partners nor infringed on their right to human dignity.⁹¹ This conclusion resulted in the majority refusing to confirm the decision of the High Court.⁹²

This judgement indicated that heterosexual domestic partners were generally excluded from claiming spousal benefits. According to the minority decision of Sachs J,⁹³ the underlying rationale for the majority judgement was based on the fact that the partners had chosen to live together as cohabitating partners despite the fact that nothing prevented them from marrying.

3.3.3.3 Recent extension of dependant's action to heterosexual domestic partners

There has been a recent exception to the general rule of non-recognition of heterosexual domestic partnerships. Although it only occurred in relation to a single spousal benefit, namely the dependant's action, it does create speculation as to whether the current non-recognition of heterosexual domestic partnerships is still absolute.

A dependant of a breadwinner, killed in a culpable and unlawful manner, may claim damages in the form of loss of support from the wrongdoer.⁹⁴ This action originated in Germanic law and has subsequently been received, applied and developed in the South African law.⁹⁵ The plaintiff can only be successful if it can be proven that a

⁹⁰ 27 of 1990.

⁹¹ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at pars 56 and 62.

⁹² *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 70.

⁹³ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 154.

⁹⁴ See eg *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Abbott v Bergman* 1922 AD 53; *Santam Bpk v Henery* 1999 3 SA 421 (SCA) and *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality intervening)* 1999 4 SA 1319 (SCA). Also see Van der Merwe & Olivier (1989) at 332; Burchell (1993) at 233; Scott & Visser (2000) at 158; Loubser & Midgley (2010) at 281 and Neethling & Potgieter (2010) at 278.

⁹⁵ See eg Neethling & Potgieter (2010) at 278-279. Traditionally, this claim was based on a delict committed against the breadwinner. This traditional view is no longer supported considering that it is dogmatically flawed. Positive law now dictates that the claim be based on the unlawful and culpable infringement on the rights of the dependant (and not the breadwinner); see Burchell (1993) at 233; Scott & Visser (2000) at 159; Loubser & Midgley (2010) at 281 and Neethling & Potgieter (2010) at 278.

reciprocal duty of support between the deceased and the plaintiff existed which was not only legally enforceable but also worthy of legal protection.⁹⁶

In *Du Plessis* (as will be discussed below)⁹⁷ it was confirmed that permanent same-sex life partners, who have established a reciprocal duty of support, could utilise this action. In coming to its decision the court, however, intentionally opted not to decide whether this action could be utilised by heterosexual domestic partners.⁹⁸ The lack of guidance provided by the judiciary in this regard has resulted in three separate and inconsistent judgments, namely, *Meyer v Road Accident Fund*,⁹⁹ *Verheem v Road Accident Fund*¹⁰⁰ and *Paixao and Another v Road Accident Fund*.¹⁰¹

In *Meyer*¹⁰² the plaintiff, who had lived with the deceased in a heterosexual domestic partnership, instituted a claim for loss of support resulting from the death of the deceased. The Road Accident Fund refused this claim as the plaintiff did not fall within the understanding of a “third party” as contained in section 17 of the Road Accident Fund Act.¹⁰³ The court sided with the defendant.¹⁰⁴ In coming to his decision Ledwaba J held that the undertaking of the deceased to maintain the plaintiff did not equate to an enforceable reciprocal duty of support which was worthy of legal protection.¹⁰⁵ According to Smith and Heaton,¹⁰⁶ this decision was based on the fact that the partners had chosen to remain unmarried even though nothing prevented them from marrying.

⁹⁶ This burden of proof was confirmed in *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) at par 10. In coming to its conclusion the court referred to the cases of *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Abbott v Bergman* 1922 AD 53; *Santam Bpk v Henery* 1999 3 SA 421 (SCA) and *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality intervening)* 1999 4 SA 1319 (SCA).

⁹⁷ *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) as discussed in ch 3 par 3.3.4 below.

⁹⁸ *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) at par 43.

⁹⁹ *Meyer v Road Accident Fund* (Unreported case no 29950/2004 (T) delivered on 2006-03-28).

¹⁰⁰ *Verheem v Road Accident Fund* 2012 2 SA 409 (GNP).

¹⁰¹ *Paixao and Another v Road Accident Fund* 2012 6 SA 377 (SCA). For a discussion and critique on these judgements: see Manyathi 2012 *De Rebus* at 94-97; Smith and Heaton 2012 *THRHR* at 472-484 and Scott 2013 *TSAR* 777-793.

¹⁰² *Meyer v Road Accident Fund* (Unreported case no 29950/2004 (T) delivered on 2006-03-28).

¹⁰³ 59 of 1996.

¹⁰⁴ *Meyer v Road Accident Fund* (Unreported case no 29950/2004 (T) delivered on 2006-03-28) at par 42.

¹⁰⁵ *Meyer v Road Accident Fund* (Unreported case no 29950/2004 (T) delivered on 2006-03-28) at pars 25 and 38. The statement implied that although it was theoretically possible for two domestic partners to enforce a reciprocal duty of support *inter partes*, it could not be enforced outside of the relationship (in relation to third parties).

¹⁰⁶ Smith & Heaton 2012 *THRHR* at 474.

In direct contrast to the *Meyer* case,¹⁰⁷ Goodey AJ in *Verheem v Road Accident Fund*¹⁰⁸ held that a heterosexual domestic partner could indeed utilise the dependant's action. In distinguishing the former from the latter judgment the court found, *inter alia*, that the plaintiff and deceased had entered into a maintenance contract,¹⁰⁹ that this contract was enforceable,¹¹⁰ that they intended to marry¹¹¹ and finally, that they were unable to do so as they could not afford it.¹¹² As a result of the aforementioned the court concluded that the duty of support between the plaintiff and the deceased was in fact worthy of legal protection.¹¹³

The inconsistency produced by the aforementioned judgements was finally settled by the Supreme Court of Appeal in the case of *Paixao and Another v Road Accident Fund*.¹¹⁴ In this case the Supreme Court of Appeal held that an enforceable duty of support had indeed existed between the plaintiff and the deceased.¹¹⁵ In determining whether this reciprocal duty of support was worthy of legal protection the court held:¹¹⁶

“Having regard to the incremental extension of the dependants’ action through the times, our ideas of morals and justice, and of equity and decency, I can see no reason of principle or policy not to extend the protection of the common law to the appellants here. In my view, the ‘general sense of justice of the community’ demands this.”

After distinguishing the present case from the decision in *Volks*,¹¹⁷ the court concluded that the dependant's action could be utilised by heterosexual domestic

¹⁰⁷ *Meyer v Road Accident Fund* (Unreported case no 29950/2004 (T) delivered on 2006-03-28).

¹⁰⁸ *Verheem v Road Accident Fund* 2012 2 SA 409 (GNP).

¹⁰⁹ *Verheem v Road Accident Fund* 2012 2 SA 409 (GNP) at par 4.1.5.

¹¹⁰ *Verheem v Road Accident Fund* 2012 2 SA 409 (GNP) at par 4.1.10.

¹¹¹ *Verheem v Road Accident Fund* 2012 2 SA 409 (GNP) at par 4.1.7.

¹¹² *Verheem v Road Accident Fund* 2012 2 SA 409 (GNP) at par 4.1.6.

¹¹³ *Verheem v Road Accident Fund* 2012 2 SA 409 (GNP) at par 4.3.

¹¹⁴ *Paixao and Another v Road Accident Fund* 2012 6 SA 377 (SCA). In this case the facts indicated that the plaintiff and the deceased had lived together in a heterosexual domestic partnership since October 2003. During the most part of this relationship the deceased was still married to his wife in terms of Portuguese law. In 2005 he obtained a divorce in terms of South African law and two years later in terms of Portuguese law. The partners intended to marry in April of 2008. This, unfortunately, never happened as the deceased was killed in January of 2008.

¹¹⁵ *Paixao and Another v Road Accident Fund* 2012 6 SA 377 (SCA) at pars 19 and 36.

¹¹⁶ *Paixao and Another v Road Accident Fund* 2012 6 SA 377 (SCA) at par 36.

¹¹⁷ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC). See *Paixao and Another v Road Accident Fund* 2012 6 SA 377 (SCA) at pars 26 and 27. The differentiation was based on the fact that the purposes of the dependant's action and the Maintenance of Surviving Spouses Act 27 of 1990 differed.

partners provided that they could prove the existence of a reciprocal duty of support.¹¹⁸

It is, therefore, possible to conclude that the law currently allows both heterosexual and same-sex domestic partners, who have established a reciprocal duty of support, to utilise the dependant's action. Whether this decision should be regarded as an implied rejection of the reasoning adopted in *Volks*,¹¹⁹ or rather just a natural development of the dependant's action, remains to be seen.

3.3.4 Development and *ad hoc* recognition of “same-sex life partnerships”

3.3.4.1 Introduction

Prior to the enactment of the Constitution the only manner in which two persons could formalise their relationship was by concluding a valid marriage in terms of the Marriage Act.¹²⁰ The Marriage Act¹²¹ allowed only for the solemnisation of a monogamous heterosexual marriage.¹²² It is thus evident that the narrow meaning of marriage, as contained in the Marriage Act,¹²³ in addition to the strict non-recognition of cohabitants (prior to the Constitution) wholly excluded same-sex couples from the possibility of automatically obtaining spousal rights or benefits. The Constitution, specifically the right to equality and human dignity,¹²⁴ necessitated change.¹²⁵

What follows is intended to provide a summary of the judicial response to the inability of same-sex cohabitants to conclude a valid union.

¹¹⁸ *Paixao and Another v Road Accident Fund* 2012 6 SA 377 (SCA) at par 40.

¹¹⁹ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC).

¹²⁰ 25 of 1961. This of course has changed in the years following the enactment of the Constitution. Since 1994 the legislature has accepted legislation which allows for both polygynous (see the Recognition of Customary Marriages Act 120 of 1998) and same-sex unions (see the Civil Union Act 17 of 2006).

¹²¹ 25 of 1961.

¹²² See s 30(1) of the Marriage Act 25 of 1961.

¹²³ 25 of 1961.

¹²⁴ See ss 9 and 10 of the Constitution respectively.

¹²⁵ See eg Sinclair (1996) at 299-300; Goldblatt 2003 *SALJ* at 624 and SALRC Discussion Paper on *Domestic Partnerships* (2003) at 226-251.

3.3.4.2 Same-sex life partnerships: An alternative form of life partnership

The concept of a same-sex life partnership was first recognised in the *National Coalition*¹²⁶ case. In this case it was decided that marriage was merely one form of life partnership. According to the court, same-sex life partnerships were another.¹²⁷ The court, for the first time in South African legal history, explicitly recognised a form of life partnership that acknowledged the sexual orientation of same-sex cohabitants.¹²⁸ Although the court failed to provide a definition for this “new” form of life partnership,¹²⁹ it could be deduced from Ackermann J’s judgment that it was characterised by an intimate and mutually interdependent relationship between two persons of the same sex.¹³⁰ The problems relating to the criteria for establishing such a partnership have already been alluded to in the previous chapter.¹³¹

After the decision in *National Coalition*,¹³² the courts were repeatedly approached to provide some or other spousal benefit or right to same-sex life partners.¹³³ On this *ad hoc* basis, same-sex life partners received spousal benefits in relation to

¹²⁶ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC).

¹²⁷ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 36. Also see Schäfer “Same-sex life partnerships” in Clarke (ed) *Family Law Service* at 3-4.

¹²⁸ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 36.

¹²⁹ Schäfer “Same-sex life partnerships” in Clarke (ed) *Family Law Service* at 3.

¹³⁰ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 17.

¹³¹ See ch 2 par 2.4 above.

¹³² *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC).

¹³³ Same-sex cohabitative couples received judicial recognition in the following instances: *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC); *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC); *Satchwell v President of the Republic of South Africa and Another* 2003 4 SA 266 (CC); *J and Another v Director General, Department of Home Affairs and Others* 2003 5 SA 621 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) and *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC).

immigration,¹³⁴ pension benefits,¹³⁵ joint adoption and registration as parents,¹³⁶ the dependant's action¹³⁷ and intestate succession.¹³⁸

In all of the aforementioned cases the courts had to decide whether it was constitutionally acceptable for the legislature to afford married spouses certain benefits, while at the same time denying those benefits to unmarried same-sex life partners.¹³⁹ This invariably boiled down to a consideration of same-sex life partners' right not to be unfairly discriminated against on the basis, *inter alia*, of sexual orientation.¹⁴⁰ In applying the *Harksen v Lane* test¹⁴¹ the courts, in the instances mentioned above, all concluded that the relevant legislative provisions amounted to unjustifiable unfair discrimination.¹⁴²

¹³⁴ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC).

¹³⁵ *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC).

¹³⁶ See *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) and *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC) respectively.

¹³⁷ *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA).

¹³⁸ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC).

¹³⁹ In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) the court had to determine whether it was constitutionally acceptable for s 25(5) of the Aliens Control Act 96 of 1991 to allow preferential treatment to married spouses while at the same time denying those benefits to same-sex life partners. Also see *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) in relation to ss 8 and 9 of the Judge's Remuneration and Conditions of Employment Act 88 of 1989 (now repealed); *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) with regards to ss 17(a) and (c) of the Child Care Act 74 of 1983 read together with s 1(2) of the Guardianship Act 192 of 1993 (now both repealed); *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC) with reference to the Births and Deaths Registration Act 51 of 1992 read together with Children's Status Act 82 of 1987 (now also repealed); *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) in relation to the dependant's action, and finally, *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) in relation to s 1(1) of the Intestate Succession Act 81 of 1987.

¹⁴⁰ See eg *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 15; *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) at pars 12 and 13; *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) at par 26; *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC) at par 32; *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) at par 26, and finally, *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 19.

¹⁴¹ *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) at par 53. As discussed in ch 3 par 3.3.2 above.

¹⁴² See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 57; *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) at pars 26 and 37; *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) at pars 31-37; *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC) at par 32; *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) at par 32, and finally, *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 19.

These decisions were all, to a large extent, based on the following rationale: The provisions in question discriminated against same-sex life partners based on their sexual orientation, as the fact that they were unmarried was "... inextricably linked to their sexual orientation".¹⁴³ As sexual orientation was a listed ground in terms of section 9(3) of the Constitution, this implied that the discrimination was presumably unfair.¹⁴⁴ In accordance with the three-stage *Harksen* enquiry¹⁴⁵ the courts had, therefore, only to determine whether this discrimination could be justified in terms of section 36 of the Constitution.

Although the courts all eventually found the challenged provisions unjustifiable, they did so for different reasons. Firstly, in *National Coalition*,¹⁴⁶ it was held that the discrimination inherent in the relevant provisions was unjustified as there was simply "... no interest on the other side that enters the balancing process".¹⁴⁷ An alternative justification, based on the changing mores of society, was used in the cases of *Du Toit*,¹⁴⁸ *J*¹⁴⁹ and *Du Plessis*¹⁵⁰ in order to find the impugned provisions unconstitutional. In these cases the discrimination was held to be unjustified as "... there ha[d] been a number of recent cases, statutes and government consultation documents in South Africa which broaden[ed] the scope of the concepts such as 'family', 'spouse' and 'domestic relationship', to include same-sex life partners".¹⁵¹ According to the court in *Du Toit*,¹⁵² for example, these instances of acceptance (presumably referring to the "... recent cases, statutes and government consultation documents") were indicative of the growing recognition of same-sex life partnerships.

¹⁴³ *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) at par 26.

¹⁴⁴ See s 9(5) of the Constitution.

¹⁴⁵ See point (c) of the *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) test for unfair discrimination: "If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution) [now s 36 of the Constitution]" ([] my addition).

¹⁴⁶ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at pars 58-60.

¹⁴⁷ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 59.

¹⁴⁸ *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) at par 32.

¹⁴⁹ *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC) at par 15.

¹⁵⁰ *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) at par 32.

¹⁵¹ *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) at par 32 ([] my addition).

¹⁵² *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) at par 32.

As such, further discrimination of this recognised and accepted form of life partnership could no longer be justified.

Affording spousal benefits to same-sex life partners was, in some instances, made dependant on the existence of a reciprocal duty of support between the partners.¹⁵³ The role of the reciprocal duty of support between same-sex life partners was (and is) uncertain and has elicited much debate.¹⁵⁴ Despite this uncertainty, it was generally set as a requirement if a same-sex life partner wished to institute a claim in terms of either the Intestate Succession Act¹⁵⁵ or the dependant's action.¹⁵⁶ While the existence of such a reciprocal duty of support is naturally important for purposes of the dependant's action,¹⁵⁷ it is less clear why it is deemed necessary to establish the existence of such a duty in relation to intestate succession.¹⁵⁸ The justification for occasionally predicating spousal benefits on the existence of a reciprocal duty of support has already been analysed above.¹⁵⁹

3.3.4.3 *Minister of Home Affairs and Another v Fourie*: Providing same-sex life partners with a choice

The persistent efforts by the gay and lesbian community to create formal legal recognition of same-sex life partners¹⁶⁰ culminated in the decision of *Minister of Home Affairs and Another v Fourie*.¹⁶¹ In this case the Constitutional Court was called upon

¹⁵³ *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) and *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC). In *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) at par 25 the court held that this reciprocal duty of support could be inferred from the facts of each case.

¹⁵⁴ For a comprehensive analysis of the requirements needed to establish a same-sex life partnership see, ch 2 par 2.4 above.

¹⁵⁵ 81 of 1987. See *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC).

¹⁵⁶ *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) at par 10.

¹⁵⁷ This burden of proof was confirmed in *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) at par 10. In coming to its conclusion the court referred to the cases of *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Abbott v Bergman* 1922 AD 53; *Santam Bpk v Henery* 1999 3 SA 421 (SCA) and *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality intervening)* 1999 4 SA 1319 (SCA). For a more comprehensive investigation into the dependant's action, see ch 3 par 3.3.3.3 above.

¹⁵⁸ *Wood-Bodley* 2008(a) SALJ at 271. He argues that to predicate the right to intestate succession on the existence of a reciprocal duty of support is inappropriate as "... the reason for a 'spouse' inheriting on intestacy is because the spouse is now regarded as close family of the deceased, equivalent to a close blood relation, not because of the existence of duties of support".

¹⁵⁹ See ch 2 par 2.4 above.

¹⁶⁰ As alluded to in ch 3 par 3.3.4 above.

¹⁶¹ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae)*; *Lesbian Equality Project and Others v Minister of Home Affairs and Others*

to determine the constitutionality of both the common law definition of marriage¹⁶² as well as certain provisions in the Marriage Act.¹⁶³ These provisions were challenged due to the fact that they made it impossible for same-sex life partners to formalise their relationship¹⁶⁴ and, as such, to acquire the same status, benefits and responsibilities as heterosexual married spouses.¹⁶⁵

After outlining the development of same-sex life partnerships,¹⁶⁶ the court held that it was inappropriate for the law to recognise (and as a consequence thereof benefit) one form of life partnership at the expense of another.¹⁶⁷ The court found that to deny a particular (recognised) form of life partnership the option of marriage was not a “... small and tangential inconvenience”.¹⁶⁸ The lack of recognition of same-sex marriage did not only deprive same-sex life partners of the material benefits that were extended to married couples, but also deprived them of the social significance attached to the institution of marriage.¹⁶⁹ In conclusion Sachs J held that marriage was “... much more than a piece of paper”¹⁷⁰ and the absence of any law providing

2006 1 SA 524 (CC). For a general discussion of the case: see Bilchitz & Judge 2007 *SAJHR* at 477-478; Bonthuys 2007 *SAJHR* at 526-542 and Barnard & De Vos 2007 *SALJ* at 798-826. For a more recent analysis of *Fourie* and parliament’s response to it: see Smith 2010 *PELJ* at 30-68.

¹⁶² See *Ismail v Ismail* 1983 1 SA 1006 (A) at 1019 where marriage was defined as “...the legally recognised voluntary union for life of one man and one woman to the exclusion of all others while it lasts”.

¹⁶³ 25 of 1961.

¹⁶⁴ See specifically s 30(1) of the Marriage Act 25 of 1961 which contains the prescribed marriage formula. This formula is gender specific as it refers to marriage as a union between one “man” and one “woman”.

¹⁶⁵ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at pars 34, 40-43.

¹⁶⁶ The court (at pars 49-58) refers to the principles established in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC); *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) and *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC).

¹⁶⁷ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at par 59.

¹⁶⁸ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at par 71.

¹⁶⁹ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at par 71. Sachs J discusses some of these material and immaterial benefits that are extended to married couples at pars 64-72. The social importance of marriage has also been alluded to above, see ch 3 par 3.2.2.

¹⁷⁰ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at par 70.

for same-sex marriage not only infringed on a same-sex couple's right to human dignity, but also constituted unfair discrimination.¹⁷¹

The state and *amici curiae* contended that the non-recognition of same-sex life partners was justified, not only in light of the social importance and significance of marriage, but also the negative impact that recognition of such marriages would have on the religious rights of many South Africans.¹⁷² In dispelling the first argument the court held that the recognition of same-sex marriage would in no way affect the capacity of heterosexual couples to conclude a valid marriage.¹⁷³ The court further argued that the second argument was not only "deeply demeaning" to homosexual couples but also inconsistent with the constitutional right of equality.¹⁷⁴ The court, as a result thereof, found the infringement of human dignity and equality to be unjustifiable.¹⁷⁵

It is, therefore, not surprising that the court concluded by finding both the prevailing common law definition of marriage and section 30(1) of the Marriage Act¹⁷⁶ unconstitutional.¹⁷⁷ The unconstitutionality was remedied by ordering parliament to rectify the exclusion of same-sex couples from the institution of marriage as apparent from section 30(1) of the Marriage Act¹⁷⁸ within one year of the order.¹⁷⁹ The court held that if parliament failed, the declaration of invalidity would take effect and the words "or spouse" would automatically be read into the relevant parts of section 30(1)

¹⁷¹ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at pars 75 and 110.

¹⁷² *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at par 110.

¹⁷³ The same argument was followed in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at pars 56 and 59.

¹⁷⁴ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at par 112.

¹⁷⁵ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at pars 110-112.

¹⁷⁶ 25 of 1961. S 30(1) contains the prescribed marriage formula and was constitutionally challenged as it expressly referred to husband and wife.

¹⁷⁷ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at par 162.

¹⁷⁸ 25 of 1961.

¹⁷⁹ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at par 162.

of the Marriage Act, thereby enabling same-sex couples to marry in terms of this Act.¹⁸⁰

It is contended that the decision in *Fourie*¹⁸¹ was a watershed moment in the development and recognition of domestic partnerships in South Africa. This is owing to the fact that the decision ignited the legislative process that would ultimately lead to the recognition of same-sex marriage and, as such, would ostensibly remove the impetus for the judicial recognition of same-sex life partners on an *ad hoc* basis.

3.3.4.4 Background to enactment of Civil Union Act 17 of 2006

The order of the Constitutional Court in *Fourie*,¹⁸² in which the legislature was ordered to rectify the unconstitutionality that resulted from section 30(1) of the Marriage Act¹⁸³ and the common law definition of marriage, resulted in the consideration of two different Bills by parliament.¹⁸⁴ The first Civil Union Bill¹⁸⁵ was released in September 2006. This Bill allowed for same-sex life partners to formalise their relationship by way of a “civil partnership” only.¹⁸⁶ As such, the Bill failed to provide specifically for same-sex *marriage* and was consequently rejected by the members of the gay and lesbian community.¹⁸⁷ The first draft Bill was followed by a second (revised) draft Bill.¹⁸⁸ The most important difference between the first and second draft Bills was that the latter allowed same-sex life partners to name their civil union either a marriage or

¹⁸⁰ 25 of 1961. *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at par 158.

¹⁸¹ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC).

¹⁸² *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC).

¹⁸³ 25 of 1961.

¹⁸⁴ See Bill 26 of 2006 and Bill 26B of 2006 respectively.

¹⁸⁵ 26 of 2006 appeared in GN 1385 of 2006 GG 29237 dated 31-08-2006.

¹⁸⁶ See the definition of “civil union” in cl 1 of the Civil Union Bill 26 of 2006 which defines a civil union as either a civil partnership or a domestic partnership.

¹⁸⁷ Barnard & De Vos 2007 SALJ at 808-811. Bilchitz & Judge 2007 SAJHR at 479-482 explain why this “separate but equal” system of regulation could not be accepted. The most prominent reason for abandoning such an approach was owing to the fact that it had specifically been discarded by Sachs J in *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC) at pars 151-152 as a viable solution.

¹⁸⁸ 26B of 2006 appeared in GN 1206 GG 29441 dated 17-11-2006.

a civil partnership.¹⁸⁹ As such the second draft Bill was accepted by parliament and subsequently enacted as the Civil Union Act.¹⁹⁰

Because same-sex marriage falls within the scope of formal life partnerships, as described in paragraph 2.3.5 above, it falls outside the scope of this research. The main provisions of the Act will, however, be outlined in the following paragraph as the Civil Union Act¹⁹¹ has had a considerable impact on the law relating to domestic partnerships.

3.3.4.5 General provisions and impact of the Civil Union Act 17 of 2006: Legislature's response to *Fourie*

The Civil Union Act¹⁹² has recognised civil unions since its enactment in November 2006.¹⁹³ The most significant contribution of this Act (relevant to this study) is the fact that it allows same-sex life partners to formalise their relationship by concluding a civil union. A civil union in terms of section 1 of the Act is defined as a monogamous and voluntary union between two persons above 18 years or older which has been solemnised in terms of the Act.¹⁹⁴ Because of the gender-neutral terminology adopted in this Act both heterosexual and same-sex domestic partners are included within its scope of application.¹⁹⁵ A civil union can be called either a marriage or a civil partnership.¹⁹⁶ This distinction is merely cosmetic considering that a civil union, whether it is called a marriage or a civil partnership, has the exact same legal consequences as a marriage concluded in terms of the Marriage Act.¹⁹⁷

¹⁸⁹ The Civil Union Bill 26B of 2006 defined a “civil union” as either a marriage or a civil partnership and, as such, allowed same-sex domestic partners to conclude a valid marriage as opposed to only a civil partnership.

¹⁹⁰ 17 of 2006. See Bilchitz & Judge 2007 *SAJHR* at 482.

¹⁹¹ 17 of 2006.

¹⁹² 17 of 2006. For a comprehensive analysis of the provisions, impact and effect of the Civil Union Act 17 of 2006: see eg Van Schalkwyk 2007 *De Jure* at 166-173; Heaton (2010) at 193-202 and Van Schalkwyk (2011) at 146-155. For a more critical analysis of the Act: see eg Bilchitz & Judge 2007 *SAJHR* 466-99; Barnard & De Vos 2007 *SALJ* at 795-824, Bonthuys 2008 *SALJ* 473-483 and McConnachie 2010 *SALJ* 424-441.

¹⁹³ See s 16 of the Civil Union Act 17 of 2006.

¹⁹⁴ 17 of 2006.

¹⁹⁵ See eg Van Schalkwyk (2011) at 148.

¹⁹⁶ S 1 of the Civil Union Act 2006.

¹⁹⁷ 25 of 1961. See s 13 of the Civil Union Act which states: “The legal consequences of a marriage contemplated in the Marriage Act [25 of 1961] apply, with such changes as may be required by the context, to a civil union” ([] my addition). This implies that a civil union is also dissolved in the same

The Act has generally been welcomed,¹⁹⁸ despite the fact that it has been criticised by some for, *inter alia*, maintaining a “separate but equal” system of same-sex marriage regulation.¹⁹⁹

The formal recognition of same-sex unions has had a profound impact on the law of domestic partnerships. As pointed out earlier, the extension of spousal benefits to same-sex life partners was specifically based on their inability to conclude a valid marriage.²⁰⁰ Since this inability has been removed, it seems logical to contend that the reason for the *ad hoc* recognition of same-sex domestic partnerships has now fallen away.²⁰¹ Based on this assumption it should, therefore, no longer be necessary to distinguish between different types of domestic partnerships. One can even argue that the relevance of sexual orientation, at least as far as the recognition of domestic partnerships is concerned, has been drastically diminished, if not completely removed, by the enactment of the Civil Union Act.²⁰² Whether the Civil Union Act²⁰³ has in fact harmonised the legal positions of heterosexual and same-sex domestic partners, at least as far as their choice to formalise their relationship is concerned, will be investigated later in this study.²⁰⁴

3.3.5 Summary

Despite the enactment of the Constitution, heterosexual domestic partners were mostly excluded but for one spousal benefit²⁰⁵ from the *ad hoc* recognition of same-

manner as marriages concluded in terms of the Marriage Act 25 of 1961: see s 13 of the Civil Union Act 17 of 2006 and Heaton (2010) at 201.

¹⁹⁸ See eg Bilchitz & Judge 2007 *SAJHR* at 482; Barnard & De Vos 2007 *SALJ* at 820, Bonthuys 2008 *SALJ* at 473-483; McConnachie 2010 *SALJ* at 424-425 and Heaton (2010) at 201-202.

¹⁹⁹ See eg Barnard & De Vos 2007 *SALJ* at 821 who criticise the Act for covertly adopting a “separate but equal” system of same-sex marriage regulation. Other problems created by the Act are discussed by McConnachie 2010 *SALJ* at 424-425. These problems relate to, *inter alia*, the assumption of a common surname and the *lex domicilii matrimonii*. Bonthuys 2008 *SALJ* at 473-483 is also critical of ss 5 and 6 of the Civil Union Act 16 of 2006 which allows marriage officers to object to the solemnisation of a civil union based on grounds of “conscience, religion and belief”. The same objections are also raised by Bilchitz & Judge 2007 *SAJHR* at 490-491 who remark that “... [t]he space provided in the Marriage Act [25 of 1961] for respecting the religious beliefs of religious marriage officers has, in our view, been vastly, and illegitimately, extended” ([] my addition).

²⁰⁰ See ch 3 par 3.3.4.2 above.

²⁰¹ Authors who ascribe to this view are, *inter alia*, Mamshela & Carnelley 2006 *Obiter* at 390; Picarra 2007 *SAJHR* at 565; Barnard & De Vos 2007 *SALJ* at 823; Kruuse 2009 *SALJHR* at 385; Heaton (2010) at 253-254; Van Schalkwyk (2011) at 360-361 and Louw 2011 *Juridikum* at 240.

²⁰² 17 of 2006.

²⁰³ 17 of 2006.

²⁰⁴ See ch 5 below.

²⁰⁵ See par 3.3.3.3 above.

sex life partnerships.²⁰⁶ The rationale underlying this differentiation was based on the fact that nothing precluded heterosexual domestic partners from marrying one another.²⁰⁷ The decision not to marry (for whatever reason) prohibited heterosexual domestic partners from claiming benefits usually reserved for spouses. In contradistinction to this, same-sex life partners enjoyed significant *ad hoc* recognition in the period after the Constitution but prior to the Civil Union Act.²⁰⁸ This recognition was based on the absolute inability of partners in such a relationship to conclude a valid marriage.²⁰⁹ Since the removal of this inability by the enactment of the Civil Union Act,²¹⁰ many authors opine that the impetus for the continued *ad hoc* recognition of same-sex life partnerships has been removed.²¹¹

3.4 Possible future recognition and regulation of domestic partnerships

3.4.1 Introduction

This third and final part of the chapter will analyse the possible future recognition and regulation of domestic partnerships. It will address the SALRC's investigation into the recognition and regulation of domestic partnerships, followed by an overview of the Draft Domestic Partnerships Bill.

3.4.2 SALRC's response to domestic partnerships

The SALRC was mandated to investigate a possible new marriage dispensation for South Africa.²¹² As a result of this wide mandate the SALRC conducted an investigation into the possibility of formally recognising unmarried domestic partnerships.²¹³ While the Discussion Paper of the SALRC was published prior to the

²⁰⁶ See specifically *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC).

²⁰⁷ See eg *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 154.

²⁰⁸ 17 of 2006.

²⁰⁹ See ch 3 par 3.3.4 above.

²¹⁰ 17 of 2006.

²¹¹ See in this regard Mamashela & Carnelley 2006 *Obiter* at 390; Picarra 2007 *SAJHR* at 565; Barnard & De Vos 2007 *SALJ* at 823; Kruuse 2009 *SALJHR* at 385; Heaton (2010) at 253-254; Van Schalkwyk (2011) at 360-361 and Louw 2011 *Juridikum* at 240. Also see in this regard ch 3 par 3.3.4.5 and ch 5 pars 5.3-5.4 below. The impact and viability of this argument will be analysed in ch 5 below.

²¹² SALRC Discussion Paper on *Domestic Partnerships* (2003) at 1. This mandate resulted in the publication of both a Discussion Paper and a subsequent Report: see the SALRC Discussion Paper on *Domestic Partnerships* (2003) as well as the SALRC Report on *Domestic Partnerships* (2006).

²¹³ SALRC Discussion Paper on *Domestic Partnerships* (2003) at 2.

decision of *Fourie*,²¹⁴ and will be referred to as the “2003 Discussion Paper”, the subsequent Report, referred to as the “2006 Report”, was released after the decision in *Fourie*.²¹⁵

The 2003 Discussion Paper served as the basis of the SALRC deliberations and was prepared in order to elicit response from all interested parties. The document was a comprehensive analysis of the law of domestic partnerships so as to “... enable [the interested parties] to place focussed submissions before the commission”.²¹⁶ The document did not, however, purport to contain the SALRC’s final views, conclusions or recommendations. Some items of discussion included an historical analysis of the law of domestic partnerships,²¹⁷ an exposition of the legal consequences of domestic partnerships,²¹⁸ and finally, a comprehensive international survey of domestic partnerships.²¹⁹ The Discussion Paper concluded with certain models of reform not only for homosexual relationships but also registered and unregistered domestic partnerships.²²⁰ The recommendations of the Discussion Paper included, *inter alia*, a recommendation that same-sex life partnerships should be acknowledged by the law, that it should be possible to create a domestic partnership by way of *consensus* with the option of registration, and finally, that unregistered domestic partnerships should receive certain benefits on a so-called *ex post facto* (judicial discretionary) basis.²²¹

The 2006 Report, which was released in March of that year, was, for the most part, based on the research and recommendations contained in the earlier 2003 Discussion Paper (with the exception that it was influenced by recent case law, such as, *Fourie*²²² and *Volks v Robinson*²²³). The 2006 Report addressed three separate issues, namely, the recognition of same-sex marriage, the recognition of registered

²¹⁴ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC).

²¹⁵ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC).

²¹⁶ See the preface to the SALRC Discussion Paper on *Domestic Partnerships* (2003) ([] my addition).

²¹⁷ See chs 3 and 4 of the SALRC Discussion Paper on *Domestic Partnerships* (2003).

²¹⁸ See ch 5 of the SALRC Discussion Paper on *Domestic Partnerships* (2003).

²¹⁹ See ch 6 of the SALRC Discussion Paper on *Domestic Partnerships* (2003).

²²⁰ SALRC Discussion Paper on *Domestic Partnerships* (2003) at 226-333.

²²¹ SALRC Discussion Paper on *Domestic Partnerships* (2003) at 334-335.

²²² *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC).

²²³ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC).

domestic partnerships, and lastly, the recognition of unregistered domestic partnerships. From the outset the 2006 Report emphasised the importance of harmonising the family law with the Bill of Rights, and specifically, the rights to equality and human dignity. Although the SALRC had taken into account various foreign solutions to the problems created by domestic partnerships,²²⁴ it recognised that the solution should be uniquely South African.²²⁵ The Report concluded with the recommendation that registered and unregistered domestic partnerships should receive legal recognition.²²⁶ The problem was, however, how to recognise such partnerships while simultaneously taking into account the religious and moral objections against such recognition.²²⁷

The combined value of the 2003 Discussion Paper and the 2006 Report was two-fold. Firstly, it comprehensively analysed, evaluated and recommended that domestic partnerships should be legally recognised, and secondly, it also provided a broad legislative blueprint for the recognition of such relationships in the form of the recommended Domestic Partnerships Bill of 2006²²⁸ followed by the Draft Domestic Partnerships Bill of 2008.

3.4.3 Draft Domestic Partnerships Bill

The legislature published the Draft Domestic Partnerships Bill²²⁹ for comment in 2008. This Bill aims to regulate not only registered domestic partnerships but also aims to provide *ex post facto* recognition to unregistered domestic partnerships.²³⁰ When it is enacted it will provide registered and unregistered domestic partners with claims relating to intestate succession, maintenance and property division.²³¹ Registered domestic partners will have to register their relationship in order to acquire these benefits, while unregistered domestic partners will be able to claim these benefits on

²²⁴ SALRC Report on *Domestic Partnerships* (2006) at 166-273.

²²⁵ See the summary of recommendations of the SALRC Report on *Domestic Partnerships* (2006).

²²⁶ See the SALRC Report on *Domestic Partnerships* (2006) at 276, 315 and 375 respectively.

²²⁷ See the summary of recommendations of the SALRC Report on *Domestic Partnerships* (2006).

²²⁸ For an explanation of the role of this piece of draft legislation, see ch 2 par 2.3.3 above.

²²⁹ GN 36 of 2008 GG 30663 dated 14-01-2008. For a comprehensive analysis of this Bill, see ch 7 below.

²³⁰ See chs 3 and 4 of the Draft Domestic Partnerships Bill respectively.

²³¹ See cls 9, 19-20, 22-23 with reference to registered domestic partnerships and cl 26 in relation to unregistered domestic partnerships.

an *ex post facto* (judicial discretionary) basis at termination.²³² As such, the Bill will fundamentally change the manner in which South African law deals with domestic partnerships.²³³ The enactment of this Bill has, unfortunately, stagnated and its enactment does not appear to be forthcoming.²³⁴ Nonetheless, it has been identified by some authors²³⁵ as a realistic indication as to how the legislature aims to regulate domestic partnerships in future.

3.5 Conclusion

The law in relation to domestic partnerships (but more specifically same-sex domestic partnerships) has seen significant development in the years since the enactment of the Constitution. This has been a welcome change given the fact that domestic partners were bereft of any moral or legal recognition prior to the enactment of the Constitution. Change was necessitated by the constitutional guarantees of *inter alia*, equality and human dignity. As a result thereof the courts extended certain spousal benefits to same-sex life partners on an *ad hoc* basis. Extending these benefits was justified owing to the fact that same-sex domestic partners were completely barred from concluding a valid marriage. The same recognition was, for the most part, not afforded to heterosexual life partners as they were not prevented from marrying. Due to the enactment of the Civil Union Act,²³⁶ the clear distinction between heterosexual and same-sex domestic partners, based on their respective capabilities either to marry or not to marry has, however, formally been removed. While the continued differentiation between heterosexual and same-sex domestic partners would thus *prima facie* seem to be unnecessary, other viewpoints do exist.²³⁷

Owing to the failure of the legislature to formally recognise domestic partnerships in dedicated status-giving legislation, domestic partners are, as yet, still in the unenviable position of being excluded from automatic spousal benefits. However, this does not mean that the law of domestic partnerships has been left completely

²³² See cls 6 and 26 of the Draft Domestic Partnerships Bill respectively.

²³³ For an exposition of the current law of domestic partnerships, see chs 2 and 4.

²³⁴ Meyersfeld 2010 *CCR* at 273.

²³⁵ Smith LLD Thesis (2009) at 464.

²³⁶ 17 of 2006.

²³⁷ The limited role that sexual orientation still plays in relation to domestic partnerships will be analysed in ch 4 and 5 below. See specifically ch 5 par 5.3-5.4.

unaffected by the enactment of, *inter alia*, the Constitution and the Civil Union Act.²³⁸ Two significant consequences have resulted from these recent developments. Firstly, domestic partnerships are currently considered (although not formally) as one of many recognised family forms found in South Africa.²³⁹ This is evident from the sheer number of instances where the judiciary has been approached by domestic partners to acquire some sort of spousal benefit or right.²⁴⁰ Furthermore, these recent developments were instrumental in allowing the extension of some much-needed spousal benefits to both same-sex and heterosexual domestic partners on an *ad hoc* basis. The reason being that the courts could no longer justify the continued non-recognition of these (socially) accepted forms of life partnership.²⁴¹

In conclusion it can be argued that despite still not being formally recognised (the effect of which will be analysed in the following chapter), domestic partnerships enjoy considerably improved legal and social acceptance after the enactment of the Constitution and the Civil Union Act.²⁴²

²³⁸ 17 of 2006.

²³⁹ See eg *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 36 where Ackerman J remarked that: "Suffice it to say that there is another form of life partnership which is different from marriage as recognised by law. This form of life partnership is represented by a conjugal relationship between two people of the same sex". This is not only true for same-sex couples but also heterosexual domestic partnerships: see eg *Verheem v Road Accident Fund* 2012 2 SA 409 (GNP) and *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA).

²⁴⁰ See eg *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC); *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC); *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA); *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC); *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC); *Verheem v Road Accident Fund* 2012 2 SA 409 (GNP) and *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA).

²⁴¹ For a discussion on the *ad hoc* recognition of specifically same-sex domestic partnerships, see ch 3 par 3.3.4 above.

²⁴² 17 of 2006.

Chapter 4:

Regulatory measures and spousal benefits: Options open to domestic partners in absence of formal legal recognition

4.1 Introduction

The previous chapters have provided insight into various foundational aspects relating to the law of domestic partnerships. The most important issues already addressed include the definition of a domestic partnership, how such partnerships can be established, and finally, the development of the law relating to domestic partnerships. However, the ways in which domestic partners can attach consequences to their relationship in the absence of formal legal recognition has not yet been addressed. This issue will consequently form the basis of the investigation to follow.

Three essential aspects relating to this issue will be analysed. Firstly, it will be determined to what extent domestic partners can rely on legislation in order to attach certain consequences to their relationship. Secondly, it will be determined what other measures can possibly be utilised by domestic partners to regulate their relationship (if they choose to do so), and lastly, the chapter will indicate which spousal benefits can currently be claimed by domestic partners in terms of the *de lege lata*.

At the outset of this chapter it should, however, be reiterated that South African family law does not, as a general rule, provide for formal recognition of domestic partnerships.¹ As such, they are excluded from any of the automatic "... protective, adjustive and supportive measures available to spouses".²

4.2 Specific statutory recognition

Despite not regulating domestic partnerships by way of a comprehensive piece of legislation, the South African legislature has extended legal recognition to domestic

¹ Schweltnus LLD Thesis (1994) at 48-51; Sinclair (1996) at 274; Clarke 2002 *SALJ* at 637; SALRC Report on *Domestic Partnerships* 2006 at 108-109; Heaton (2010) at 243; Skelton & Carnelley (2010) at 208; Van Schalkwyk (2011) at 359 and Smith 2013 *SALJ* at 538.

² SALRC Report on *Domestic Partnerships* 2006 at 110.

partners in the instances mentioned below.³ This means that although they are not yet formally recognised, domestic partners can claim certain spousal rights and benefits, provided that they can be accommodated within the scope of application of the legislation in question.

- Section 35(2)(f)(i) of the Constitution provides that a detained person may communicate with and be visited by, *inter alia*, that person's "spouse or partner".
- The National Health Act⁴ as well as the Older Persons Act⁵ state that a person's "spouse or partner" may provide consent in relation to certain medical matters.
- Section 1(1) of Pension Funds Act⁶ allows for the board of the pension fund to include a domestic partner within the definition of a "dependant". The board can only do this if a reciprocal duty of support existed between the survivor and the deceased.⁷

³ For a general discussion of the legislative recognition of domestic partners: see amongst others SALRC Report on *Domestic Partnerships* 2006 at 148-153; Smith LLD Thesis (2009) at 712-722; Schweltnus "Cohabitation" in Clarke (ed) *Family Law Service* at 13-19 and Schäfer "Same-sex life partnerships" in Clarke (ed) *Family Law Service* at 10-18. This list does not purport to be definitive on the issue.

⁴ 61 of 2003: ss 1, 64 and 66(1)(b).

⁵ 13 of 2006: specifically s 21(3)(b).

⁶ 24 of 1956.

⁷ See s 1(1)(a) of the Pension Funds Act 24 of 1956.

- Similar broad definitions of the word “dependant” can also be found in the Compensation for Occupational Injuries and Diseases Act⁸ as well as the Medical Schemes Act.⁹
- The Domestic Violence Act¹⁰ includes domestic partners within its ambit of protection.
- Section 231(1)(a)(ii) of the Children’s Act¹¹ allows “partners in a permanent domestic life-partnership” to jointly adopt a child. Furthermore, section 293(1) determines that a court can only confirm a surrogacy agreement if the commissioning parent’s “husband, wife or partner ... has given his or her written consent to the agreement”. Section 293(2) requires the same of the surrogate mother’s “husband or partner”.
- Following the *National Coalition* case,¹² same-sex domestic partners are included in the definition of the word “spouse” as contained in the Immigration Act.¹³
- Currently, section 20(13) of the Insolvency Act¹⁴ only includes heterosexual domestic partners within its definition of the word “spouse”.¹⁵
- The Employment Equity Act¹⁶ includes the word “partner” within its definition of “family responsibility”. The Basic Conditions of Employment Act¹⁷ contains a similar provision with regards to paid leave if an employee’s “spouse or life partner” dies.

⁸ 130 of 1993. See the definition of “dependant of an employee” in s 1 of the Act. Owing to the fact that the Act refers specifically to a relationship between a “man and wife” it would appear as if same-sex domestic partners are not included within the protection afforded by this Act: see the SALRC Report on *Domestic Partnerships* 2006 at 151.

⁹ 131 of 1998.

¹⁰ 116 of 1998: s 1 sv “domestic relationship”.

¹¹ 38 of 2005.

¹² *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC).

¹³ 13 of 2002.

¹⁴ 24 of 1936.

¹⁵ According to Schäfer “Same-sex life partnerships” in Clarke (ed) *Family Law Service* at 13 there can be no constitutional justification for this exclusion of same-sex domestic partners.

¹⁶ 55 of 1998: s 1 sv “family responsibility”.

¹⁷ 75 of 1997.

- Prior to the Civil Union Act,¹⁸ the Taxation Laws Amendment Act¹⁹ amended provisions in the Transfer Duty Act,²⁰ the Estate Duty Act²¹ and the Income Tax Act²² so as to include same-sex domestic partners within the respective definitions of the word “spouse”.
- Other Acts, which fall beyond the scope of this study, such as the Lotteries Act,²³ the South African Civil Aviation Authority Act,²⁴ the Road Traffic Management Corporation Act,²⁵ the Diplomatic Immunities and Privileges Act,²⁶ Independent Media Commission Act,²⁷ the Independent Broadcasting Authority Act²⁸ and the Rental Housing Act²⁹ also provide legislative recognition to domestic partnerships by either including domestic partners within the definition of the word “spouse”,³⁰ or by directly referring to domestic/life partnerships.³¹

4.3 Other regulatory measures

4.3.1 Introduction

Regardless of the lack of formal legal recognition, domestic partners can choose to regulate their relationship by alternative means. These regulatory measures, referred to by Smith as “private law rules and remedies”,³² can enable domestic partners to attach consequences to their relationship. These “private law rules and remedies” include, *inter alia*, the creation of a universal partnership, the conclusion of a domestic partnership agreement or the creation of a trust. The following paragraphs will attempt to provide a concise exposition of the applicability and viability of each of these regulatory measures and remedies.

¹⁸ 17 of 2006.

¹⁹ 5 of 2001.

²⁰ 40 of 1949: s 1.

²¹ 45 of 1955: s 1.

²² 58 of 1962: s 1.

²³ 57 of 1997.

²⁴ 40 of 1998.

²⁵ 20 of 1999.

²⁶ 35 of 2008.

²⁷ 148 of 1993.

²⁸ 153 of 1993.

²⁹ 50 of 1999.

³⁰ See eg the Lotteries Act 57 of 1997 as stipulated in ss 3(7)-(8).

³¹ See eg s 10(2) of the Road Traffic Management Corporation Act 20 of 1999.

³² Smith 2013 *SALJ* at 538.

4.3.2 Contractual regulation

Most authors opine that the prevailing *boni mores* are no longer opposed (as they were prior to the Constitution)³³ to the contractual regulation of domestic partnerships.³⁴ As such, domestic partners are currently not only capable, but are generally encouraged, to regulate their relationship during its existence as well as the consequences that arise at the termination thereof.³⁵ These agreements, known as “cohabitation contracts” or “domestic partnership agreements”,³⁶ may regulate any aspect of the relationship, provided that it is not unlawful.³⁷ Regulated aspects may include, *inter alia*, maintenance, property division and the purchasing of household necessities.³⁸ A cohabitation contract may be concluded either expressly, tacitly or by implication.³⁹

Leaving domestic partners to regulate their own relationship is, however, not generally regarded as a satisfactory means of protecting partners in such a relationship.⁴⁰ The reason advanced for this view is that these agreements are mostly only available to sophisticated and educated members of the society,⁴¹ and if concluded, are usually based upon unequal bargaining positions.⁴² Moreover,

³³ See ch 3 par 3.2.2 above.

³⁴ See eg Sinclair (1996) at 280-281; SALRC Report on *Domestic Partnerships* 2006 at 119; Smith LLD Thesis (2009) at 363-364; Skelton & Carnelley (2010) at 219 and Heaton (2010) at 244. According to Singh 1996 *CILSA* at 323 these contracts will be null and void only to the extent that they “... explicitly rest upon [an] immoral and illicit consideration of meretricious sexual services”.

³⁵ See eg Sinclair (1996) at 281; Singh 1996 *CILSA* at 320; Smith LLD Thesis (2009) at 362; Skelton & Carnelley (2010) at 219 and Heaton (2010) at 244. See specifically Schweltnus “Cohabitation” in Clarke (ed) *Family Law Service* at 21-22 where she speculates on what the precise content of such an agreement should be. She contends that the following should, *inter alia*, be regulated by a cohabitation contract: maintenance, succession, property division, arrangements regarding the common home and household goods, and finally, the intention regarding the existence (or non-existence) of a universal partnership.

³⁶ See eg both Sinclair (1996) at 281 and Schweltnus “Cohabitation” in Clarke (ed) *Family Law Service* at 20 who refer to these types of contracts as cohabitation agreements/contracts. In contradistinction to this, Heaton (2010) at 246-247 refers to these types of contracts as either “life partnership contracts” or “domestic partnership contracts”.

³⁷ See eg Heaton (2010) at 257-258.

³⁸ Singh 1996 *CILSA* at 321 and Schweltnus “Cohabitation” in Clarke (ed) *Family Law Service* at 21-22.

³⁹ Singh 1996 *CILSA* at 321 and Schweltnus “Cohabitation” in Clarke (ed) *Family Law Service* at 22 recommend that these types of contracts should ideally be in writing. These authors are of the view that it would not only facilitate the process of proving the existence of such a contract but also the exact contents thereof.

⁴⁰ Sinclair (1996) at 280-283; Bonthuys 2004 *SALJ* at 879-901 and SALRC Report on *Domestic Partnerships* 2006 at 121.

⁴¹ Sinclair (1996) at 283. Also see SALRC Report on *Domestic Partnerships* 2006 at 121.

⁴² Sinclair (1996) at 283. Also see Bonthuys 2004 *SALJ* at 879 and SALRC Report on *Domestic Partnerships* 2006 at 121.

because of the informal nature of a domestic partnership, partners will generally not wish to formally enter into a domestic partnership agreement.⁴³

4.3.3 Universal partnerships

South African common law generally recognises two types of universal partnerships, namely, a *societas universorum* and a *societas universorum quae ex quaestu veniunt*.⁴⁴ The former applies to all current and prospective property whether gained from commercial undertakings or otherwise, while the latter only includes property gained by means of commercial enterprise.⁴⁵ Only the former type of universal partnership is relevant for the current investigation as a domestic partnership defined for purposes of this study only includes intimate partnerships and can, as such, hardly be described as a *purely* “commercial enterprise”. However, if all the property of the domestic partners in question also forms part of a commercial enterprise, a *societas universorum quae ex quaestu veniunt* could conceivably come into existence between them.⁴⁶

In order to establish the existence of a universal partnership, the common law dictates that a plaintiff must prove that both partners contributed to the partnership,⁴⁷ that the partnership was concluded for the joint benefit of the parties concerned, that the object of the partnership was to make profit and finally, that the contract between

⁴³ Sinclair (1996) at 283. Also see SALRC Report on *Domestic Partnerships* 2006 at 121.

⁴⁴ *Butters v Mncora* 2012 4 SA 1 (SCA) at par 14. For a more thorough analysis of these two types of universal partnerships: see the SALRC Report on *Domestic Partnerships* 2006 at 111-112; Delpont (2011) at 197 and Van Schalkwyk 2013 *LitNet* 186-187.

⁴⁵ See SALRC Report on *Domestic Partnerships* 2006 at 111-112; Delpont (2011) at 197 and Van Schalkwyk 2013 *LitNet* 186. Also see *Butters v Mncora* 2012 4 SA 1 (SCA) at par 14.

⁴⁶ See Van Schalkwyk 2013 *LitNet* at 186-187 where he states that a *societas universorum* differs from a *societas universorum quae ex quaestu veniunt* in that not all property usually forms part of a *societas universorum quae ex quaestu veniunt* but only property gained for purposes of a commercial enterprise. He does, however, remark that a *societas universorum quae ex quaestu veniunt* can exist between domestic partners “... in die teoretiese geval waar die partye met niks begin nie en al die bates deel van die kommersiële universele vennootskap vorm”.

⁴⁷ This contribution need not necessarily be a financial contribution. In the case of *Isaacs v Isaacs* 1949 1 SA 952 (C) at 961-962 the court held that the rendering of a domestic service also qualified as a contribution. This view is supported, *inter alia*, by Heaton (2010) at 246.

the parties was lawful.⁴⁸ Universal partnerships can be established either expressly or tacitly.⁴⁹

Once a universal partnership is proved the partnership property is jointly owned in undivided shares by the domestic partners. The division of shares in the partnership will depend on what the parties agreed to and does not necessarily have to be equally divided amongst the domestic partners. A court will determine the division of property, whether in equal shares or otherwise, only if the partners fail to agree upon the share allocation.⁵⁰

Some authors are opposed to the use of universal partnerships as a means to attach proprietary consequences to a domestic partnership.⁵¹ This is mostly due to the practical difficulties of proving the requirements of a universal partnership.⁵² Other problems include, but are not limited to, the fact that universal partnerships are unsuitable in a family law context,⁵³ that partnership property cannot be held in exclusive possession at termination⁵⁴ and finally, that it does not regulate ancillary

⁴⁸ For a discussion of these requirements: see eg *Mühlmann v Mühlmann* 1984 3 SA 102 (A) and, more recently, *Butters v Mncora* 2012 4 SA 1 (SCA) at par 11. Also see Smith LLD Thesis (2009) at 367; Skelton & Carnelley (2010) at 218; Heaton (2010) at 245 and Delpont (2011) at 190.

⁴⁹ *Ally v Dinath* 1984 2 SA 451 (T). This point in law was recently confirmed in the case of *Butters v Mncora* 2012 4 SA 1 (SCA) at par 18 where Brand JA held: “[A] universal partnership of all property does not require an express agreement. Like any other contract it can also come into existence by tacit agreement, that is by an agreement derived from the conduct of the parties” ([] my addition). The existence of a tacit agreement must be proven on a preponderance of probabilities.

⁵⁰ *Isaacs v Isaacs* 1949 1 SA 952 (C) at 962-963 and *Mühlmann v Mühlmann* 1984 3 SA 102 (A) at 128C-129D. This method has generally been accepted in South African law: see eg SALRC Report on *Domestic Partnerships* 2006 at 112; Smith LLD Thesis (2009) at 369; Heaton (2010) at 246; Skelton & Carnelley (2010) at 217 and Schweltnus “Cohabitation” in Clarke (ed) *Family Law Service* at 4.

⁵¹ Singh 1996 *CILSA* at 323; Sinclair (1996) at 279; Clarke 2002 *SALJ* at 639; SALRC Report on *Domestic Partnerships* 2006 at 113; Smith LLD Thesis (2009) at 372-381; Skelton & Carnelley (2010) at 218 and Heaton (2010) at 246.

⁵² Singh 1996 *CILSA* at 323; Sinclair (1996) at 279 and Skelton & Carnelley (2010) at 218. According to Skelton & Carnelley (2010) at 218 the difficulty of proving a universal partnership is exacerbated in cases where the relationship was particularly short or where the existence of such a partnership is contested.

⁵³ Skelton & Carnelley (2010) at 218.

⁵⁴ See specifically Heaton (2010) at 246. Heaton states: “As the law of partnership provides that a former partner may not remain in exclusive possession and occupation of partnership assets after the termination of the partnership ... a surviving partner may be ordered to vacate immovable property owned by the universal partnership”. According to her (also at 246), this unfortunate eventuality can be averted if the parties had properly contracted, or alternatively, if the deceased had bequeathed the property in question to the surviving partner.

matters such as maintenance and will, therefore, not adequately protect the partners in such a partnership.⁵⁵

4.3.4 Trusts

According to the Trust Property Control Act⁵⁶ a trust "... means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed to another". A trust in the narrow sense includes not only an ownership trust⁵⁷ but also a "bewind" trust.⁵⁸ The Trust Property Control Act⁵⁹ should, according to Gauntlett,⁶⁰ not be seen as a codification of trust law. Gauntlett is of the opinion that the Act "... merely settled certain previously uncertain and contentious issues in relation to trusts".⁶¹ According to this view the common law, as adapted and applied to the trust figure by our courts, thus still plays a considerable role in relation to the regulation of trusts. In terms of South African law:⁶²

"A trust in the narrow sense is said to exist when one person (the founder of the trust) has handed over, or is bound to hand over, the control of property to another (the trustee in the narrow sense) who then administers such property, and/or the proceeds deriving from it, for the benefit of some person or persons other than the trustee or in pursuance of an impersonal object."

A trust can only be established if it complies with all the requirements set out in the case of *Administrators, Estate Richards v Nichol and Another*.⁶³

⁵⁵ Smith LLD Thesis (2009) at 374 finds this criticism unconvincing. According to him it is unnecessary for maintenance to be regulated by a universal partnership as it will already be regulated in terms of the Maintenance Act 99 of 1998.

⁵⁶ S 1 of the Trust Property Control Act 57 of 1988.

⁵⁷ Implies that the trustee is the owner of the trust property and will be administered so as to benefit a person or persons in line with the provisions of the trust instrument. See s 1 of the Trust Property Control Act 75 of 1988 as well as De Waal & Schoeman-Malan (2008) at 187.

⁵⁸ This type of trust means that the trust beneficiaries are made the owners of the trust property while the trust property is placed under the control of the trustee (to be administered in accordance with the provisions of the trust instrument). See s 1 of the Trust Property Control Act 75 of 1988 as well as De Waal & Schoeman-Malan (2008) at 187.

⁵⁹ 57 of 1988.

⁶⁰ Gauntlett *LAWSA* 31 at par 529.

⁶¹ Gauntlett *LAWSA* 31 at par 529.

⁶² Du Toit (2007) at 2. For a similar definition: see Cameron *et al* (2002) at 3.

⁶³ *Administrators, Estate Richards v Nichol and Another* 1996 4 SA 253 (C) at 258E-F. See Smith LLD Thesis (2009) at 388 where he summarises these requirements in the following manner: the trust founder must have the intention to create the trust, this intention must be expressed in a mode apt to

In addition there must also be a functional separation between the control and enjoyment of the trust property.⁶⁴

Several different types of trusts are recognised in common-law jurisdictions.⁶⁵ One of these types of trusts, namely a constructive trust, has been used, especially in England,⁶⁶ to aid domestic partners in the equitable division of property at the termination of their relationships.⁶⁷ An extraordinary feature of a constructive trust is that it does not require a clear and express prior intention to be created.⁶⁸ This definitive feature is exactly why a constructive trust cannot be created in terms of South African law (as South African law requires the express intention to create a trust).⁶⁹ It is, as such, not surprising that several authors argue against its adoption into South African law.⁷⁰

Domestic partners are, however, still free to create a trust either in terms of the common law or the relevant legislation alluded to earlier in this paragraph.⁷¹

4.3.5 Unjustified enrichment

This doctrine allows a person, who has been impoverished to the benefit of another without any legal justification, to institute an enrichment claim in order to recoup his or her losses.⁷² This doctrine has never been applied in relation to domestic partnerships.⁷³ The most probable reason for this is that South African law does not, according to the court in *Nortjé en 'n Ander v Pool NO*,⁷⁴ recognise a general

create an obligation, the trust property must be defined with reasonable certainty, the object of the trust must be defined with reasonable certainty, and finally, the object of the trust must be lawful.

⁶⁴ See Du Toit (2007) at 27. See also, more recently, Smith 2013 *SALJ* at 527-552 where he analyses the requirement of an independent trustee within the context of a “functional separation” between the control and enjoyment of the trust property.

⁶⁵ Gauntlett *LAWSA* 31 at par 532.

⁶⁶ Cameron *et al* (2002) at 75.

⁶⁷ See eg Sinclair (1996) at 274 and SALRC Report on *Domestic Partnerships* 2006 at 124.

⁶⁸ Cameron *et al* (2002) at 131.

⁶⁹ See eg Sinclair (1996) at 277 and SALRC Report on *Domestic Partnerships* 2006 at 124.

⁷⁰ See eg Sinclair (1996) at 277 and Smith LLD Thesis (2009) at 389.

⁷¹ Smith LLD Thesis (2009) at 389-390.

⁷² *Nortjé en 'n Ander v Pool NO* 1966 3 SA 96 (A) at 104A-105E. This principle is supported by academic opinion: see eg Hutchings & Delpont 1992 *De Rebus* at 123; SALRC Report on *Domestic Partnerships* 2006 at 122; Visser (2008) at 4; Smith LLD Thesis (2009) at 382; Heaton (2010) at 247 and Skelton & Carnelley (2010) at 217.

⁷³ Smith LLD Thesis (2009) at 382: see specifically fn 105.

⁷⁴ *Nortjé en 'n Ander v Pool NO* 1966 3 SA 96 (A) at par 139E-140B. For a case discussion see Eiselen & Pienaar (2008) at 10-20.

enrichment claim. Although this restrictive approach has recently been relaxed,⁷⁵ many authors are opposed to the application of this doctrine within the ambit of domestic partnerships⁷⁶ as it is “... fraught with legal uncertainty” and its applicability is “... speculative at best”.⁷⁷

4.3.6 Estoppel

Estoppel may be utilised to preclude a person “... from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice”.⁷⁸ This form of estoppel is referred to as estoppel by representation.⁷⁹ Some authors argue that another form of estoppel,⁸⁰ namely proprietary estoppel, can also be relevant in relation to domestic partnerships.⁸¹ This latter form of estoppel refers, *inter alia*, to the factual scenario where “... [a] legal titleholder created a situation from which it could reasonably be inferred that some right or legal interest in or over [certain] property [has] been accorded to [a] non-owner”.⁸²

There seems to be little doubt as to the applicability of estoppel by representation in relation to contracts for household necessities.⁸³ The applicability of proprietary estoppel is less certain.

⁷⁵ See *Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere* 1994 3 SA 283 (A) at 333C-E. For a general case discussion see Eiselen & Pienaar (2008) at 135-140. According to the court this doctrine should be extended to all cases where its application would be necessary and desirable.

⁷⁶ See eg SALRC Report on *Domestic Partnerships* 2006 at 123; Smith LLD Thesis (2009) at 383 and Skelton & Carnelley (2010) at 217.

⁷⁷ Skelton & Carnelley (2010) at 217.

⁷⁸ *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 3 SA 274 (A) 291D-E. For a thorough analysis of the definition of estoppel: see Rabie & Sonnekus (2000) at 2.

⁷⁹ Rabie & Sonnekus (2000) at 7.

⁸⁰ Singh 1996 *CILSA* at 319. This argument has also been adopted by the SALRC Report on *Domestic Partnerships* 2006 at 122.

⁸¹ See eg SALRC Report on *Domestic Partnerships* 2006 at 122; Smith LLD Thesis (2009) at 388; Skelton & Carnelley (2010) at 219 and Heaton (2010) at 247.

⁸² Singh 1996 *CILSA* at 319 ([] my addition). For an overview of proprietary estoppel: see Rabie & Sonnekus (2000) at 206-207.

⁸³ See eg *Thompson v Model Steam Laundry* 1926 TDP 674. This has, more recently, also been confirmed by the SALRC Report on *Domestic Partnerships* 2006 at 122; Smith LLD Thesis (2009) at 388; Heaton (2010) at 247; Skelton & Carnelley (2010) at 219 and Van Schalkwyk (2011) at 174-175. As a result thereof it seems that domestic partners are bound to such contracts in the same way that married couples are. This is owing to the fact that a third party will be able to preclude the domestic partners from relying on their unmarried status.

This can be attributed to the fact that the sources, for example, Singh⁸⁴ and the SALRC,⁸⁵ who suggest that it is applicable, fail to provide any authority for their submission.⁸⁶ Authors opposed to this view, such as Rabie and Sonnekus,⁸⁷ argue that, at least in South African law, proprietary estoppel is not recognised as a means of acquiring property.⁸⁸ Rabie and Sonnekus's argument is made stronger by the fact that South African law only recognises estoppel as a defence.⁸⁹ It would, therefore, arguably be impossible for an aggrieved domestic partner to use estoppel as a cause of action. One can thus conclude, as Smith has, that "... both Singh and the Law Reform Commission may be overtly (perhaps unduly?) optimistic about the extent to which proprietary estoppel may play a role in South Africa".⁹⁰

4.3.7 Adequacy of alternative regulatory measures

It is apparent that South African law does not provide domestic partners, at least at the breakdown of their relationship, with any effective or satisfactory means to regulate their relationship. This is because the regulatory measures and remedies which are currently available to them are too inadequate to properly address the complexities which can result from the termination of a domestic partnership. The main reason for this contention is that these measures, for the most part, appear to ignore the *consortium* that existed between the two domestic partners in question. Instead, the measures mentioned above appear to treat the partners as if they were strangers, rather than two persons who were cohabitating together in an intimate permanent relationship akin to marriage.

4.4 Spousal benefits currently available to domestic partners

4.4.1 Introduction

The analysis to follow is intended to be a summary of the *ad hoc* recognition discussed thus far. The purpose of this summary is to emphasise the lack of legal

⁸⁴ Singh 1996 *CILSA* at 319.

⁸⁵ SALRC Report on *Domestic Partnerships* 2006 at 122.

⁸⁶ Smith LLD Thesis (2009) at 386-387.

⁸⁷ Rabie & Sonnekus (2000) at 207.

⁸⁸ This argument has also been adopted by Smith LLD Thesis (2009) at 388 and Heaton (2010) at 247.

⁸⁹ See eg *Union Government v National Bank of South Africa Ltd* 1921 AD 121 at 128 and Rabie & Sonnekus (2000) at 20-21.

⁹⁰ Smith LLD Thesis (2009) at 388.

protection available to domestic partners and, as such, clearly indicate the dire need to regulate domestic partnerships by way of robust and comprehensive legislation.

4.4.2 Maintenance rights

It is generally accepted that there is no *ex lege* duty of support between two domestic partners.⁹¹ The judiciary has, however, been willing to accept that such a duty of support can be created *ex contractu*.⁹² Such a contractual duty will be enforceable considering that the Maintenance Act⁹³ applies to any reciprocal duty of support “... irrespective of the nature of the relationship ... giving rise to that duty”.⁹⁴

4.4.3 Succession rights

Traditionally all domestic partners were excluded from the ambit of the Intestate Succession Act.⁹⁵ Since *Gory v Kolver*⁹⁶ this is no longer true for same-sex domestic partners who have established a reciprocal duty of support.⁹⁷ This exclusion does

⁹¹ This is the position in relation to both heterosexual and same-sex domestic partnerships. With regards to same-sex domestic partnerships the courts have, however, held that such a duty of support may be inferred from the facts: see eg *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) at par 25. In *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (NGP) at 316H it was, contrary to subsequent decisions of the Constitutional Court, held that such an *ex lege* duty of support does indeed exist between same-sex life partners. According to Skelton & Carnelley (2010) at 210 the impact of this decision is, however, diminished by the fact that it only has “... persuasive value in the jurisdiction it was decided” as well as the fact that it was decided prior to not only *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) but also *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC). For a confirmation of the position of heterosexual domestic partnerships: see *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 62. This common law position is also confirmed by the following authors: Hahlo 1972 SALJ at 324; Kahn (1983) at 246; Thomas 1984 THRHR at 456; Hutchings & Delpont 1992 *De Rebus* at 122; Sinclair (1996) at 284; SALRC Report on *Domestic Partnerships* 2006 at 154; Smith LLD Thesis (2009) at 307; Skelton & Carnelley (2010) at 210; Van Schalkwyk (2011) at 359 and Schwellnus “Cohabitation” in Clarke (ed) *Family Law Service* at 7. The absence of an *ex lege* duty of support is true not only during the existence of the relationship but also at the termination thereof.

⁹² Traditionally the ability to form a contractual duty of support was extended only to same-sex domestic partners. See eg *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) and *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC). Recently, in *Paixao v Road Accident Fund* 2012 6 SA 377 (SCA) at par 36, the Supreme Court of Appeal was prepared to enforce such a contractual duty of support between two heterosexual domestic partners. It would appear that same-sex and heterosexual domestic partners are currently on an equal footing at least pertaining to maintenance agreements: see Skelton & Carnelley (2010) at 210-211. Whether it is desirable for domestic partnerships to be regulated exclusively by the law of contract has already been discussed in ch 4 par 4.3.2 above.

⁹³ 99 of 1998.

⁹⁴ See s 2(1) of the Maintenance Act 99 of 1998.

⁹⁵ 81 of 1987. See ch 3 par 3.2.2 above.

⁹⁶ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC).

⁹⁷ This is another example where same-sex domestic partners find themselves in a more favourable legal position than their heterosexual counterparts: see Skelton & Carnelley (2010) at 212.

not, however, preclude either heterosexual or same-sex domestic partners from including one another in their wills.⁹⁸

4.4.4 Proprietary rights

There are no statutory or common law proprietary consequences that automatically attach to the conclusion of a domestic partnership.⁹⁹ As such, all property acquired by the partners, which was not acquired jointly (by means of contract),¹⁰⁰ will be regarded as separate property. Separate property is owned by only one of the partners and will not be subjected to any form of property division, redistribution or transfer at termination of the domestic partnership.¹⁰¹ The existing non-regulation in this regard is arguably most problematic in relation to the home shared by the partners.¹⁰² This is because the non-owner domestic partner will neither have a legally recognised right to occupy the home nor share in the proceeds of the sale thereof.¹⁰³

If a non-owner domestic partner incurred costs in relation to the separate property of the owner domestic partner, he or she will only be able to reclaim the incurred costs by relying on the ordinary principles of unjustified enrichment,¹⁰⁴ or alternatively, proving the existence of a universal partnership.¹⁰⁵

Although no *ex lege* community of property can be established by the partners (except if they prove the existence of a universal partnership), they can acquire

⁹⁸ See eg; Sinclair (1996) at 289; SALRC Report on *Domestic Partnerships* 2006 at 157-158 and Schwellnus "Cohabitation" in Clarke (ed) *Family Law Service* at 13.

⁹⁹ See generally ch 3 par 3.2.2; Sinclair (1996) at 274; SALRC Report on *Domestic Partnerships* 2006 at 159; Skelton & Carnelley (2010) at 211; Van Schalkwyk (2011) at 359 and Schwellnus "Cohabitation" in Clarke (ed) *Family Law Service* at 5.

¹⁰⁰ This contract may be either an express or implied contract in relation to particular property: see eg Sinclair (1996) at 274 and Schwellnus "Cohabitation" in Clarke (ed) *Family Law Service* at 5-6, or may extend over all property and, as such, be described as a universal partnership: see eg Skelton & Carnelley (2010) at 211. For a detailed discussion on universal partnerships, see ch 4 par 4.3.3 above.

¹⁰¹ See eg Van Schalkwyk (2011) at 359.

¹⁰² Skelton & Carnelley (2010) at 211.

¹⁰³ Skelton & Carnelley (2010) at 211. In instances where the joint home is leased a partner who is not a party to the lease agreement will be similarly vulnerable: see eg Smith LLD Thesis (2009) at 188-190. The non-owner/non-contracting party to the lease agreement will not be completely without legal recourse as s 7 of the Domestic Violence Act 116 of 1998 regulates the eviction of domestic partners from the familial home. For a general discussion on the Domestic Violence Act 116 of 1998: see Heaton (2010) at 257-268.

¹⁰⁴ The law of unjustified enrichment as it applies to domestic partnerships has already been discussed in ch 4 par 4.3.5 above.

¹⁰⁵ See ch 4 par 4.3.3 above for a thorough analysis of universal partnerships.

property jointly.¹⁰⁶ In such instances the ownership of the specific property is vested in both partners in undivided shares.¹⁰⁷ As such, the use and division of the joint property will be regulated in terms of the law of co-ownership rather than the family law.¹⁰⁸ Two types of co-ownership exist, namely, tied (or bound) co-ownership and free co-ownership.¹⁰⁹ Bound co-ownership refers to co-ownership where a special legal relationship exists between the co-owners, for example, marriages in community of property, partnerships¹¹⁰ and voluntary associations without legal relationship.¹¹¹ On the other hand, free co-ownership is established where there is no other legal relationship between the parties except for the fact that they are co-owners.¹¹²

It is contended that if domestic partners acquire property jointly, free co-ownership will determine the use and division of the property in question.¹¹³ The reason for this is that their relationship (as indicated in the previous chapter) does not constitute a “special legal relationship”, in the sense that a marriage in community of property does. This implies that in the absence of a universal partnership being proven, the nature of the ownership vested in the domestic partners will thus usually amount to free co-ownership.¹¹⁴ This means that domestic partners who co-own property would be able to, *inter alia*, sell their respective shares in the property without the other partner’s permission and also unilaterally terminate the co-ownership.¹¹⁵

¹⁰⁶ If they, for eg, purchase furniture together.

¹⁰⁷ Van der Walt & Pienaar (2009) at 48-57 and Van Schalkwyk & Van der Spuy (2012) at 194.

¹⁰⁸ For a general discussion on the law of co-ownership: see Van der Walt & Pienaar (2009) at 48-57; Mostert & Pope (2010) at 96-100 and Van Schalkwyk & Van der Spuy (2012) at 194-199.

¹⁰⁹ See eg Van der Walt & Pienaar (2009) at 50-57.

¹¹⁰ See *Bonheur 76 General Trading (Pty) Ltd and Others v Caribbean Estates (Pty) Ltd and Others* 2010 4 SA 298 (GSJ) at 14.

¹¹¹ Van Schalkwyk & Van der Spuy (2012) at 195. This definition was referred to favourably in *Ex Parte Menzies et Uxor* 1993 3 SA 799 (C) at 811C-D. For a thorough analysis of the implications of bound (or tied) co-ownership: see *Ex Parte Menzies et Uxor* 1993 3 SA 799 (C) at par 811A-812I.

¹¹² *Ex Parte Menzies et Uxor* 1993 3 SA 799 (C) at par 811C; *Bonheur 76 General Trading (Pty) Ltd and Others v Caribbean Estates (Pty) Ltd and Others* 2010 4 SA 298 (GSJ) at 14. Also see Van Schalkwyk & Van der Spuy (2012) at 195.

¹¹³ See eg Schweltnus “Cohabitation” in Clarke (ed) *Family Law Service* at 11.

¹¹⁴ This is confirmed by Schweltnus “Cohabitation” in Clarke (ed) *Family Law Service* at 11 who states: “One of the partners, however, can sell his share in the property to a third party without the other’s permission [which is an essential characteristic of free co-ownership] if the cohobitees have not formed a partnership, expressly or impliedly” ([] my addition).

¹¹⁵ Van Schalkwyk & Van der Spuy (2012) at 195.

At termination of the domestic partnership, and if the parties are unable to reach an agreement as to how the property should be divided,¹¹⁶ they can approach a court to divide the joint property in terms of the *actio communi dividundo*.¹¹⁷ When the *actio communi dividundo* is instituted a court will attempt to divide the property according to the size of the various co-owners' shareholding (provided that it can be divided).¹¹⁸ Where the property is indivisible (either physically or in terms of the law) the common law provides a court with a discretion to divide the (indivisible) property in question.¹¹⁹ This discretion includes the alienation of the thing by public auction and division of the proceeds according to the shareholding of each co-owner, or alternatively, transferring the property to one co-owner and ordering the compensation of the other co-owner(s).¹²⁰

4.4.5 Parental rights

South African law, prior to the enactment of the Constitution, differentiated between legitimate and illegitimate children.¹²¹ This differentiation was, however, largely removed by the enactment of the Children's Act.¹²²

Parental responsibilities and rights, as defined in the Children's Act,¹²³ are acquired by parents as individuals and, as such, are no longer necessarily based on the parents' marital status.¹²⁴ While the biological mother of a child acquires parental responsibilities and rights automatically,¹²⁵ marital status does still to some extent determine the manner in which a biological father will acquire parental responsibilities

¹¹⁶ See Van der Walt & Pienaar (2009) at 56; Mostert & Pope (2010) at 100 and Van Schalkwyk & Van der Spuy (2012) at 198-199.

¹¹⁷ See Van der Walt & Pienaar (2009) at 56-57; Mostert & Pope (2010) at 100 and Van Schalkwyk & Van der Spuy (2012) at 199.

¹¹⁸ Van Schalkwyk & Van der Spuy (2012) at 199.

¹¹⁹ Van Schalkwyk & Van der Spuy (2012) at 199.

¹²⁰ See Van der Walt & Pienaar (2009) at 56 and Van Schalkwyk & Van der Spuy (2012) at 199.

¹²¹ See ch 3 par 3.2.2 above.

¹²² 38 of 2005. Also see SALRC Report on *Domestic Partnerships* 2006 at 161 and Skelton & Carnelley (2010) at 213.

¹²³ 38 of 2005. See specifically s 18(2).

¹²⁴ For a general discussion on the manner in which parental responsibilities and rights are acquired: see Louw LLD Thesis (2009) at 71-135; Heaton (2010) at 285-291 and Van Schalkwyk (2011) at 21-50.

¹²⁵ The marital status of the mother is irrelevant as section 19(1) of the Children's Act 38 of 2005 automatically bestows all parental responsibilities and rights on her when the child is born. She will not, however, receive full parental responsibilities and rights if she is an unmarried minor. In such a case the mother's guardian will also be the guardian of the child: see s 19(2) of the Children's Act 38 of 2005. For a general discussion on parental responsibilities and rights: see Heaton (2010) at 283-319 and Van Schalkwyk (2011) at 11-68.

and rights.¹²⁶ In terms of section 20 of the Children's Act¹²⁷ a biological father can only automatically acquire full parental responsibilities and rights if he is married to the child's mother at the time of the child's conception, birth or at any intervening time. If he is, or remains unmarried to the child's mother, he could acquire these responsibilities and rights in terms of section 21 of the Children's Act.¹²⁸ Regardless of whether he has acquired parental responsibilities and rights the biological father will still owe the child a reciprocal duty of support.¹²⁹ This is owing to the fact that the reciprocal duty of support between a parent and a child is based on blood relationship.¹³⁰

As far as parental status is concerned, domestic partners have not only received legal recognition in relation to the automatic acquisition of parental responsibilities and rights but also in relation to the assignment of such responsibilities and rights.¹³¹ In terms of section 231 of the Children's Act¹³² persons in a "... permanent domestic life-partnership" are, for example, allowed to adopt a child jointly.

Although the Children's Act¹³³ has greatly improved the legal status of domestic partners *vis-à-vis* their children, it can be criticised for failing to recognise same-sex domestic partners as parents in relation to children born by way of artificial insemination. In the case of *J and Another v Director-General: Department of Home Affairs*,¹³⁴ as alluded to earlier,¹³⁵ Goldstone J ordered that the words "... or

¹²⁶ See ss 20 ad 21 of the Children's Act 38 of 2005

¹²⁷ 38 of 2005.

¹²⁸ 38 of 2005. Section 21 states that he can acquire parental responsibilities and rights by either proving that he and the mother lived in a permanent life partnership at the time of birth, or alternatively, by acknowledging paternity and contributing to the child's maintenance and upbringing. For a detailed discussion of the acquisition of parental responsibilities and rights by unmarried fathers: see Louw LLD Thesis (2009) at 116-135.

¹²⁹ S 15(3)(a) of the Maintenance Act 99 of 1998 and s 18(2)(d) of the Children's Act 38 of 2005. See generally Skelton & Carnelley (2010) at 214; Heaton (2010) at 322 and Van Zyl (2010) at 4-14.

¹³⁰ See eg Van der Vyver & Joubert (1991) at 627; Heaton (2010) at 322; Van Zyl (2010) at 4 and Van Schalkwyk (2011) at 60.

¹³¹ *Du Toit and Another v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC). This decision has been incorporated into s 231 of the Children's Act 38 of 2005 which now enables not only same-sex but also heterosexual domestic partners to jointly adopt a child/children. For an explanation of the effect of s 231: see primarily Louw LLD Thesis (2009) at 411-413; Skelton & Carnelley (2010) at 213 and Van Schalkwyk (2011) at 33-35 (specifically fn 132).

¹³² 38 of 2005.

¹³³ 38 of 2005.

¹³⁴ *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC).

¹³⁵ See ch 3 par 3.3.4 above.

permanent same sex life partner” be read into section 5 of the Children’s Status Act¹³⁶ in order to allow both same-sex domestic partners to be registered as the “parents” of their children who were born by way of artificial insemination.¹³⁷ Currently, however, section 40 of the Children’s Act¹³⁸ does not make any mention of domestic partnerships. Instead, it provides that only spouses will automatically acquire parental responsibilities and rights of children born by way of artificial insemination.¹³⁹ According to Louw,¹⁴⁰ this creates “... serious reservations about the constitutionality of the specific provision” as it may possibly amount to unfair discrimination against domestic partners based on their marital status.¹⁴¹

4.4.6 Dependant’s action

The extent to which both heterosexual and same-sex domestic partners can rely on the dependant’s action has already been outlined above.¹⁴²

To reiterate, both heterosexual and same-sex couples can rely on the dependant’s action provided that it can be proven that a reciprocal duty of support had existed between them.

4.5 Conclusion

South African law does not formally recognise domestic partnerships. This has not prevented the legislature and judiciary from providing domestic partners with a limited degree of *ad hoc* legal recognition.¹⁴³ The *ad hoc* legal recognition which has been received to date is, however, completely insufficient to protect the interests of the parties concerned. Furthermore, although domestic partners can regulate their relationship in terms of ordinary private law rules and remedies, these measures are insufficient as their application appears to ignore the *consortium* that existed between

¹³⁶ 82 of 1987 (now repealed).

¹³⁷ *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC) at par 28.

¹³⁸ 38 of 2005.

¹³⁹ See eg 40(1)(a) of the Children’s Act 38 of 2005.

¹⁴⁰ Louw LLD Thesis (2009) at 193.

¹⁴¹ Louw LLD Thesis (2009) at 193.

¹⁴² See ch 3 par 3.3.3.3 above.

¹⁴³ See generally ch 3 par 3.3 above.

the domestic partners in question. This unsatisfactory state of affairs was effectively summarised by Smith:¹⁴⁴

“The legal position pertaining to [domestic] partnerships is determined by a ‘patchwork of laws’ comprised of piecemeal statutory and judicial recognition and self-regulation by means of ordinary legal mechanisms ... and legal remedies. In addition, same-sex and opposite-sex [domestic] partners are treated differently, with the former being entitled to more comprehensive legal protection than the latter. It goes without saying that the current state of affairs requires legislative attention”.¹⁴⁵

One cannot help but to agree with Smith that the current legal regulation of domestic partnerships (as described earlier in this chapter) is completely inadequate, and that the only conceivable solution to this problem is the formal legislative recognition of domestic partnerships. The challenge seems to be to determine what this legislative intervention should look like. As such, the remainder of this study will investigate the most appropriate underlying rationale to guide the seemingly inevitable formal (legislative) recognition and regulation of domestic partnerships.

¹⁴⁴ Smith 2013 *SALJ* at 543.

¹⁴⁵ Footnotes omitted ([] my addition).

Chapter 5:

Traditional justification for lack of legal recognition and the “choice argument”

5.1 Introduction

The previous chapters were, *inter alia*, aimed at establishing the positive law in relation to domestic partnerships. It was concluded that apart from the *ad hoc* recognition afforded to domestic partners, they have formally been excluded from spousal benefits.¹ Exclusion in this regard has been based on the fact that because domestic partners have chosen to remain unmarried they cannot be treated as spouses. Determining whether this reasoning, generally referred to as the choice argument, can still be adhered to, will be the aim of this chapter.

To this end the current exposition will be divided into three segments. The initial segment will provide a theoretical overview of the choice argument. The subsequent (second) segment will determine what influence the Constitution and the enactment of the Civil Union Act² has had on the development of the choice argument. Finally, the third segment will articulate some of the contemporary opinions in relation to the conceptual and constitutional viability of the choice argument. The aim and purpose of this final segment will be to determine whether the choice argument can continue to underlie the non-recognition of domestic partnerships in future.

5.2 Choice argument: A theoretical overview

5.2.1 Introduction

The legal disregard of domestic partners has been based on a well-structured legal argument which is supported by the constitutionally entrenched rights to privacy, freedom, and human dignity.³ Given its prominence within the context of domestic

¹ See ch 2 par 2.3.4 above for an explanation of “formal recognition” of domestic partnerships.

² 17 of 2006.

³ See eg Kahn (1983) at 262-263. More recently Sachs J in his minority decision in *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 154 intimated that personal autonomy underlies the basis of the choice argument. Personal autonomy (which includes the principle of *pacta sunt servanda*) is described as “the liberty to follow one’s own will”: see *Napier v Barkhuizen* 2006 4 SA 1 (SCA) at par 12; Sclater *et al* (2009) at 1 and Nedelsky (2011) at 45. There is some indication that this value is inherently related to the values of, *inter alia*, privacy, human dignity and freedom: see *Brisley v Drotzky* 2002 4 SA 1 (SCA) at pars 93-94 and also Sclater *et al* (2009) at 1. Considering its close

partnership regulation, necessity dictates a comprehensive analysis of its exact contents as well as its limitations.

5.2.2 Meaning of choice argument

Traditionally, prior to the enactment of the Constitution,⁴ heterosexual domestic partners were denied legal recognition based on what some conveniently refer to as the “choice argument”.⁵ The application of the choice argument is, however, not limited to the era prior to the Constitution. It was, in fact, recently used by the majority in *Volks v Robinson*⁶ as the primary reason for excluding heterosexual domestic partners from claiming spousal benefits. Although it has been expressed in a variety of ways,⁷ the choice argument is based on the following reasoning:⁸

“By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage, a person cannot complain if she is denied the legal benefits she would have had if she had married. Having chosen cohabitation rather than marriage, she has to bear the consequences. Just as the choice to marry is one of life’s defining moments, so, it is contended, the choice not to marry must be a determinative feature of one’s life.”

It is clear, from the above, that supporters of this argument do not only attach consequences to a person’s choice to marry, but also to a person’s choice not to

ties with the rights to human dignity and freedom (which are expressly protected in the Constitution) it is widely accepted that personal autonomy (and one can argue by implication the choice argument) is protected by the Constitution: see *Barkhuizen v Napier* 2007 5 SA 323 (CC) at par 57. Also see Bonthuys 2004 SALJ at 894; Brand 2009 SALJ at 85 and Sonnekus 2010 TSAR at 53.

⁴ See ch 3 par 3.2.2 above.

⁵ See eg Smith (2010) PELJ at 238. For a traditional perspective on this argument: see Kahn (1983) at 262-263. See ch 1 par 1.1 for the use of inverted commas in relation to the term “choice argument”.

⁶ See the minority judgement of Sachs J in *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 154 where he explains that the choice argument was the underlying rationale used in the majority decision. He explains that the choice argument was not only a central argument advanced in the appellant’s written submissions but also “... the philosophical premise underlying the majority judgement”. For a discussion of this case see ch 3 par 3.3.3.2 above. Other judgements in which this line of reasoning was accepted include: *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 60; *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) at par 16; *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC) at par 19; *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) at par 43 and *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 29.

⁷ See eg Schäfer 2006 SALJ at 640.

⁸ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 154.

marry.⁹ The choice argument presupposes that a person's marital status, whether married or unmarried, is a result of an explicit or positive choice.¹⁰

The effect of the choice argument can be illustrated with the following example: Suppose A and B are in a heterosexual domestic partnership. They have been living together for five years and in year 6, A (who was the breadwinner) dies. At the termination of the relationship, B institutes an action for maintenance in terms of the Maintenance of Surviving Spouses Act.¹¹ This Act only allows a spouse whose marriage was dissolved by death to claim posthumous maintenance. The choice argument now dictates that B cannot be allowed this spousal benefit as A and B had explicitly chosen not to marry. It would accordingly be an unjustifiable infringement of A's personal autonomy if the law attaches consequences to his relationship which he had explicitly chosen to exclude.¹²

5.2.3 Limitation of choice argument

As alluded to above,¹³ the choice argument prevented all heterosexual domestic partners who had failed to conclude a marriage¹⁴ from claiming any of the "... protective, adjustive and supportive measures available to spouses".¹⁵ This exclusion was, however, not unconditional as the choice argument operated within a paradigm in terms of which it was, in fact, objectively possible for the domestic partners to conclude a valid marriage.¹⁶ If there was an impediment or bar to their marriage, the law could obviously not penalise the partners for not formalising their relationship, as they would not have had a choice in the matter.

⁹ See *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 156.

¹⁰ See eg Lind 2005 *Acta Juridica* at 121-122 where he explains, even if he does not support, this line of reasoning. According to him (at 122) the choice argument takes an unnecessarily narrow approach to what choice entails.

¹¹ 27 of 1990. See specifically s 2(1). For an analysis of this Act see ch 3 par 3.3.3.2 above.

¹² See eg *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 93 and par 94; Kahn (1983) at 262; Sinclair (1996) at 292; Goldblatt 2003 *SALJ* at 619 and De Ru 2009 *Speculum Juris* at 119-121. According to Smith & Heaton 2012 *THRHR* at 474, this line of reasoning was also followed recently to exclude heterosexual domestic partners from utilising the dependant's action (see *Meyer v Road Accident Fund* (Unreported case no 29950/2004 (T) delivered on 2006-03-28)).

¹³ Ch 5 par 5.2.2 above.

¹⁴ In terms of the Marriage Act 25 of 1961.

¹⁵ SALRC Report on *Domestic Partnerships* 2006 at 110.

¹⁶ Marriage Act 25 of 1961.

It would appear as though, generally speaking, there are two possible impediments that could prevent domestic partners from marrying, namely, an objective legal impediment and a subjective circumstantial impediment.¹⁷ The choice argument disregards the latter subjective circumstantial impediment to marriage as the choice argument "... assesses the availability of choice for any given couple by looking only to the presence or absence of an absolute legal impediment to marriage".¹⁸

By ignoring subjective circumstantial impediments to marriage the application of the choice argument was limited. It was limited in the sense that by only taking into account objective legal impediments to marriage it ignored the fact that "... gender inequality, disempowerment of women, poverty and ignorance of the law all contribute towards removing *real choice* from many people".¹⁹

According to Schäfer,²⁰ limiting the application of the choice argument to take into account only objective legal impediments to marriage has its benefits. These benefits include, *inter alia*, the promotion of legal certainty, and also "... underscore[s] the seriousness of attaching rights and duties to inter-personal relationship[s]".²¹ The disadvantages that result from this limitation of the choice argument will be analysed later in paragraph 5.4 below.

¹⁷ See Schäfer 2006 *SALJ* at 640-644. Schäfer 2006 *SALJ* at 626-647 was the first South African author to provide a comprehensive analysis of the choice argument (or as he calls it the "objective model of choice"). In this work he not only lays a theoretical foundation for the choice argument but also advocates for its retention (albeit in a slightly amended form).

¹⁸ Schäfer 2006 *SALJ* at 640. Legal impediments to marriage can further be sub-divided into objective legal impediments (as referred to in the quote above) and relative legal impediments. Relative legal impediments, such as, age and capacity, do not disrupt the application of the choice argument provided that the impediment in question promotes a legitimate and reasonable objective (see Schäfer 2006 *SALJ* at 640). As a result of this, two domestic partners cannot claim spousal benefits if they were prevented from marrying due to the fact that one of the domestic partners, for example, lacked capacity. Although Schäfer 2006 *SALJ* at 640 only describes age and capacity as relative legal impediments, it is submitted that affinity and consanguinity will also serve as such impediments. For a general explanation of these principles see eg Heaton (2010) at 15-34 and Van Schalkwyk (2011) at 102-135. The reason for this submission is that these impediments, like the impediments in relation to age and capacity, promote a legitimate and reasonable objective.

¹⁹ Goldblatt 2003 *SALJ* at 616.

²⁰ See generally Schäfer 2006 *SALJ* at 642.

²¹ Schäfer 2006 *SALJ* at 642 ([] my addition).

5.3 Influence of recent case law and legislation on choice argument

5.3.1 Introduction

Heterosexual domestic partners were traditionally denied legal recognition based on the fact that they had chosen not to marry and could, as a result thereof, not claim spousal benefits on an *ex post facto* basis. A similar rationale could not be adopted in relation to same-sex domestic partners as the Marriage Act²² prohibited same-sex marriage. The existence of this objective legal impediment to marriage dictated that the choice argument could not be applied to their relationship.²³ For this reason, a limited number of spousal benefits were extended on an *ad hoc* basis to same-sex domestic partners only.²⁴

The objective legal impediment to same-sex marriage, which traditionally prevented the application of the choice argument to same-sex domestic partnerships, has ostensibly been removed by the enactment of the Civil Union Act.²⁵ Whether the current ability of same-sex domestic partners to formalise their union has necessarily harmonised the legal positions of heterosexual and same-sex domestic partners is, however, anything but certain.²⁶

5.3.2 *Gory v Kolver*

The uncertainty in this regard stems from the decision in *Gory v Kolver*.²⁷ In this case, which was decided a week before the enactment of the Civil Union Act,²⁸ the court was tasked to determine whether it was constitutionally acceptable for section 1(1) of

²² 25 of 1961.

²³ See ch 5 par 5.2.3 above. Also see Schäfer 2006 *SALJ* at 640-641.

²⁴ See ch 3 par 3.3.4.2 above.

²⁵ 17 of 2006. This is owing to the fact that same-sex domestic partners are now (like their heterosexual counterparts) able to formalise their relationship by concluding a civil union (to be called either a marriage or civil partnership) in terms of the Civil Union Act 17 of 2006. See in this regard eg Mamashela & Carnelley 2006 *Obiter* at 390; Picarra 2007 *SAJHR* at 565; Barnard & De Vos 2007 *SALJ* at 823; Kruuse 2009 *SAJHR* at 385; Heaton (2010) at 253-4; Van Schalkwyk (2011) at 360-361 and Louw 2011 *Juridikum* at 240.

²⁶ See eg Wood-Bodley 2008(a) *SALJ* at 260 who remarks that the Civil Union Act 17 of 2006 does not "... *ipso facto* end the recognition of same-sex conjugal relationships".

²⁷ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC).

²⁸ 17 of 2006. For a general case discussion: see Barnard and De Vos 2007 *SALJ* at 823; Picarra 2007 *SAJHR*; Wood-Bodley 2008(a) *SALJ* at 260; Heaton Casebook (2010) at 358-63 and Smith 2010 *PELJ* at 260-1.

the Intestate Succession Act²⁹ to exclude same-sex life partners from its ambit.³⁰ After concluding that such exclusion was indeed unconstitutional,³¹ Van Heerden AJ made the following statement with regards to the *ad hoc* recognition of same-sex domestic partners prior to the enactment of the Civil Union Act:³²

“Any change in the law pursuant to *Fourie* will not necessarily amend those statutes into which words have already been read by this Court so as to give effect to the constitutional rights of gay and lesbian people to equality and dignity. In the absence of legislation amending the relevant statutes, the effect on these statutes of decisions of this Court in cases like *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs, Satchwell, Du Toit* and *J v Director-General, Department of Home Affairs* will not change. The same applies to the numerous other statutory provisions that expressly afford recognition to permanent same-sex life partnerships.”

This judgement has consequently, according to Louw,³³ “... contradicted the general assumption” that the choice argument will be applicable to same-sex domestic partners after the enactment of the Civil Union Act.³⁴ The *dictum* invites the inference that, unlike heterosexual domestic partners, same-sex domestic partners who fail to formalise their union (even though there is no longer any objective legal impediment to such a union) can still claim certain spousal benefits which were extended to them prior to the decision of *Fourie*.³⁵ Should this be the case it would mean that the choice argument would be strictly applied to heterosexual domestic partnerships,³⁶ but ignored in relation to their same-sex counterparts.

²⁹ 81 of 1987.

³⁰ S 1(1) of the Intestate Succession Act 81 of 1987 conferred certain benefits on heterosexual spouses but not on same-sex life partners.

³¹ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 19.

³² 17 of 2006. *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 28.

³³ Louw 2011 *Juridikum* at 240.

³⁴ 17 of 2006.

³⁵ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC). See specifically *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 29 where Van Heerden AJ remarks that “... unless specifically amended, section 1(1) [of the Intestate Succession Act 81 of 1987] will ... apply to permanent same-sex life partners who have undertaken reciprocal duties of support but who do not ‘marry’ ... Depending on the nature and content of this new statutory dispensation (if any), there is the possibility that unmarried heterosexual couples will continue to be excluded from the ambit of section 1(1) of the Act” ([] my addition).

³⁶ As applied by the majority in *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC).

5.3.3 Responses to *Gory v Kolver*

5.3.3.1 Introduction

Prior to the Civil Union Act³⁷ (and based on the choice argument)³⁸ South African law differentiated between heterosexual domestic partnerships on the one hand,³⁹ and same-sex domestic partnerships on the other.⁴⁰ The common assumption that this differentiation would fall away as soon as the prohibition against same-sex marriage was removed was not, however, reflected in the decision of *Gory v Kolver*.⁴¹ This anomalous situation has given rise to a plethora of academic opinions.⁴² These opinions can for practical purposes be categorised according to their substance as the majority opinion, the textual opinion and finally, the dissenting opinion. Each of these opinions will be analysed in the subsequent paragraphs in order to determine whether the choice argument is still constitutionally viable after the decision of *Gory v Kolver*.⁴³

5.3.3.2 Majority opinion

The majority of legal authors are opposed to the continued differentiation between same-sex and heterosexual domestic partners.⁴⁴ These authors argue that the Civil Union Act⁴⁵ has removed the impetus for granting spousal benefits to same-sex

³⁷ 17 of 2006.

³⁸ See ch 3 pars 3.3.3-3.3.4 above.

³⁹ See eg *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) in which it was held that heterosexual domestic partners could not claim spousal benefits.

⁴⁰ See eg *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC); *J and Another v Director General; Department of Home Affairs and Others* 2003 5 SA 621 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA) and *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) in which spousal benefits were extended to same-sex domestic partners.

⁴¹ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 28.

⁴² For a broad overview of the academic reaction to the decision of *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC): see Kruuse 2009 SAJHR at 385-386 and Louw 2011 *Juridikum* at 240.

⁴³ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC).

⁴⁴ See eg Mamashela & Carnelley 2006 *Obiter* at 390; Bilchitz & Judge 2007 SAJHR 496-497; Picarra 2007 SAJHR at 565; Kruuse 2009 SAJHR at 385; Heaton (2010) at 253-254; Louw 2011 *Juridikum* at 240 and Van Schalkwyk (2011) at 360 (see specifically fn 14). This opinion finds support even in the decision of *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 29 where Van Heerden AJ held: "Once this impediment [referring to the impediment against same-sex marriage] is removed, then there would appear to be no good reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples".

⁴⁵ 17 of 2006.

domestic partners on an *ad hoc* basis.⁴⁶ Because the Act now also gives same-sex domestic partners the choice to formalise their union,⁴⁷ these authors are of the opinion that the choice argument should apply equally to all types of domestic partnerships.

Although the majority opinion regards the continued differentiation between heterosexual and same-sex domestic partners to be unequivocally unconstitutional,⁴⁸ most of the authors do not provide suggestions as to how this situation should be resolved. Heaton,⁴⁹ as an exception to this general trend, suggests that the existing differentiation should not be eliminated by merely removing the protection provided to same-sex domestic partners but rather by “... extending such protection to [include] heterosexual [domestic] partners” as well.⁴⁹ This approach seems to have gained some limited judicial acceptance if regard is had to the judgement in *Paixao*.⁵⁰

Van Heerden AJ remarked in *Gory v Kolver*⁵¹ (as quoted above) that “... in the absence of legislation amending the relevant statutes, the effect on these statutes ... will not change”. Considering that the majority opinion is of the view that the legal positions of heterosexual and same-sex domestic partners have now been harmonised, one can conclude that the majority opinion is founded on the view that the Civil Union Act⁵² was in fact the amending legislation referred to by Van Heerden AJ above.

⁴⁶ See eg Heaton (2010) at 253-254 who phrases the argument in the following manner: “Now that the Civil Union Act [17 of 2007] has come into operation, same-sex life partners do have the option of entering into a marriage (albeit a marriage under the Civil Union Act [17 of 2006] and not a civil marriage). The Constitutional Court’s argument that same-sex life partners should not be excluded from spousal benefits because they are barred from entering into a legally recognised marriage has therefore become redundant”.

⁴⁷ See s 2(a) read with s 1 of the Civil Union Act 17 of 2006 ([] my addition).

⁴⁸ This inequality has been brought about by the *ad hoc* extension of spousal benefits to same-sex domestic partners exclusively: see cases such as *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) and *Du Plessis v Road Accident Fund* 2004 1 SA 369 (SCA). For a comprehensive analysis of these instances of recognition, see ch 3 par 3.3.4.2 above.

⁴⁹ Heaton (2010) at 253-254 ([] my addition).

⁵⁰ See *Paixao and Another v Road Accident Fund* 2012 6 SA 377 (SCA) as discussed in ch 3 par 3.3.3.3 above.

⁵¹ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 28.

⁵² 17 of 2006.

5.3.3.3 Textual (positivist) opinion

The court in *Gory v Kolver*,⁵³ as quoted above,⁵⁴ held specifically that any change in the law pursuant to *Fourie*⁵⁵ will not automatically amend the spousal benefits which were awarded to same-sex domestic partners prior to the Civil Union Act.⁵⁶ It was in fact held that only an express legislative amendment could affect the rights already conferred on same-sex domestic partnerships. While the majority opinion⁵⁷ regards the Civil Union Act⁵⁸ as this “express legislative amendment”, the textual (positivist) approach as represented mostly by Smith,⁵⁹ contends that such a legislative amendment is still to be enacted.⁶⁰

Contrary to the majority opinion, the textual (positivist) opinion emphasises the reality of the fact that that the law *currently* differentiates between same-sex and opposite sex cohabitants.⁶¹ Supporters of this view,⁶² however, hasten to add that although the majority view is in principle correct it can only be accepted as the *de lege lata* once the position is clarified by either the legislature and/or the judiciary.

5.3.3.4 Dissenting opinion

The majority opinion, as alluded to above,⁶³ regards the continued differentiation between heterosexual and same-sex domestic partners to be “... ironic, paradoxical and anomalous”.⁶⁴ The dissenting opinion, in contradistinction to this, argues that the

⁵³ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 28.

⁵⁴ See ch 5 par 5.3.2 above.

⁵⁵ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian Equality Project and Others v Minister of Home Affairs and Others* 2006 1 SA 524 (CC).

⁵⁶ 17 of 2006.

⁵⁷ See ch 5 par 5.3.3.2 above.

⁵⁸ 17 of 2006.

⁵⁹ See eg Smith LLD Thesis (2009) at 285-300; Smith 2010 *PELJ* at 261 and Skelton & Carnelley (2010) at 215-216. This stance is taken by Smith as it supports his main argument that the South African law should abandon the choice argument for a more contextualised approach to choice. The content, impact and viability of this argument will be comprehensively analysed in ch 6 below.

⁶⁰ See also Skelton & Carnelley (2010) at 215.

⁶¹ See eg Skelton & Carnelley (2010) at 215 and Smith 2010 *PELJ* at 261.

⁶² Skelton & Carnelley (2010) at 215.

⁶³ See ch 5 par 5.3.3.2 above.

⁶⁴ See Kruuse 2009 *SAJHR* at 385.

current differentiation between heterosexual and same-sex domestic partners is justified owing to considerations of substantive equality.⁶⁵

Formal equality,⁶⁶ which forms the basis of the majority opinion,⁶⁷ dictates that persons who are similarly situated should be treated in a similar fashion.⁶⁸ As such, it is predicated on a basis of “sameness of treatment”.⁶⁹ As a result it does not tolerate differentiation, even if such differentiation promotes substantive equality.⁷⁰ Substantive equality, on the other hand, is based on the idea that the law should guarantee the outcome of equality and that this outcome may be achieved by enduring differential treatment.⁷¹ Interpreting equality in this manner is, according to some,⁷² not only enshrined within the Constitution but has also been expressly endorsed by the Constitutional Court.⁷³ According to De Ru and Bonthuys and Albertyn, there are two ways in which substantive equality can be achieved in the present context.⁷⁴ The first, so-called inclusionary approach, dictates that persons who were previously “outsiders” are included within the operation of a specific equality right.⁷⁵ The second, so-called transformatory approach, would go beyond

⁶⁵ The dissenting argument was first raised by Wood-Bodley: see Wood-Bodley 2008(a) *SALJ* at 259-273; Wood-Bodley 2008(b) *SALJ* at 46-62 and Wood-Bodley 2008(c) *SALJ* at 483-488. It was later accepted and further developed by De Ru 2009 *Speculum Juris* at 111-126. These authors are the two main proponents of this opinion although some of their arguments are also accepted by other authors. These instances will be highlighted below. For a critical analysis of this argument within the framework of the contextualised model of choice (which will be discussed in ch 6 below): see Smith LLD Thesis (2009) at 285-300 and 2010 *PELJ* at 261-273.

⁶⁶ For an overview of the right to equality, see ch 3 par 3.3.2 above. For a general overview of the difference between formal and substantive equality: see Bonthuys & Albertyn (2007) at 87-94; Bilchitz & Judge 2007 *SAJHR* 466-499; De Ru 2009 *Speculum Juris* at 122-123; Meyersfeld 2010 *CCR* at 280-281 and Currie & De Waal (2013) at 210-214.

⁶⁷ Meyersfeld 2010 *CCR* at 280 describes formal and substantive equality as two broadly different philosophical approaches.

⁶⁸ See eg Meyersfeld 2010 *CCR* at 280 and Currie & De Waal (2013) at 210. Bonthuys & Albertyn (2007) at 87 remark that formal equality presumes that all persons are equal.

⁶⁹ See eg Currie & De Waal (2013) at 213.

⁷⁰ Bonthuys & Albertyn (2007) at 87. This, according to Bonthuys & Albertyn (2007) at 87, results in formal equality being opposed to affirmative action measures.

⁷¹ De Ru 2009 *Speculum Juris* at 122.

⁷² See eg De Ru 2009 *Speculum Juris* at 122 and Currie & De Waal (2013) at 214.

⁷³ See eg *Brink v Kitshoff NO* 1996 4 SA 197 (CC) at par 42; *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at par 41; *Minister of Finance and Another v Van Heerden* 2004 6 SA 121 (CC) at par 26 and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) at par 62.

⁷⁴ See Bonthuys & Albertyn (2007) at 94 and De Ru 2009 *Speculum Juris* at 123.

⁷⁵ See eg Bonthuys & Albertyn (2007) at 94.

inclusion and would address “... the structural conditions that create and perpetuate inequalities”.⁷⁶

Wood-Bodley,⁷⁷ the main proponent of the dissenting opinion, argues that the differentiation created in *Gory v Kolver*⁷⁸ is apt as it would be “unwise” to force same-sex domestic partners to conclude a civil union in order to receive certain spousal benefits.⁷⁹ It would be unwise, as the conclusion of a same-sex marriage would mean that a person’s sexual orientation would become “unrelentingly out”.⁸⁰ The danger in this is that it may expose that person to the truly shocking and unacceptable instances of homophobia that still seem to be prevalent in South Africa.⁸¹ Wood-Bodley further contends that the prevalence of homophobia will make the conclusion of a same-sex marriage “practically impossible” as same-sex couples need to protect themselves against homophobia.⁸² As such, he contends that a substantive approach to equality should prevent the application of the choice argument in relation to same-sex domestic partners. He reaches this conclusion due to the fact that a substantive approach to equality will tolerate the continued practical inequalities between same-sex and heterosexual domestic partners.

De Ru,⁸³ the second supporter of this argument, not only confirms Wood-Bodley’s argument but also develops it further. She does this by utilising section 9(2) of the Constitution (the so-called “affirmative action clause”) to provide additional constitutional credence to Wood-Bodley’s argument. The affirmative action clause allows a particular group of persons to enjoy preferential treatment provided that they

⁷⁶ Bonthuys & Albertyn (2007) at 94.

⁷⁷ See Wood-Bodley 2008(a) SALJ at 259-273 and Wood-Bodley 2008(b) SALJ at 46-62.

⁷⁸ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 28.

⁷⁹ Wood-Bodley 2008(b) SALJ at 55.

⁸⁰ Wood-Bodley 2008(b) SALJ at 55.

⁸¹ Wood-Bodley 2008(b) SALJ at 55-57 refers to some of these instances of homophobia. According to his research homosexuals are at danger of being discriminated against, assaulted, sexually assaulted, raped, murdered and denied healthcare based on their sexual orientation. Other authors, such as Barnard & De Vos 2007 SALJ at 814-819 and Bonthuys 2008 SALJ at 473, also mention the prevalence of homophobia (although they discuss it within the ambit of the consultation process leading up to the enactment of the Civil Union Act 17 of 2006). Wood-Bodley 2008(b) SALJ at 57 makes the interesting observation that homosexual couples need not actually experience homophobia for it to negatively affect them. According to him all homosexuals will be affected by these instances of homophobia owing to so-called “felt-stigma”. Felt-stigma refers to “... an individual’s subjective experience of stigma against her or his group, including her or his awareness of stigma’s prevalence and manifestations even without having directly experienced enacted stigma”: see Wood-Bodley 2008(b) SALJ at 57.

⁸² Wood-Bodley 2008(a) SALJ at 260.

⁸³ See De Ru 2009 *Speculum Juris* at 111-126.

were previously disadvantaged by unfair discrimination.⁸⁴ In order for a person to benefit in terms of section 9(2) of the Constitution, he or she has to prove that the affirmative action measures will target persons or categories of persons who have been disadvantaged by unfair discrimination in the past, are designed to protect and advance such persons or categories of persons and finally, will promote the achievement of substantive equality.⁸⁵

De Ru⁸⁶ argues that enabling same-sex domestic partners to continue to rely on spousal benefits awarded to them prior to the Civil Union Act,⁸⁷ to the exclusion of their heterosexual counterparts, will qualify as affirmative action measures (as explained above). This is owing to the fact that same-sex domestic partners can be described as a vulnerable group “... that has been persecuted and marginalised by unfair discrimination in the past”.⁸⁸ Differentiating between heterosexual and same-sex domestic partners will, as such, not amount to unfair discrimination owing to the fact that a substantive approach to equality will tolerate the resulting differentiation in order to ultimately promote equality.⁸⁹

Even though the dissenting opinion is founded on the Constitution (for which it should be commended) it can be criticised for ostensibly using a subjective circumstantial impediment to marriage, namely homophobia, to bar the application of the choice argument. Using a subjective circumstantial impediment to marriage in this situation contradicts the general principles on which the choice argument is based.⁹⁰ The choice argument is premised on the assumption that only an objective legal impediment to marriage can bar its application. As such, it logically follows that the “homophobia argument”⁹¹ is not a valid impediment which could exclude the application of the choice argument in this context, as it is based on the subjective considerations of same-sex partners. The latter proposition (dissenting opinion) does,

⁸⁴ See Currie and De Waal (2013) at 241 and De Ru 2009 *Speculum Juris* at 124.

⁸⁵ Currie and De Waal (2013) at 242.

⁸⁶ De Ru 2009 *Speculum Juris* at 124-125.

⁸⁷ 17 of 2006.

⁸⁸ De Ru 2009 *Speculum Juris* at 125.

⁸⁹ De Ru 2009 *Speculum Juris* at 124-125.

⁹⁰ See ch 5 par 5.2.2 above.

⁹¹ A term employed by Smith 2010 *PELJ* at 262.

however, provide considerable support for the adoption of a contextualised model of choice which will be analysed in the following chapter.⁹²

5.4 Flaws of choice argument

Despite the fact that all of the aforementioned opinions raise valid legal arguments, none of them can be supported for purposes of this study. The reason is that each opinion, instead of providing a concrete solution to the legal dilemma created by the decision of *Gory v Kolver*,⁹³ only has the effect of highlighting the constitutional or conceptual deficiencies that exist within the underlying rationale of the other opinions.

The majority opinion, for example, cannot be supported as it does not take cognisance of the existing inequalities that persist between heterosexual and same-sex couples. It is, therefore, constitutionally deficient as it does not comply with a substantive understanding of equality. In contrast to the majority opinion, the dissenting opinion does align itself with a substantive approach to quality. While this constitutionally sound approach should be commended, it does not detract from the fact that the dissenting opinion (incorrectly) uses a subjective circumstantial impediment to marriage in order to prevent the application of the choice argument. Finally, the study cannot support the textual (positivist) opinion as it is merely a stark reflection of the *status quo* which does not attempt to address the apparent inequality that is caused by the decision of *Gory v Kolver*.⁹⁴

In addition to the aforementioned deficiencies that result from the decision of *Gory v Kolver*,⁹⁵ there are other reasons for discarding the choice argument.

- Because the choice argument only takes into account an objective legal impediment to marriage, it disregards the context within which choice is made.⁹⁶ As remarked by Schäfer "... [f]or some, social and economic hardships can be so acute as to render meaningless ... their capacity to

⁹² See ch 6 par 6.2 below.

⁹³ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC).

⁹⁴ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC).

⁹⁵ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC).

⁹⁶ Schäfer 2006 *SALJ* at 640-641 and Smith LLD Thesis (2009) at 234. This view of choice is according to Lind 2005 *Acta Juridica* at 122 an overly simplistic view of what choice entails. It assumes that choice is limited to express choice which has been expressed in a pre-defined manner (the conclusion of a marriage ceremony).

choose”.⁹⁷ According to Sachs J,⁹⁸ applying such a de-contextualised approach to choice will inevitably lead to “... very unfair anomalies”. Whether a contextual approach to choice is desirable in South African law will be analysed later in this study.⁹⁹

- A further deficiency relates to the fact that the choice argument fails to respect the individual autonomy of *both* domestic partners.¹⁰⁰ In the case of *Volks v Robinson*,¹⁰¹ for example, it is clear that the law, on the one hand, only attaches weight to Mr Shandling’s decision not to marry, while on the other, totally discounting Mrs Robinsons’ complete willingness to formalise her relationship. Lind remarks that it would appear as if the law, when adhering to the principles of the choice argument, only gives effect to the autonomy of the more powerful person in the relationship.¹⁰² Personal autonomy must surely dictate that the law provides equal weight to both parties’ personal autonomy.
- Finally, certain authors criticise the choice argument for its inability to differentiate between informed and uninformed choice.¹⁰³ Conversely stated, it does not take into account that certain choices are made “... on the basis of ignorance or error”.¹⁰⁴ The choice argument assumes that it is giving effect to the intention of the parties.¹⁰⁵ In reality this may not be the case as partners can either be “... remiss about directing their lives”,¹⁰⁶ or alternatively, mistakenly believe that they are already entitled to spousal benefits on the basis of a “common law marriage”.¹⁰⁷

⁹⁷ Schäfer 2006 *SALJ* at 641 ([] my addition). Cooke 2005 *SALJ* at 555 reiterates that choice implies that a person has alternatives. If such alternatives are not present, be it due to social, legal or economic reasons, choice cannot exist.

⁹⁸ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 162.

⁹⁹ See ch 6 below.

¹⁰⁰ Lind 2005 *Acta Juridica* at 123; Schäfer 2006 *SALJ* at 641-642 and Smith LLD Thesis (2009) at 234. Also see the remarks made in *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 108.

¹⁰¹ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 104.

¹⁰² Lind 2005 *Acta Juridica* at 123.

¹⁰³ Bonthuys 2004 *SALJ* at 895; Schäfer 2006 *SALJ* at 642 and Smith LLD Thesis (2009) at 234. Bonthuys delivers her contribution in the context of domestic partnership agreements. It is, however, contended that those principles are also applicable to the current discussion.

¹⁰⁴ Schäfer 2006 *SALJ* at 642.

¹⁰⁵ Bonthuys 2004 *SALJ* at 895.

¹⁰⁶ Sinclair (1996) at 273. According to Sinclair these types of domestic partners “... drift into and remain in relationships without consciously considering the implications of failure and termination [of their relationship]”.

¹⁰⁷ Schäfer 2006 *SALJ* at 642.

5.5 Conclusion

The choice argument, which stipulates that partners who choose to remain unmarried are precluded from being treated as spouses, has been the driving force behind the non-recognition of heterosexual domestic partnerships.¹⁰⁸ However, the choice argument could not be applied to same-sex domestic partners as the application thereof was barred by the existence of an objective legal impediment to their marriage, namely, the prohibition against same-sex marriage. The general assumption that the differentiation between same-sex and heterosexual domestic partners would fall away as soon as same-sex domestic partners were allowed to formalise their relationship was, however, to some extent contradicted by the Constitutional Court in *Gory v Kolver*.¹⁰⁹ This is because Van Heerden AJ intimated that same-sex domestic partners would still be entitled to spousal benefits awarded to them prior to the enactment of the Civil Union Act.¹¹⁰ Three differing opinions resulted from the uncertainty caused by the judgement, namely, the majority opinion, the textual (positivist) opinion and the dissenting opinion. It was shown that none of them could be supported because they would either not uphold the constitutional values of equality and/or they contradicted the underlying basis of the choice argument.

As a result of the aforementioned constitutional and conceptual flaws, it was concluded that the choice argument cannot continue to underpin the recognition of domestic partnerships. In the *lacuna* left by the rejection of the choice argument, it has to be investigated whether there are other suitable theoretical foundations which can possibly underlie the future recognition and regulation of domestic partnerships.

¹⁰⁸ See ch 3 par 3.3.3 and ch 5 par 5.2.2 above. See specifically *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 154. A possible exception to the general non-recognition of heterosexual domestic partnerships occurred in the case of *Paixao and Another v Road Accident Fund* 2012 6 SA 377 (SCA). For current purposes, however, it is contended that *Paixao* should be regarded as a development of the dependant's action rather than an indication by the courts that the choice argument should no longer apply to heterosexual domestic partnerships. This conclusion is strengthened by the fact that the Supreme Court of Appeal (at pars 26 and 27) differentiated *Paixao* from *Volks* in that the purpose of the dependant's action differed from the Maintenance of Surviving Spouses Act 27 of 1990.

¹⁰⁹ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 28.

¹¹⁰ 17 of 2006.

Chapter 6: Theoretical basis for recognition and regulation of domestic partnerships in future

6.1 Introduction

The South African law of domestic partnerships, if such a coherent body of law exists,¹ finds itself at a proverbial cross-roads as far as finding an appropriate underlying theoretical basis for the recognition and regulation of domestic partnerships in future. The predicament has been brought about by the failure of the state (be it the legislature or judiciary) to provide guidance in this regard. The absence of such guidance offers a unique opportunity to re-evaluate the manner in which South African law should regulate domestic partnerships. If it is accepted, as concluded in the previous chapter, that the choice argument cannot form the theoretical foundation for the recognition of domestic partnerships, an alternative basis should be identified. Identifying such a “new” basis will be the objective of this chapter.

Legal sources refer to three viable alternatives to the choice argument, namely, the contextualised model of choice, the function-over-form approach and lastly, the approach recommended by Smith (henceforth referred to as the Smith model). While the first is a more restrictive approach, the second and third models will have a more invasive effect on the family law. After each of these options have been analysed separately, they will be compared with each other. Finally, the chapter will conclude with a motivated justification for the adoption of the contextualised model of choice.

¹ Hahlo 1972 *SALJ* at 321 contends that there is no “law of concubinage” in the same sense that there is a “law of husband and wife”. A similar contention was recently made by Skelton & Carnelley (2010) at 209 where they held that there is no “... law of cohabitation as there is a law of marriage”. It is suggested that these remarks do not imply that there is no law of domestic partnerships. These remarks should rather be interpreted to mean that there is no formal subdivision of family law dealing exclusively with domestic partnerships.

6.2 Model of contextualised choice: A restrictive (less invasive) approach

6.2.1 Introduction

Traditionally the choice argument was based on the premise that a person's choice to either marry or not to marry was a result of the exercise of a direct and explicit choice.² One of the main flaws of the reasoning underlying this argument was that it did not appreciate the context within which choice or autonomy was expressed.³ It did not, for example, take into account that "... [g]ender inequality and patriarchy result in women lacking the choice to freely and equally ... set the terms of their relationships".⁴ The result thereof was that the choice argument invariably favoured the more powerful partner in the relationship.⁵ In an attempt to adequately address the shortcomings of the choice argument, there has been a call for a more contextualised approach to choice. What such an approach to choice will entail, and whether it can be applied in South African law, will be analysed in the following paragraphs.

6.2.2 General principles

After identifying some of the aforementioned flaws in the application of the choice argument,⁶ certain authors attempted to develop a more nuanced approach to choice.⁷ A contextual approach to choice assumes that a person actually has alternatives when making a choice.⁸ As such, choice will not be present if "... the individual does not have *genuine* options to choose between".⁹ Understanding choice contextually implies, according to Goldblatt, that "... gender inequality, disempowerment of women, poverty and ignorance of the law all contribute towards removing *real choice* from many people, especially poor women".¹⁰ This sentiment has resulted in the development of

² Lind 2005 *Acta Juridica* at 122.

³ See ch 5 par 5.2 above

⁴ Goldblatt 2003 *SALJ* at 616.

⁵ Lind 2005 *Acta Juridica* at 123.

⁶ For a comprehensive analysis of the flaws that result from the application of the choice argument, see ch 5 par 5.4 above.

⁷ Authors who argue for this more nuanced approach to choice include, *inter alia*, Clarke 2002 *SALJ* at 634-648; Goldblatt 2003 *SALJ* at 610-629; Lind 2005 *Acta Juridica* at 108-130; Cooke 2005 *SALJ* at 542-557; Meyersfeld 2010 *CCR* at 271-294; Smith LLD Thesis (2009) at 233-242 and 2010 *PELJ* 238-294. Favourable reference to this approach can also be found in case law: see eg *Volks NO v Robinson and Others* 2005 5 *BCLR* 446 (CC) at pars 152-165 and *Hassam v Jacobs NO and Others* 2009 11 *BCLR* 1148 (CC) at par 38.

⁸ Clarke 2002 *SALJ* at 555.

⁹ Clarke 2002 *SALJ* at 555 (own emphasis added).

¹⁰ Goldblatt 2003 *SALJ* at 619 (own emphasis added).

an alternative regulatory foundation for domestic partnership regulation namely, the model of contextualised choice.¹¹

The choice argument as described in chapter five above,¹² determines whether choice exists only by looking at the presence or absence of an objective legal impediment to marriage.¹³ Subjective circumstantial impediments do not interrupt its application. This is not true for the contextualised model of choice. Approaching choice on a contextual basis recognises "... that while in theory the individual is free to marry or not to marry, in practise the reality may be otherwise".¹⁴ As such, choice can be negated by social or economic hardship.

Whether a person truly has the ability to exercise choice should be determined on a case-to-case basis. This does not, however, detract from the reality that there are at least two categories of persons, namely, women and same-sex couples, who may in general be less able to exercise their choice to marry freely.

6.2.2.1 Women and contextualised model of choice

Determining the legal, social or economic status of women is by no means a primary objective of this study.¹⁵ The following discussion will, as such, be limited to an overview of the status of women as it pertains to the analysis of the contextualised model of choice only.¹⁶ Identifying women as one of the categories of persons who

¹¹ This term was first coined by Smith 2010 *PELJ* at 260 after he refined and developed the platform provided by Sachs J in his minority decision of *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 154-160. For an analysis of the latter see ch 6 par 6.2.3 below.

¹² Ch 5 par 5.2.4.

¹³ Schäfer 2006 *SALJ* at 640.

¹⁴ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 157.

¹⁵ For such an analysis consult, *inter alia*, Sinclair (1996) at 3-180; Goldblatt 2003 *SALJ* at 610-629; SALRC report on *Domestic Partnerships* (2006) at 23-29; Bonthuys & Albertyn (2007); Bonthuys 2007 *SAJHR* at 526-542 and, more recently, Maluleke 2012 *PELJ* 2-22.

¹⁶ Adhering to such a limited discussion is justifiable as "... [a]lthough the problems [referring to the legal status of women] are not universal, they are so overwhelming, and so obvious to anyone with even the most rudimentary, unrefined skills of observation, that it seems almost ludicrous to demand evidence of them. It takes no specially talented social scientist to notice that men and women occupy very different relations of power in South Africa, even now, ten years after the advent of a democratic Constitution. Nor does it take a genius to discern that family break-up - whether of a married or unmarried family - has a greater negative impact on women than it does on men": see Lind 2005 *Acta Juridica* at 119-120 ([] my addition).

may not necessarily have the ability to enforce their choice to marry was motivated by the following statement made by Sachs J in *Volks v Robinson*:¹⁷

“For all the subtle masks that racism may don, it can usually be exposed more easily than sexism and patriarchy, which are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible. The constitutional quest for the achievement of substantive equality therefore requires that patterns of gender inequality reinforced by the law be not viewed simply as part of an unfortunate yet legally neutral background. They are intrinsic, not extraneous, to the interpretive enquiry”.

According to feminist critiques, the dependent positions in which many women find themselves are caused by discrimination in both the public and private spheres.¹⁸ The public sphere discrimination is caused by the fact that women have been perceived as being second-class employees.¹⁹ Men are perceived to be better employees considering that they have no child-rearing responsibilities.²⁰ The result of these (debatable) assumptions is that women usually find themselves employed in lower paid or part-time positions.²¹ The oppression of women in the public sphere cannot, however, be addressed without confronting the role of women in the private sphere.²² According to Sinclair,²³ women in the private sphere find themselves in a mostly patriarchal system which views domestic responsibility as “[unpaid] women’s work”.²⁴ This largely patriarchal system also tends to ignore the gender-based violence that seems to be “endemic in our society”.²⁵ The supposed subordination of women, and especially poor black women,²⁶ has been proposed as the reason why women generally lack the choice to freely and equally set the terms of their relationships.²⁷

¹⁷ Sachs J in *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 163.

¹⁸ Sinclair (1996) at 69; Lind 2005 *Acta Juridica* at 117 and Bonthuys & Albertyn (2007) at 82. According to the latter this inequality is pervasive in social, economic and political life.

¹⁹ Sinclair (1996) at 69.

²⁰ Sinclair (1996) at 69. Bonthuys & Albertyn (2007) at 89 identify women’s responsibility for child care as the main source of their social and economic disadvantage.

²¹ Sinclair (1996) at 69 and Bonthuys & Albertyn (2007) at 82.

²² Sinclair (1996) at 69.

²³ Sinclair (1996) at 69.

²⁴ Sinclair (1996) at 69 ([] my addition).

²⁵ Bonthuys & Albertyn (2007) at 82. See especially Maluleke 2012 *PELJ* 2-22, who gives an African perspective on gender-based violence. She analyses violence against women pertaining to certain African traditions (or customs) such as, female genital mutilation, widows’ rituals, virginity testing and *ukuthwala*.

²⁶ Bonthuys & Albertyn (2007) at 82. According to Sinclair (1996) at 70 the premise of patriarchy is even more fundamental in customary law.

²⁷ Goldblatt 2003 *SALJ* at 616.

6.2.2.2 Same-sex couples and contextualised model of choice

Whether, or rather the extent to which, same-sex couples have a choice to conclude a marriage has already been alluded to above.²⁸ As such, this paragraph will merely attempt to reiterate the arguments as set out by Wood-Bodley²⁹ and De Ru³⁰ within the parameters of the contextualised model of choice.

The aforementioned authors contend that same-sex couples, although theoretically allowed to formalise their union, are unable to practically exercise this choice.³¹ They argue that when same-sex couples reveal their sexual orientation to the general public (by concluding a civil union)³² they potentially expose themselves to violent homophobia which can result in assault or even murder.³³

As in the case of women, it would seem as though the choice of same-sex couples to formalise their relationship may to some extent, only exist in theory.

6.2.3 Implications of adopting contextualised approach to choice

It is apparent from the preceding paragraphs that there may be many women in heterosexual relationships as well as some same-sex couples who do not necessarily have the ability to enforce the formalisation of their relationship.³⁴ Bonthuys argues that this is owing to the fact that the same “vulnerabilities and inequalities” which are present in heterosexual relationships are also applicable to same-sex relationships.³⁵ If one accepts that choice only exists in theory, it becomes clear that the manner in which South African law defines “choice” should be re-evaluated. It is contended that the principles relating to the model of contextualised choice, as explained above,³⁶ should be the starting point for this re-examination. Some questions immediately present themselves. For example, what would adopting such an approach imply, what

²⁸ See ch 5 par 5.3.3.4.

²⁹ Wood-Bodley 2008(a) *SALJ* at 259-273; Wood-Bodley 2008(b) *SALJ* at 46-62 and Wood-Bodley 2008(c) *SALJ* at 483-488.

³⁰ De Ru 2009 *Speculum Juris* at 111-126.

³¹ See eg Wood-Bodley 2008(a) *SALJ* at 260.

³² In terms of the Civil Union Act 17 of 2006.

³³ Wood-Bodley 2008(b) *SALJ* at 55-57.

³⁴ See eg Smith 2010 *PELJ* at 267-268.

³⁵ Bonthuys 2007 *SAJHR* at 540-541. Smith 2010 *PELJ* at 267-268 also remarks on the matter. He argues that the same obstacles that prevent heterosexual couples from concluding a valid marriage also exist in relation to same-sex couples after the enactment of the Civil Union Act 17 of 2006.

³⁶ See ch 6 par 6.2.2 above.

is the precise scope of such an approach, and finally, to what extent has the model of contextualised choice been recognised either nationally or internationally?³⁷

In terms of the traditional formulation of the choice argument a person cannot claim spousal benefits if he or she decides not to marry. Its operation can only be interrupted if an objective legal impediment to marriage exists. In contradistinction to this, the contextualised model of choice does not penalise a party (by excluding him or her from claiming certain spousal benefits) for not exercising the choice to marry.³⁸ As stated by Cooke³⁹ “... cohabitants should not be penalised for the fact that they are not married, because marriage may not be something they had the power or ability to enter into”. The implication of adopting a contextualised approach to choice was thoroughly analysed by Sachs J in *Volks v Robinson*,⁴⁰ who, in turn, relied heavily on Canadian case law in the form of *Miron v Trudel*⁴¹ and *Nova Scotia (Attorney-General) v Walsh*.⁴²

According to Sachs J⁴³ adopting a contextualised approach to choice will mean that South African law will have to differentiate between spousal claims relating to need, on the one hand, and spousal claims not relating to need, on the other. The reason for this differentiation is based on the fact that a contextualised approach to choice recognises that a domestic partner cannot be deprived of claims relating to need despite the fact that he or she has chosen not to get married. However, the contextualised model of choice does not allow domestic partners to claim spousal

³⁷ It would be prudent at this stage to make mention of the limited number of legal sources which clearly and effectively discuss the legal implications of adopting a contextualised model of choice. Although various authors, such as, Clarke 2002 *SALJ* at 634-648; Goldblatt 2003 *SALJ* at 610-629; Lind 2005 *Acta Juridica* at 108-130 and Meyersfeld 2010 *CCR* at 271-294 make mention of, and even support such an approach to choice conceptually, they do not provide a concise explanation as to how adopting such an approach will impact on the law of domestic partnerships. As such, they merely discuss the implications of approaching choice contextually. A few authors have, however, critically analysed the consequences of adopting a model of contextualised choice as described above: see Cooke 2005 *SALJ* at 542-557; Smith LLD Thesis (2009) at 233-242 and 2010 *PELJ* 238-294. Another important source of authority, which relates to the implication of the contextualised model of choice, is the minority judgement of Sachs J in *Volks NO v Robinson and Others* 2005 5 *BCLR* 446 (CC) at pars 152-165. As a result of the dearth of sources, the following paragraphs will depend heavily on the aforementioned sources.

³⁸ Smith 2010 *PELJ* at 244.

³⁹ Cooke 2005 *SALJ* at 554.

⁴⁰ *Volks NO v Robinson and Others* 2005 5 *BCLR* 446 (CC) at pars 152-165.

⁴¹ *Miron v Trudel* [1995] 2 *SCR* 418.

⁴² *Nova Scotia (Attorney-General) v Walsh* [2002] 4 *SCR* 325.

⁴³ *Volks NO v Robinson and Others* 2005 5 *BCLR* 446 (CC) at par 161. Also see Smith 2010 *PELJ* at 244.

benefits which are not based on need. Owing to its importance, the distinction between need-based claims and non need-based claims should be clarified.

Fortunately, some guidance was provided in the Canadian case of *Nova Scotia (Attorney General) v Walsh* case⁴⁴ where Gonthier J held that one should look to the objective that is fulfilled by the specific claim in order to determine whether or not it can be described as a need-based claim. While claims based on need fulfil a social objective, non need-based claims do not. According to Gonthier J⁴⁵ claims based, for example, on property division do not fulfil a social objective but rather attempt to divide matrimonial assets according to a property regime chosen by the parties.⁴⁶ Considering that the division of property does not fulfil a social objective the court concluded that such a claim will not be based on need.⁴⁷

If one accepts the reasoning used by Gonthier J, it becomes clear that division of property does not qualify as a need-based claim. According to legal literature there are two claims that will, however, qualify as need-based claims. The first, namely spousal maintenance, was specifically identified by Sachs J in *Volks v Robinson*⁴⁸ as a need-based claim. Smith contends that intestate succession, in addition to spousal maintenance, should also qualify as a need-based claim.⁴⁹ Although his argument has not explicitly been accepted by the judiciary, it does seem to be convincing. He bases his opinion on the fact that intestate succession, as described by De Waal⁵⁰ and the Constitutional Court in *Daniels v Campbell*,⁵¹ is indeed based on the achievement of a social objective. As stated by De Waal:

⁴⁴ *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR at par 204.

⁴⁵ See *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR at par 204; *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 160.

⁴⁶ See *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR at par 204; *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 160.

⁴⁷ See *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR at par 204; *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 160.

⁴⁸ In *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 161. Smith 2010 *PELJ* at 260 agrees with the finding in *Volks*.

⁴⁹ Smith 2010 *PELJ* at 270. He reaches this conclusion by applying the rationale used in *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) with regards to the Maintenance of Surviving Spouses Act 27 of 1990 to the decision of *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) and the Intestate Succession Act 81 of 1987.

⁵⁰ De Waal 1997 *Stell LR* 162-166.

⁵¹ See *Daniels v Campbell* 2004 5 SA 331 (CC) at pars 22-23 where the objective of intestate succession was, *inter alia*, described as "... ensur[ing] that widows would receive at least a child's share instead of being precariously dependent on family benevolence".

“The social function of the law of succession is intimately linked with the family. It proceeds from the premise ... that the family is an important social unit, worthy of legal protection and preservation. Therefore, in a situation where a person dies with a spouse and dependent children, the law attempts to ensure that the *basic needs of the surviving family members* will be provided for via the estate of the deceased”.⁵²

As such, Smith remarks that it can “... be accepted that both the Intestate Succession Act and the Maintenance of Surviving Spouses Act serve a similar fundamental purpose, namely to address the *needs* of the survivor”.⁵³

Furthermore, Smith argues that domestic partners can only successfully institute need-based claims if they are able to prove the existence of a reciprocal duty of support.⁵⁴ In fact, he regards a reciprocal duty of support as a *sine quo non* for the extension of need-based claims.⁵⁵ This requirement is in line with the conclusions already reached earlier in this study as it was expressly stated that if a claim has “financial implications” the domestic partner in question will be required to prove not only a *consortium* but also a reciprocal duty of support.⁵⁶ As both claims for maintenance and intestate succession clearly have “financial implications” domestic partners will have to prove a reciprocal duty of support before they can rely on the aforementioned need-based claims.

The implications of adopting a contextualised model of choice can easily be explained by the following example: Suppose A and B are two unmarried partners living together in a domestic partnership. The only reason why they are not married is because A does not want to be subject to the patrimonial consequences that inhere to a marriage. A and B have, however, by their conduct clearly accepted to support each other. They have not established a universal partnership nor have they attempted to regulate the proprietary consequences of their relationship in any other manner. In the sixth year of their relationship A (the breadwinner) terminates the domestic partnership and permanently leaves the shared home. In terms of the contextualised model of choice one should now differentiate between B’s claims based on need and those not based on need. Although B has remained unmarried, the contextualised model of choice will

⁵² De Waal 1997 *Stell LR* 164-165 (own emphasis added).

⁵³ Smith 2010 *PELJ* at 270.

⁵⁴ Smith 2010 *PELJ* at 260.

⁵⁵ Smith 2010 *PELJ* at 256 and 260.

⁵⁶ See ch 2 par 2.4.5 above.

recognise the subjective circumstantial impediments that prevented her from marrying A. As such, she will not be prevented from claiming spousal support from A. She will, however, not be allowed to claim redistribution of A's separate property, considering that such a claim will not be based on need. In contrast to the separate property, the joint property (which the parties acquired jointly by means of contract) will be divided according to the principles of the law of co-ownership as explained in paragraph 4.4.4 above.

If the relationship was terminated by A's death, B, by the same token, will have the ability to claim in terms of both the Intestate Succession Act⁵⁷ and the Maintenance of Surviving Spouses Act⁵⁸ as both are based on need. She will still, however, be precluded from claiming a share in the separate property amassed by A during the existence of the domestic partnership as such a claim will not be based on need. However, the property which the partners had acquired jointly will be divided in accordance with the law of co-ownership as explained in the previous paragraph.

6.2.4 Extent of recognition of contextualised model of choice

6.2.4.1 International recognition

The contextualised model of choice has received overwhelming support from the Canadian courts. The rationale behind the model was accepted in three separate cases, namely, *Miron v Trudel*,⁵⁹ *Nova Scotia (Attorney-General) v Walsh*⁶⁰ and *M.A.S v F.K.M.*⁶¹ These cases were heavily relied upon by Sachs J in *Volks v Robinson*⁶² and should, as such, be discussed in further detail.

The first case which recognised that choice should be understood within the context in which it was exercised was *Miron v Trudel*.⁶³ In this case it had to be determined whether the Ontario Standard Automobile Policy⁶⁴ unfairly discriminated against domestic partners in terms of section 15(1) of the Canadian Charter of Rights and

⁵⁷ 81 of 1987.

⁵⁸ 27 of 1990.

⁵⁹ *Miron v Trudel* [1995] 2 SCR 418.

⁶⁰ *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR 325.

⁶¹ *M.A.S v F.K.M* 2003 BCSC 849.

⁶² *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at pars 157-161.

⁶³ *Miron v Trudel* [1995] 2 SCR 418. For a discussion of the case: see *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 157 and Cooke 2005 SALJ at 553-554.

⁶⁴ S B: ss 2-3.

Freedoms by not including them within its ambit.⁶⁵ In concluding that the aforementioned policy did indeed unfairly discriminate against domestic partners the Supreme Court of Canada held:⁶⁶

“In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise . . . [t]he law; the reluctance of one’s partner to marry; financial; religious or social constraints — these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual’s effective control”.

This rationale was further developed in the subsequent case of *Nova Scotia (Attorney-General) v Walsh*.⁶⁷ In this case one of the parties in a domestic partnership challenged the constitutionality of the Canadian Matrimonial Property Act.⁶⁸ According to the applicant this Act violated section 15(1) of the Canadian Charter of Rights and Freedoms by not providing her with a presumption of equal division of matrimonial property, which presumption was afforded to married spouses.⁶⁹ The *Walsh* case⁷⁰ is of vital importance to the contextualised model of choice as it authoritatively predicated its application on the existence of a need-based claim.⁷¹ As such, it was possible for the court to conclude, with respect to the division of matrimonial property, that the decision to live together, without more, is not sufficient to indicate a positive intention to contribute to and share in each other’s assets and liabilities.⁷²

These principles were recently referred to with approval in the case of *M.A.S v F.K.M.*⁷³ In this case the court had to decide on two matters, namely, whether a domestic partner was able to claim spousal support from the other, and secondly, whether a non-owner domestic partner could claim compensation for work done to recreational property owned by the owner domestic partner.⁷⁴ In deciding whether a domestic partner could institute a claim for maintenance, Neilson J referred with approval to the

⁶⁵ *Miron v Trudel* [1995] 2 SCR at par 8. Section 15(1) of the Canadian Charter of Rights and Freedoms prohibits unfair discrimination based on, *inter alia*, race, nationality, religion and sex.

⁶⁶ *Miron v Trudel* [1995] 2 SCR at par 153.

⁶⁷ *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR 325. For a discussion of the case: see *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at pars 158-161; Cooke 2005 SALJ at 554 and Smith LLD Thesis (2009) at 235-236 and 273-274.

⁶⁸ Nova Scotia Matrimonial Property Act of 1989.

⁶⁹ *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR at pars 3-7.

⁷⁰ *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR 325.

⁷¹ *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR at pars 203-204.

⁷² *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR at par 154.

⁷³ *M.A.S v F.K.M* 2003 BCSC at par 61-62.

⁷⁴ *M.A.S v F.K.M* 2003 BCSC at par 1.

*Walsh*⁷⁵ case by remarking that: “Finally, the judgments in *Walsh* ... clearly distinguish between the import of a common law relationship with respect to matrimonial assets, as opposed to spousal support”.⁷⁶ This led the court to conclude that the defendant should pay maintenance to the plaintiff for a period of two years.⁷⁷

6.2.4.2 National judicial recognition

The South African judiciary has acknowledged the principles relating to the contextualised model of choice on two separate occasions.⁷⁸ Sachs J in the minority decision of *Volks v Robinson*⁷⁹ was the first to recognise its possible application. In his judgement he attempted to transplant the relevant principles, as they had developed in Canadian law,⁸⁰ into the South African family law. Applying these principles to the facts before the court had resulted in him opposing the decision of the majority.⁸¹ According to Sachs J,⁸² he “... believe[d] that a de-contextualised approach to the status of unmarried survivors of intimate life partnerships [w]ould lead to very unfair anomalies”.

In *Hassam v Jacobs*,⁸³ a case in which the Constitutional Court had to evaluate the constitutionality of section 1(4)(f) of the Intestate Succession Act,⁸⁴ the court also employed the principles relating to the contextualised model of choice.⁸⁵ Section 1(4)(f) had the effect of excluding widows of polygynous Muslim marriages from the operation of the Intestate Succession Act.⁸⁶ In holding that such an exclusion was indeed unconstitutional,⁸⁷ Nkabinde J stated:

“The purpose of the Act would clearly be frustrated rather than furthered if widows to polygynous Muslim marriages were excluded from the benefits of the Act simply because their marriages were contracted by virtue of Muslim rites ... *These women, as was the case with the applicant, often do not have*

⁷⁵ *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR.

⁷⁶ *M.A.S v F.K.M* 2003 BCSC at par 62.

⁷⁷ *M.A.S v F.K.M* 2003 BCSC at par 91.

⁷⁸ See *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at pars 157-161 and *Hassam v Jacobs NO and Others* 2009 11 BCLR 1148 (CC) at par 38. For an interesting comparison between the two cases: see Meyersfeld 2010 CCR at 271-294.

⁷⁹ See *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at pars 157-161.

⁸⁰ See ch 6 par 6.2.4.1 above.

⁸¹ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 242.

⁸² *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 162 ([] my addition).

⁸³ *Hassam v Jacobs NO and Others* 2009 11 BCLR 1148 (CC) at par 1.

⁸⁴ 81 of 1987.

⁸⁵ *Hassam v Jacobs NO and Others* 2009 11 BCLR 1148 (CC) at par 38.

⁸⁶ 81 of 1987.

⁸⁷ *Hassam v Jacobs NO and Others* 2009 11 BCLR 1148 (CC) at par 49.

any power over the decisions by their husbands whether to marry a second or a third wife".⁸⁸

According to Meyersfeld, *Hassam*⁸⁹ accorded with the principles of the contextualised model of choice as it "... correctly looked to the substance of the experience of women in South Africa".⁹⁰

6.2.4.3 Academic recognition

Academics have shown considerable support for the adoption of a contextualised approach to choice.⁹¹ Authors such as Goldblatt,⁹² Lind⁹³ and Meyersfeld⁹⁴ support the adoption of the contextualised model of choice conceptually, while authors such as Cooke⁹⁵ and Smith⁹⁶ have investigated the possible impact of the model in greater detail.

Not all authors, however, support the adoption of the contextualised model of choice. Schäfer,⁹⁷ for example, contends that such an approach to choice will pave the way for potentially unfair value judgements as it would require a judge to determine why a person made a particular choice. Such a task will be particularly difficult as "... the decision to marry or not to marry ... might be motivated by an endless range of considerations".⁹⁸

A further criticism can be levelled against the contextualised model of choice. This criticism relates to the fact that the contextualised model of choice presupposes a clear separation between need-based and non need-based claims. It does not take into

⁸⁸ *Hassam v Jacobs NO and Others* 2009 11 BCLR 1148 (CC) at par 38 (own emphasis added).

⁸⁹ *Hassam v Jacobs NO and Others* 2009 11 BCLR 1148 (CC).

⁹⁰ Meyersfeld 2010 *CCR* at 284.

⁹¹ See eg Clarke 2002 *SALJ* at 634-648; Goldblatt 2003 *SALJ* at 610-629; Lind 2005 *Acta Juridica* at 108-130; Cooke 2005 *SALJ* at 542-557; Meyersfeld 2010 *CCR* at 271-294 and Smith LLD Thesis (2009) at 233-242 and 2010 *PELJ* 238-294.

⁹² Goldblatt 2003 *SALJ* at 610-629.

⁹³ Lind 2005 *Acta Juridica* at 108-130.

⁹⁴ Meyersfeld 2010 *CCR* at 271-294.

⁹⁵ Cooke 2005 *SALJ* at 542-557.

⁹⁶ See both Smith LLD Thesis (2009) at 233-242 and Smith 2010 *PELJ* 238-294. He is (at 2010 *PELJ* 289) of the opinion that the contextualised model of choice can only be applied to a specific domestic partnership once it has been established that a reciprocal duty of support exists between the partners. The role of the reciprocal duty of support has already been discussed in ch 2 par 2.4 above. For the purposes of this discussion it is contended that the contextualised model of choice will be applicable to a domestic partnership once the existence thereof has been proven. How it must be proven is not relevant to the current discussion as it has already been analysed, see ch 2 par 2.4.5 above.

⁹⁷ Schäfer 2006 *SALJ* at 641.

⁹⁸ Schäfer 2006 *SALJ* at 641.

account that proprietary claims can also be used to address the weaker domestic partner's need.⁹⁹ Evidence of the overlap between need-based and non need-based claims can be found in section 7(2) and (3) of the Divorce Act.¹⁰⁰ Section 7(2) states clearly that when a court makes a maintenance order it can take into account "... an order in terms of subsection (3) [which refers to a redistribution order]".¹⁰¹ Furthermore, section 7(5) of the aforementioned Act determines that when a court orders the redistribution of property in terms of section 7(3), it may take into account any factor deemed necessary in terms of the court's opinion. According to the Supreme Court of Appeal in *Beaumont v Beaumont*¹⁰² this includes a maintenance order made in terms of section 7(2). As was stated by the court:¹⁰³

"I cannot imagine that the legislature could have intended, in such an oblique manner, to require the Court to shut its eyes to the possibility of making an order in terms of ss (2) when considering what order to make in terms of ss (3). If the court should find, for whatever reason (and that there may be many valid ones cannot be doubted), that an order in terms of ss (2) is necessary in order to do justice between the parties, it is clear, in my view, that such an order would qualify to be taken into account under the wide terms of para (d) of ss (5) in determining the nature or extent of a redistribution order which is to be made in terms of ss (3)."

While it is therefore possible in theory to distinguish between need-based and non need-based claims, the absolute distinction presupposed by the contextualised model of choice does not appear to be so easily applied in practice.

6.3 Function-over-form approach: A broader (more invasive) approach

6.3.1 Introduction

Adopting a model of contextualised choice is not the only basis upon which the claims by domestic partners can be addressed. The so-called "function-over-form" approach has also been proposed as a way of alleviating the plight of domestic partners. As such, it is imperative to determine what this approach entails, the extent to which it has

⁹⁹ And also *vica versa*, that addressing the need of the weaker domestic partner may influence that partner's desire to claim property.

¹⁰⁰ 70 of 1979.

¹⁰¹ For a discussion on the interplay between ss 7(2) and (3) of the Divorce Act 70 of 1979: see Heaton (2010) at 141-143 and Van Schalkwyk (2011) at 272 and 284.

¹⁰² *Beaumont v Beaumont* 1987 1 SA 967 (A) at 992C-F.

¹⁰³ *Beaumont v Beaumont* 1987 1 SA 967 (A) at 992C-F. Also see Heaton (2010) at 141-143 and Van Schalkwyk (2011) at 272.

been recognised, and finally, whether the principles that underlie its application can be incorporated into South African family law.

6.3.2 What does this approach entail?

According to Goldblatt the purpose of family law is to “... protect vulnerable members of families and to ensure fairness between the parties in family disputes”.¹⁰⁴ The functional approach to family law recognises that not all families are created by the conclusion of a valid marriage,¹⁰⁵ and as such, that domestic partnerships can fulfil the same social functions as a valid marriage.¹⁰⁶ In addition, it also recognises that “... the gender division of labour within the family means that women and children are at particular risk of being left economically vulnerable when such relationships end, *just as they are at the end of a marriage*”.¹⁰⁷

As alluded to earlier,¹⁰⁸ women and same-sex couples may not necessarily have the ability freely to set the terms of their relationships. This does not, however, detract from the fact that their relationships closely mimic those of married spouses. In *Satchwell*,¹⁰⁹ for example, the domestic partners had completed wills in each other’s favour, purchased property together, lived together, were recognised as each other’s beneficiaries in terms of investment and insurance policies, and finally, undertook to support each other. If a functional approach were applied to their relationship, it would mean *that the law should provide them with all the legal rights and benefits that are*

¹⁰⁴ Goldblatt 2003 *SALJ* at 610 and 616. Describing the purpose of family law in this manner was referred to with approval by Sach J in *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 171. He also stated (at par 212) “... that the general purpose of family law is to promote stability, responsibility and equity in intimate family relations”.

¹⁰⁵ See the dissenting judgement of Mokgoro and O’Reagan JJ in *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 106. For a general discussion on the functional approach to family law: see Goldblatt 2003 *SALJ* at 610-629; Lind 2005 *Acta Juridica* at 108-130; SALRC Report on *Domestic Partnerships* (2006) at 55-60; Smith LLD Thesis (2009) at 238-241; Meyersfeld 2010 *CCR* at 271-294 and Meyerson 2010 *CCR* at 295-316. Approaching family law functionally has also been analysed by the Constitutional Court: see eg *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) and *Hassam v Jacobs NO and Others* 2009 11 BCLR 1148 (CC). Lastly, a functional approach to family law has also been referred to with approval within the context of child law: see SALRC Discussion Paper on the *Review of the Child Care Act* (2003) at 175-191 and Louw LLD Thesis (2009) at 233-235.

¹⁰⁶ Meyerson 2010 *CCR* at 295.

¹⁰⁷ Meyerson 2010 *CCR* at 295 (own emphasis added).

¹⁰⁸ See ch 6 par 6.2.2.1-6.2.2.2 above.

¹⁰⁹ *Satchwell v President of the Republic of South Africa and Another* 2002 6 SA 1 (CC) at par 5.

available to married spouses despite the fact that they had never formally concluded a valid marriage.¹¹⁰

As in the case of the contextualised model of choice, the function-over-form approach has a particular understanding of what autonomy entails. It recognises that choice need not necessarily be expressed in the form of marriage in order to be a recognised choice.¹¹¹ Functionally, choice includes “... the lived conditions in which multiple autonomous choices, changing almost daily, are made and expressed *in the practice of a family life*”.¹¹² According to the function-over-form approach the conduct of the parties is deemed to be an expression of choice¹¹³ and a partner living in a domestic partnership cannot avoid being sued for spousal benefits by claiming that he or she had expressly chosen not to marry. In such circumstances Lind¹¹⁴ argues that autonomy should be subverted in order to come to the need of the vulnerable partner.¹¹⁵

6.3.3 Criteria for applying approach

Applying the function-over-form approach means that a person can claim spousal benefits despite the fact that the person is unmarried. If the law does away with the requirement of an express formal choice, namely, the conclusion of a valid marriage or civil union, what is the basis for the extension of the benefits in question? One might simply argue that the extension of rights should be provided by the functional approach as soon as a domestic partnership is formed.

This is, however, not as uncomplicated as it might seem owing to the uncertainty relating to the requirements for a domestic partnership.¹¹⁶ Sachs J in *Volks v*

¹¹⁰ See eg Goldblatt 2003 *SALJ* at 617 who states: “Where a domestic partnership has created responsibilities for, and expectations of, the parties, the law should play a role in enforcing the responsibilities and realising the expectations of the parties”.

¹¹¹ Lind 2005 *Acta Juridica* at 123-124.

¹¹² Lind 2005 *Acta Juridica* at 123-124 (own emphasis added).

¹¹³ Lind 2005 *Acta Juridica* at 124.

¹¹⁴ Lind 2005 *Acta Juridica* at 124.

¹¹⁵ He (at 124) states that autonomy is regularly subverted in family law in order to ensure that justice (presumably with regards to the more vulnerable partner) prevails. According to him family obligations are often imposed against the wishes of a particular member of the family. Child support is one such example, another may possibly be post-divorce maintenance. Meyersfeld 2010 *CCR* at 283 concurs with Lind by stating: “Legal protection in our constitutional order has never required the consent of ... individuals before bestowing rights – we have always maintained as a constitutional order that rights exists irrespective of one’s compliance with the mainstream”.

¹¹⁶ See specifically ch 2 par 2.4 above.

*Robinson*¹¹⁷ is of the opinion that domestic partners should be able to claim in terms of the functional approach as soon as there is a familial *nexus* of such proximity and intensity as to render it manifestly unfair to deny the partner in question certain spousal benefits.

Sachs J is of the opinion that it would be manifestly unfair to deny spousal benefits to domestic partners in two instances.¹¹⁸ The first instance is where the partners had either expressly or through their conduct created a reciprocal duty of support.¹¹⁹ The second is where the reciprocal duty of support had not been created by any agreement but rather *ex lege* from "... the nature of the particular life partnership itself".¹²⁰ Smith finds the latter instance, namely the *ex lege* extension of spousal benefits to domestic partners, unconvincing.¹²¹ His criticism seems apt as it would appear logical to attach rights and obligations to domestic partnerships on the basis that the partners had contractually created a reciprocal duty of support rather than utilising an inexact standard such as "... by the nature of their relationship". Until such time as the legislature or judiciary provides guidance in this regard, this point of view will, however, only amount to speculation. The reason for this is that the current role of the reciprocal duty of support is anything but certain.¹²²

Internationally, the European Court of Human Rights has grappled with the same uncertainty when determining whether a relationship can be regarded as constituting a family.¹²³ While Article 8(1) of the European Convention of Human Rights expressly provides for a right to private and family life, the article fails to provide a definition of either "private" or "family".¹²⁴ The European Court of Human Rights has consequently decided that it should be determined on a case-to-case basis whether a particular

¹¹⁷ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 213. Smith LLD Thesis (2009) at 241 seems to accept Sachs J's opinion.

¹¹⁸ See *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at pars 214 and 218.

¹¹⁹ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 214.

¹²⁰ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 218.

¹²¹ See Smith LLD Thesis (2009) at 244-245 where he opines that there is no real distinction between the two categories of domestic partnerships as a reciprocal duty of support will exist in both instances. As such, he finds the distinction less than convincing.

¹²² See ch 2 par 2.4 above where the various opinions in relation to the role of the reciprocal duty of support are analysed.

¹²³ O'Donnell 1995 *Maastricht JECL* at 89 and Kilkelly (2003) at 16.

¹²⁴ O'Donnell 1995 *Maastricht JECL* at 89.

relationship should be included within the understanding of “family life”.¹²⁵ The test used to determine if a family exists is to investigate whether close *personal ties exist between the parties*.¹²⁶ According to O’Donnell,¹²⁷ this implies that evidence must be given of, for example, financial or emotional dependence.¹²⁸ While this case-to-case approach is certainly pragmatic, it does, however, make it nearly impossible “... to enumerate those relationships which constitute family life and those which do not”.¹²⁹

6.3.4 Extent of recognition of function-over-form approach

6.3.4.1 International recognition

Meyerson¹³⁰ opines that the formal approach to family law has, at least with regards to Western jurisdictions, been discarded for a more functional approach. According to her, this shift in focus has been the result of a growing dissatisfaction with the formal approach to family law.¹³¹ It would appear as though the functional approach to family law has been received with much enthusiasm by, *inter alia*, British academics.¹³² While this is surely not the only jurisdiction which has accepted this approach,¹³³ one cannot

¹²⁵ *Gas and Dubois v France* (dec.), no. 25951/07, ECHR 2010. Also see Van Der Linde LLD Thesis (2001) at 55-59 where he states: “Waar die verhouding tussen persone informeel is, sal dit afhang van al die feite of daar ’n gesinslewe tot stand gekom het of nie”.

¹²⁶ *Johnston and Others v Ireland*, no. 9697/82, ECHR 1986 and *Gas and Dubois v France* (dec.), no. 25951/07, ECHR 2010. Also see: O’Donnell 1995 *Maastricht JECL* at 89 and Kilkelly (2003) at 16.

¹²⁷ O’Donnell 1995 *Maastricht JECL* at 89.

¹²⁸ More recently, in *Schalk and Kopf v Austria*, no. 30141/04, ECHR 2010 at par 94, a case regarding the recognition of same-sex domestic partners, the European Court of Human Rights extended the meaning of “family life” to include “... a cohabitating same-sex couple living in a stable *de facto* partnership”. As such, one can conclude that the permanence (or stability) of a particular relationship can also be used to determine whether the relationship qualifies as a “family” for purposes of Art 8(1).

¹²⁹ Kilkelly (2003) at 16.

¹³⁰ Meyerson 2010 *CCR* at 295.

¹³¹ Meyerson 2010 *CCR* at 295. She contends that the formal approach has been discarded owing to the fact that it rests upon illegitimate moral disapproval of extra-marital relationships, that it results in unfair discrimination based on marital status, and finally, that it is out of touch with the *boni mores*.

¹³² See in this regard Freeman & Lyon (1983) at 145-182; Bailey-Harris 1996 *Child & Fam LQ* at 137; Barlow & Probert 2004 *Law & Policy* at 2-3; Barlow *et al* (2005) at 77-118; Williams *et al* 2008 *Child & Fam LQ* at 519; Barlow & Smithson 2010 *Child & Fam LQ* at 350 and Sanders 2013 *ICLQ* at 665. Millbank 2008 *Child & Fam LQ* at 165 does, however, remark that functional reforms in the United Kingdom, as in South Africa, have been considerably slower when compared to countries such as Canada and Australia.

¹³³ See in this regard Schweltnus LLD Thesis (1994) at 100-113 and 137-145 for a discussion on the underlying principles guiding legal reform in the Netherlands and Sweden. Also see Barlow *et al* (2005) at 115-116 who are of the opinion that the functional approach to domestic partnerships has been accepted in countries such as Australia, Spain and Canada. For a more recent contribution: see Millbank 2008 *Child & Fam LQ* at 155-182 for an analysis of the extent to which the functional approach to family law has been accepted in Canada, Australia, England and the United States of America.

ignore the fact that there are significant similarities between the positions in South Africa and England.¹³⁴

According to Barlow *et al*¹³⁵ two approaches can be adopted in order to regulate domestic partnerships. The first is a formal or status approach which would mean that rights can only be acquired by gaining a particular status in a manner prescribed by the law (for example the registration of a domestic partnership). The second approach would be to attach rights on the basis of the function that a relationship fulfils rather than the relationship's legal status.¹³⁶ Barlow *et al*¹³⁷ argue for the adoption of the second approach provided that the parties have the ability to opt-out of the consequences attached to a domestic partnership if they wished to do so.¹³⁸ They adopt this approach because "... to abandon a functional approach at this moment would leave social and legal norms dangerously apart".¹³⁹ Bailey-Harris echoes this sentiment by remarking that the law is obliged to provide legal status to alternative family forms as society becomes increasingly diverse in its "... personal morality and value systems".¹⁴⁰

Similarly, Freeman and Lyon also argue for the adoption of a functional approach to the family law.¹⁴¹ They contend that the principal justification for awarding spousal benefits to domestic partners is that there is no difference in the family functions performed by domestic partners, on the one hand, and married spouses on the other.¹⁴² They predicate the extension of spousal benefits to domestic partners on the

¹³⁴ See specifically the discussion on the requirement of a "familial *nexus*" below.

¹³⁵ Barlow *et al* (2005) at 107 and Millbank 2008 *Child & Fam LQ* at 155

¹³⁶ Millbank 2008 *Child & Fam LQ* at 155.

¹³⁷ Barlow *et al* (2005) at 107 and, more recently, Barlow & Smithson 2010 *Child & Fam LQ* at 343, 349 and 350.

¹³⁸ A similar opt-out approach is contained in cl 32(1) of the Draft Domestic Partnerships Bill which states that unregistered domestic partners may apply to court for the division of the partnership property in the absence of an agreement to the contrary. This is another example of why it is practical to compare the law of South Africa with the position in England. A similar approach is also argued for by Williams *et al* 2008 *Child & Fam LQ* at 520-521.

¹³⁹ Barlow *et al* (2005) at 118. In another contribution Barlow & Probert 2004 *Law & Policy* at 2-3 do, however, recognise that England has not yet adopted a completely functional approach to marriage. They remark: "Cohabiting unions are treated as if they were marriages for certain purposes, are given limited legal recognition as an inferior family form for others, and are ignored in other cases".

¹⁴⁰ Bailey-Harris 1996 *Child & Fam LQ* at 137.

¹⁴¹ Freeman & Lyon (1983) at 145-150. Also see Bailey-Harris 1996 *Child & Fam LQ* at 141 who states that there can be no justification for distinguishing between domestic partners and spouses once it is accepted that the purpose of family law is to ensure a fair result between the parties at the breakdown of the relationship.

¹⁴² Freeman & Lyon (1983) at 145-150.

existence of a familial *nexus* between the domestic partners.¹⁴³ It is contended that much can be gained by comparing our law to the position in England, considering that Sachs J had also used the existence of a familial *nexus* as a prerequisite for the extension of spousal benefits to domestic partnerships.¹⁴⁴

6.3.4.2 National judicial recognition

South African courts have been influenced by a functional approach to family law in several instances.¹⁴⁵ In the *Dawood* case,¹⁴⁶ for example, the Constitutional Court specifically stated that families come in many different shapes and sizes. It was furthermore held that the *boni mores* influences the manner in which families are defined and that care must be taken "... not to entrench particular forms of family at the expense of other forms".¹⁴⁷

The same opinion was expressed by Sachs J in *Volks v Robinson*¹⁴⁸ when he stated that the law should adopt a flexible and evolutionary approach to family life. He accepts that courts should not be bound to a traditional view of how families should be constituted provided that the specific social, historical and legal context of every case is taken into account.¹⁴⁹

¹⁴³ Freeman & Lyon (1983) at 149. According to these authors certain factors have to be taken into account in order to determine this "familial *nexus*". These factors include (at 150-154) the presence of children, the duration of the relationship, and finally, the behaviour of the partners. More recently, Williams *et al* 2008 *Child & Fam LQ* at 520 also observed that the presence of children and the duration of the relationship in question should play a role in determining the share that a domestic partner can claim in terms of intestate succession.

¹⁴⁴ See ch 6 par 6.3.3 above.

¹⁴⁵ See, *inter alia*, *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) at par 99; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at par 47; *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) at par 31; *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 210 and *Hassam v Jacobs NO and Others* 2009 11 BCLR 1148 (CC) at par 35.

¹⁴⁶ *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) at par 31.

¹⁴⁷ *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) at par 31.

¹⁴⁸ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 211.

¹⁴⁹ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 211.

Although South African judges appear to appreciate the value of the functional approach to family law, Meyerson¹⁵⁰ is of the opinion that the judiciary has not truly incorporated its principles into its judgements. According to her,¹⁵¹ instead of using the guarantee of non-discrimination on the ground of marital status to challenge the privileged position of married couples, the Constitutional Court rather chose to extend the meaning of marriage to be more inclusive.¹⁵² Meyerson argues that in *Hassam*,¹⁵³ for example, the Constitutional court had not truly adopted a functional approach to family life considering that the court had analysed the relationship in question "... through the prism of marriage".¹⁵⁴ She remarks that there is "... a significant mismatch between the Court's inclusive rhetoric and [the] reality of exclusion".¹⁵⁵

6.3.4.3 Other recognition

Several authors¹⁵⁶ as well as the SALRC¹⁵⁷ have also recognised the importance of adopting a functional approach to family law.

Goldblatt¹⁵⁸ has arguably articulated one of the most convincing arguments for the adoption of a functional approach to family law. One of her main contentions is that South African law should abandon the idea that relationships should be defined in terms of marriage.¹⁵⁹ According to her, one should evaluate the possibility of attaching rights to a relationship by investigating the function that the relationship fulfils,¹⁶⁰ rather than the form it has taken.¹⁶¹ The reason for adopting this approach is that the law should attach consequences to the expectations created by the domestic partners *vis-à-vis* each other.¹⁶² Goldblatt's work has been referred to favourably by the judiciary,¹⁶³

¹⁵⁰ Meyerson 2010 *CCR* at 295.

¹⁵¹ Meyerson 2010 *CCR* at 297.

¹⁵² Meyerson 2010 *CCR* at 297.

¹⁵³ *Hassam v Jacobs NO and Others* 2009 11 BCLR 1148 (CC).

¹⁵⁴ Meyerson 2010 *CCR* at 302.

¹⁵⁵ Meyerson 2010 *CCR* at 297 ([] my addition).

¹⁵⁶ Such as, Goldblatt 2003 *SALJ* at 610-629; Lind 2005 *Acta Juridica* at 108-130; Smith LLD Thesis (2009) at 238-241; Meyersfeld 2010 *CCR* at 271-294 and Meyerson 2010 *CCR* at 295-316.

¹⁵⁷ SALRC Report on *Domestic Partnerships* (2006) at 55-60.

¹⁵⁸ Goldblatt 2003 *SALJ* at 610-629.

¹⁵⁹ Goldblatt 2003 *SALJ* at 616-617.

¹⁶⁰ Goldblatt 2003 *SALJ* at 616.

¹⁶¹ Goldblatt 2003 *SALJ* at 617.

¹⁶² Goldblatt 2003 *SALJ* at 617.

¹⁶³ See eg *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 171.

and can be regarded as forming the basis of several authors' subsequent evaluation of the functional approach to family law.¹⁶⁴

The SALRC has conducted its own evaluation of the effect of adopting a functional approach to family law.¹⁶⁵ After analysing some of the case law referred to above,¹⁶⁶ it concludes that to "... regard marriage as a guarantee that the family created thereby would have certain characteristics [such as security, stability and dependence] is a misrepresentation".¹⁶⁷ The SALRC argued that the characteristics of a healthy and permanent family unit can be present in a domestic partnership while being absent in a marriage.¹⁶⁸ Public commitment, as such, is not a prerequisite for the creation of a family.

6.4 Smith model

6.4.1 Introduction

The third and final approach that can possibly underlie the future recognition of domestic partnerships is the revised model of contextualised choice as proposed by Smith. The Smith approach¹⁶⁹ is based to a large extent on the contextualised model of choice as discussed above.¹⁷⁰ It does, however, have certain characteristics which cannot be reconciled with the principles associated with the contextualised model of choice. As such, it will be analysed and discussed separately.

6.4.2 General principles and effect of Smith model

The Smith model accepts the underlying rationale of the contextualised model of choice, namely, "... that while in theory the individual is free to marry or not to marry, in practise the reality may be otherwise".¹⁷¹ As such, the Smith model, in accordance with the model of contextualised choice, provides domestic partners with the ability to rely

¹⁶⁴ See eg Lind 2005 *Acta Juridica* at 111, 116 and 119 and Meyersfeld 2010 *CCR* at 273.

¹⁶⁵ SALRC Report on *Domestic Partnerships* (2006) at 55-60.

¹⁶⁶ See ch 6 par 6.3.4.2 above.

¹⁶⁷ SALRC Report on *Domestic Partnerships* (2006) at 57 ([] my addition).

¹⁶⁸ SALRC Report on *Domestic Partnerships* (2006) at 57.

¹⁶⁹ Termed as such considering that Smith developed this model as a result of certain shortcomings identified by him in the application of the contextualised model of choice: see Smith LLD Thesis (2009) at 567-584 and 2010 *PELJ* at 274-294.

¹⁷⁰ See ch 6 par 6.2 above.

¹⁷¹ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 157.

on need-based claims provided that they can prove that a reciprocal duty of support existed between them. The model does, however, differ from the contextualised model of choice in that it also allows domestic partners to rely on principles of matrimonial property law (presumably including division of property) in certain circumstances.

As stated earlier,¹⁷² the contextualised model of choice does not provide domestic partners with proprietary claims as these claims are not regarded as need-based claims. This is because they do not fulfil any social objective and the mere fact that two persons live together is not indicative of an intention to share in each other's assets and liabilities.¹⁷³ The Smith model, however, does not necessarily exclude the possibility of extending proprietary claims to domestic partners. As far as proprietary claims are concerned, the Smith model takes into account the differences between registered and unregistered domestic partners as envisaged by the Draft Domestic Partnerships Bill. While the differences between registered and unregistered domestic partners will only be analysed in the following chapter,¹⁷⁴ it is sufficient for the current analysis to take cognisance of the fact that registered domestic partners undergo a ceremony of public commitment, while unregistered domestic partners do not.

With regards to registered domestic partnerships, Smith contends that any principle of matrimonial property law should be available to registered domestic partners where domestic partnership legislation does not provide "... *an effective and well-defined alternative to matrimonial property law*".¹⁷⁵ He remarks that this protection will not automatically be enforced upon registered domestic partners but must simply be available should it be needed.¹⁷⁶ According to this view registered domestic partners will be able to claim not only need-based claims but also claims relating to property

¹⁷² See ch 6 par 6.2.3 above.

¹⁷³ See *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR at par 204 and *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 160 and 244-245.

¹⁷⁴ See ch 7 par 7.2 below.

¹⁷⁵ See Smith 2010 *PELJ* at 284-285. Primarily he (at 280-282) uses the case of *Van Der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* 2006 4 SA 230 (CC) to conclude that there can be no rational governmental purpose behind the lack of protection afforded to registered domestic partners in terms of the Draft Domestic Partnerships Bill. He states that "... there can surely be no legitimate governmental purpose behind denying protection to a person who has entered into a relationship that, in the same way as marriage does, involves both the undertaking of a formal public commitment before the state, as well as an alteration of legal status".

¹⁷⁶ Smith 2010 *PELJ* at 285.

division, which, strictly speaking, falls outside of the ambit of the contextualised model of choice. Smith concludes by stating:¹⁷⁷

“In the result, it is submitted that the most equitable outcome will be achieved by an amendment [to the Draft Domestic Partnerships Bill] that takes the golden midway between outright autonomy and sufficient legal protection. The solution must therefore be framed in such a way as to be able to accommodate the individual requirements of the partners and the principles of the law of obligations, and yet be robust enough in order to protect a vulnerable partner *should this be necessary*. In order to achieve this, it is submitted that the courts be given the competency, on application by either or both domestic partners, and provided that there are sound reasons for doing so, to extend any principle of matrimonial property law in order to give effect to the original intention expressed by the parties in their registered partnership agreement”.

Furthermore, with regards to unregistered domestic partnerships, Smith contends:

“Where the facts of an application lead a court to conclude that a vulnerable applicant was unable to convince his/her partner to formalise their relationship, the extension of a principle of matrimonial (or registered domestic partnership) property law may conceivably be justified due to the lack of any real choice”.¹⁷⁸

He does, however, remark that such an extension will be unlikely owing to the wide range of protection afforded to unregistered domestic partnerships in chapter 4 of the Draft Domestic Partnerships Bill.¹⁷⁹

Although the Smith model is based on the contextualised model of choice, it does not prevent domestic partners from relying on principles of matrimonial property law despite the fact that these claims are not based on need. To avail themselves of such claims the domestic partners will, however, be obliged to do the following:

- Bring an application to court;
- prove that the extension of a specific principle is necessary;
- indicate that the specific domestic partnership legislation does not provide for an effective and well-defined alternative to matrimonial property law;
- give sufficient reasons why the court should provide them with such claims; and

¹⁷⁷ Smith 2010 *PELJ* at 285 ([] my addition).

¹⁷⁸ Smith 2010 *PELJ* at 293-294.

¹⁷⁹ Smith 2010 *PELJ* at 294.

- in the case of unregistered domestic partners, indicate that the partner bringing the application lacked the choice to formalise his or her relationship.¹⁸⁰

6.4.3 Extent of recognition of Smith model

While the Smith model is undoubtedly based on sound legal research and logic, it has not been incorporated into any case law or legislation. This is presumably owing to the fact that it was only developed in 2009.¹⁸¹ Given Smith's considerable contribution to the law of domestic partnerships,¹⁸² it is contended that the lack of judicial or legislative recognition does not detract from the weight that should be given to his proposed model.

6.5 Some concluding remarks on the way forward

(a) Contextualised model of choice

The contextualised model of choice seems, at least *prima facie*, to solve many of the problems created by the traditional formulation of the choice argument. Adopting such an approach enables the law to take into account a person's subjective circumstantial constraints which prevented him or her from marrying. Understanding choice contextually would probably mostly benefit women and same-sex couples as the choice to formalise their relationships *generally* only exists in theory. Adopting such an approach does not, however, imply that a domestic partner can claim all the spousal benefits that attach to a marriage or civil union. A domestic partner will only be allowed to claim spousal benefits that are based on need, such as spousal maintenance and arguably intestate succession. Considering that the decision to live together is not deemed sufficient to indicate a positive intention to contribute to and share in each other's assets and liabilities, a domestic partner will not be able to claim division of separate property at termination of the domestic partnership in question.

While the majority of academic commentators appear to be in support of a contextual approach to choice, the criticism levelled against the adoption of such a model seems

¹⁸⁰ Smith 2010 *PELJ* at 284-285 and 293-294.

¹⁸¹ Smith LLD Thesis (2009) at 567-584.

¹⁸² See, *inter alia*, Smith LLD Thesis (2009); Smith 2010 *PELJ* 238-294; Smith 2010 *ISFL* at 297-311; Smith & Robinson 2010 *PELJ* at 30-67; Smith 2011 *SALJ* at 560-591; Smith & Heaton 2010 *THRHR* at 472-484 and Smith 2013 *SALJ* at 527-591.

valid.¹⁸³ It is, however, promising that the South African judiciary has acknowledged such an approach to choice on two different occasions.

(b) Functional approach to family law

Approaching domestic partnerships functionally implies that spousal benefits should be provided to domestic partners as soon as there is an adequate familial *nexus* between the partners which renders the refusal of spousal benefits manifestly unfair. This implies that spousal benefits must be extended to the partners despite the fact that they have not formalised their union. The rationale behind this is that marriages or civil unions are not the only forms of relationship that create safety, security and dependence within a family,¹⁸⁴ and that to argue that they are, would be to ignore the society that we have become.¹⁸⁵

Adopting such an approach will have a more invasive effect on the South African family law when compared to the adoption of the model of contextualised choice. This is because, in principle, all spousal benefits will have to be made available to domestic partnerships and not only those benefits based on need.

Two criticisms can be levelled against the functional approach to family law. The first problem that confronts the proponents of the function-over-form approach is the uncertainty regarding the prerequisite of an adequate “familial *nexus*”. For example, should this familial *nexus* be proved in addition to the existence of a domestic partnership? How must one determine if such a *nexus* in fact exists? What factors should be taken into account? How does one determine if the familial *nexus* is sufficient to render the refusal of spousal benefits manifestly unfair? In contradistinction to this, the contextualised model of choice requires no additional proof after the existence of a domestic partnership and a reciprocal duty of support has been proven.¹⁸⁶ Objection to the function-over-form approach is strengthened if one has regard to the difficulty that the European Court of Human Rights has experienced

¹⁸³ See ch 6 par 6.2.4.3 above. The contextualised model of choice is criticised on the basis that it would not only be difficult to apply it in practice but also that it does not recognise that need-based and non need-based claims may in certain instances overlap.

¹⁸⁴ See ch 6 par 6.3.4.3 above.

¹⁸⁵ Lind 2005 *Acta Juridica* at 111.

¹⁸⁶ The reciprocal duty of support has to be proven as need-based claims have “financial implications”: for further explanation see ch 6 par 6.2.3 above.

when attempting to establish whether a particular relationship qualifies as a “family” in terms of Article 8 of the European Convention of Human Rights.

The second, probably more serious critique, is based on the fact that the functional approach to family law, by providing domestic partners with all the rights and benefits that attach to marriage (whether based on need or not), erodes the established differences between marital relationships and domestic partnerships. This is not insignificant given the considerable judicial¹⁸⁷ and academic¹⁸⁸ insistence that domestic partnerships cannot be equated with marriage. As was stated by Sachs J in his minority decision in *Volks v Robinson*:¹⁸⁹

“Just as the choice to marry is one of life’s defining moments, so, it is contended, the choice not to marry must be a determinative feature of one’s life”.

And also by Mokgoro and O’Reagan JJ:¹⁹⁰

“... marriage is a particular form of relationship, concluded formally and publically with specified and clear consequences. Many people who choose to cohabit may do so specifically to avoid those consequences. In our view, the legislature is entitled to take this into account when it regulates cohabitation relationships”.

Sinclair, for example, argues that the law of domestic partnerships should preserve cohabitation as an alternative to marriage while recognising that the weaker parties at the breakdown of the relationship deserve protection.¹⁹¹ This sentiment is also echoed by Schwellnus,¹⁹² who contends that domestic partnership regulation should rather clarify the position of domestic partners than intensively regulate their respective legal positions. The legislative intervention must, however, ensure that it grants protection to vulnerable partners who would otherwise be left destitute at the termination of the

¹⁸⁷ See eg *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 123.

¹⁸⁸ See Schwellnus LLD Thesis (1994) at 223-229; Sinclair (1996) at 292-293 and Smith 2010 *PELJ* at 281-285. This has also been recognised internationally: see eg Barton (1985) at 77 where it is stated that complete assimilation of domestic partnerships into formal marriage would be “unrealistic”. Also see more recently Winnie 2013 *LS* at 46 who states “... there remain reasons not to assimilate cohabitation fully with marriage”.

¹⁸⁹ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 154.

¹⁹⁰ *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 123.

¹⁹¹ See Sinclair (1996) at 292-293.

¹⁹² Schwellnus LLD Thesis (1994) at 223-231.

relationship.¹⁹³ According to her, this does not include extensive (if any) proprietary rights to be extended to domestic partners.¹⁹⁴

(c) Smith model

The Smith model would seem to have attributes of both the contextualised model of choice and the functional approach to family law. While it recognises that domestic partners should be able to rely on need-based claims, in line with the principles of the contextualised model of choice,¹⁹⁵ it goes further by also providing them with the ability to rely on claims which are, strictly speaking, not based on need.¹⁹⁶ Despite mimicking the functional approach to family law in this latter regard, the Smith model cannot, however, be described as a purely functional approach. Unlike the function-over-form approach in terms of which partners would automatically be able to claim all spousal benefits, the Smith model requires domestic partners to satisfy certain requirements before they can claim.¹⁹⁷

Despite the more onerous burden of proof suggested by the Smith model, its functional tendencies make it susceptible to the same criticisms that were raised against the function-over-form approach. As referred to in the previous paragraph, respect for autonomy remains a powerful argument against the regulation of domestic partnerships.¹⁹⁸ This means that the law should preserve cohabitation as true alternative to marriage.¹⁹⁹ When one considers the model proposed by Smith it can be argued that, similar to the function-over-form approach, it does not sufficiently differentiate between the regulation of spouses and domestic partners as both approaches allow domestic partners to rely on claims which are not based on need.

Smith, however, argues that his model does not aim to replicate matrimonial property law in domestic partnership regulation.²⁰⁰ According to him, the protection provided by matrimonial property law should only be available by way of court application and then

¹⁹³ Schweltnus LLD Thesis (1994) at 231.

¹⁹⁴ Schweltnus LLD Thesis (1994) at 227 and 229.

¹⁹⁵ See ch 6 par 6.2.3 above.

¹⁹⁶ See ch 6 par 6.4.2 above.

¹⁹⁷ See ch 6 par 6.4.2 above.

¹⁹⁸ Sinclair (1996) at 292.

¹⁹⁹ See Sinclair (1996) at 292-293.

²⁰⁰ Smith 2010 *PELJ* at 285.

only where it is necessary to do so.²⁰¹ Applying for protection will presumably be necessary in instances where domestic partnership legislation does not provide an effective and well-defined alternative to matrimonial law, and additionally, in the case of unregistered domestic partnerships, where it can be proven that a particular unregistered domestic partner lacked the ability to enforce their choice to marry.²⁰²

(d) Model proposed in this study

As is clear from the discussion above, the functional approach to family law cannot underlie the future recognition of domestic partnerships. This is because of the uncertainty relating to the requirement of a “familial *nexus*” in conjunction with the fact that the functional approach appears to create a regulatory system which does not sufficiently differentiate between domestic partners and spouses.

Rejecting the function-over-form approach implies that either the contextualised model of choice or the Smith model should underlie the recognition of domestic partnerships in future. For purposes of this study, it is contended that the most appropriate model is the original model of contextualised choice. The reason for rejecting the Smith model is based on the fact that it can possibly lead to a duplication of matrimonial law in domestic partnership regulation. While it is true that the Smith model has certain requirements which serve to curb its functional nature, the fact remains that if domestic partners (whether registered or unregistered) can satisfy these requirements they will be able to rely on benefits which are, firstly, not based on need, and secondly, usually reserved exclusively for spouses. The danger in this is that it can lead to a situation where the choice of a domestic partner not to formalise his or her relationship is completely negated as his or her relationship will for all intents and purposes be equated with a marriage. In contradistinction to this, the contextualised model of choice balances the need of the more vulnerable party proportionately to the autonomy of the stronger party. This model appreciates that a domestic partnership cannot be equated with a marriage while still recognising that vulnerable domestic partners should be provided at least a minimum standard of protection, namely, the recognition their need-based claims provided that they can prove the existence of a reciprocal duty of support.

²⁰¹ Smith 2010 *PELJ* at 285.

²⁰² See ch 6 par 6.4.2 above.

6.6 Conclusion

South African family law cannot continue to ignore the plight of domestic partners. The fact that the legislature has until now failed to enact legislation which formally recognises domestic partnerships, creates a unique opportunity to speculate on the theoretical foundation that should underlie the seemingly inevitable recognition of domestic partnerships. Legal sources, at present, support the adoption of one of three possible approaches. The first, namely the model of contextualised choice, is based on the premise that choice may only exist in theory. As a result the law should provide partners who cannot enforce their decision to marry with a minimum standard of legal protection. This “minimum standard of legal protection” means that the law should provide a domestic partner with spousal benefits relating to need only. The law is, therefore, not obliged to protect a domestic partner if his or her claim falls beyond the ambit of “need-based claims”.

The second, function-over-form approach, is a more invasive approach. Approaching domestic partnerships in a functional manner implies that a domestic partner will be able to claim all the benefits that attach to marriage, provided that it can be proven that his or her relationship fulfils the same function as a marital relationship. As such, there must exist a familial *nexus* between the partners to such an extent that to refuse their claim would be manifestly unfair.

The third and final approach, referred to as the Smith model, accepts the general premise of the model of contextualised choice, namely that domestic partners who cannot enforce their decision to marry should be provided with a minimum degree of protection. This “minimum degree of protection” implies that they should be provided with claims based on need. The Smith model, however, goes further than the model of contextualised choice by providing domestic partners (whether registered or unregistered) with claims relating to property division which are, strictly speaking, not based on need. These claims can only be accessed once the partners have satisfied a court of certain requirements, *inter alia*, that the domestic partnership legislation in question does not create an effective and well-defined alternative to matrimonial law.

It is contended, for purposes of this study, that the model of contextualised choice should underlie the future recognition of domestic partnerships. This is because the

function-over-form approach as well as the Smith model, by providing domestic partners with the opportunity to claim need as well as non need-based claims, run the risk of creating a regulatory system which is not sufficiently different from matrimonial law. In addition, adopting either the function-over-form approach or the Smith model might not sufficiently protect party autonomy within the context of domestic partnership regulation.

Chapter 7:

Extent of accommodation of contextualised model of choice in Draft Domestic Partnerships Bill

7.1 Introduction

Once it is accepted that the contextualised model of choice should provide the basis for the future recognition of domestic partnerships, the next step would be to determine whether, or rather to what extent, the legislation proposed to regulate domestic partnerships in future already adopts this model.¹

In order to achieve this objective the chapter will have to be divided into two sections. The first part of the chapter will provide an in-depth analysis of the Draft Domestic Partnerships Bill itself. Topics to be covered must include the objective of the Bill, the ambit of the Bill, the legal consequences attached to a registered domestic partnership, and finally, the legal consequences attached to an unregistered domestic partnership. The second part of the chapter will attempt to determine whether, or to what extent, the Draft Domestic Partnerships Bill accommodates a contextualised approach to choice.

7.2 Draft Domestic Partnerships Bill

7.2.1 Introduction

The Draft Domestic Partnerships Bill was published² as a result of an investigation by the SALRC into the legal status of domestic partnerships.³ Although it was not the

¹ This is of utmost importance considering that the Draft Domestic Partnerships Bill provides one with “... a more than reliable idea” as to what the legislature perceives domestic partnership legislation to be: see Smith LLD Thesis (2009) at 464.

² See GN 36 of 2008 GG 30663 dated 14-01-2008.

³ Skelton & Carnelley (2010) at 219. According to Smith LLD Thesis (2009) at 463 the Draft Domestic Partnerships Bill is based on the proposals contained in chs 6 and 7 of the SALRC Report on *Domestic Partnerships* (2006). Legal commentary on the Draft Domestic Partnerships Bill is limited to only a few sources, presumably owing to its status as mere draft legislation. Sources which do, however, discuss the ambit, impact and consequences of the Bill are, *inter alia*, Bakker 2009 *THRHR* at 9-14; Smith LLD Thesis (2009) at 461-746; Skelton & Carnelley (2010) at 219-231; Smith 2010 *ISFL* at 297-311; Smith 2010 *PELJ* at 274-293; Bakker 2013 *PELJ* at 134-139 and Smith 2013 *SALJ* at 527-553. For a more detailed analysis of the Draft Domestic Partnership Bill, see ch 3 par 3.4.3 above.

first time the SALRC recommendations had been encapsulated into draft legislation,⁴ it was the first time it had been published to specifically regulate domestic partnerships. Although the Bill has not been enacted,⁵ Smith is of the opinion that the Bill is definitely not a “... novice on the legislative scene” and provides an accurate indication of how the legislature aims to regulate domestic partnerships in future.⁶

Given the right to equality entrenched in section 9(1) of the Constitution and the fact that there is currently no formal legal protection for heterosexual domestic partners,⁷ the Draft Domestic Partnerships Bill aims in terms of its preamble to, *inter alia*, provide legal recognition to domestic partnerships, to regulate their rights and obligations, to protect the legal interests of all the parties concerned, and finally, to regulate the termination of domestic partnerships.⁸ In attempting to achieve this aim the Bill differentiates between registered domestic partnerships and unregistered domestic partnerships.⁹

7.2.2 Scope of application of the Draft Domestic Partnerships Bill

The ambit of the Draft Domestic Partnerships Bill depends on whether the partnership was registered or not. In terms of clause 4(1) of the Bill “... a person may only be in one registered domestic partnership at any given time”. Clause 4(2) further emphasises this by prohibiting a person from concluding a registered domestic partnership if he or she is already a spouse in a civil or customary marriage,¹⁰ or alternatively, a partner in a civil union.¹¹ A registered domestic partnership will, as such, be a monogamous partnership.

⁴ According to Smith LLD Thesis (2009) at 463 the Draft Domestic Partnerships Bill is almost identical to chapter 3 of the original Civil Union Bill 26 of 2006 published in GN 1385 of 2006 GG 29169 dated 31-08-2006. Also see the Domestic Partnerships Bill of 2006 as discussed in ch 2 par 2.3.3 above.

⁵ See eg Meyersfeld 2010 CCR at 273, who remarks that the legislative process seems to have stagnated.

⁶ Smith LLD Thesis (2009) at 464.

⁷ See the preamble to the Domestic Partnerships Bill. It is interesting to note that the preamble only makes reference to heterosexual domestic partnerships. This appears to be a considerable oversight when one considers the discussion in ch 5 par 5.3-5.6 above.

⁸ See ch 2 of the Draft Domestic Partnerships Bill.

⁹ See chs 3 and 4 of the Draft Domestic Partnerships Bill respectively.

¹⁰ Clause 4(2) stipulates that spouses married in terms of either the Marriage Act 25 of 1961 or the Recognition of Customary Marriages Act 120 of 1998 are excluded.

¹¹ In terms of the Civil Union Act 17 of 2006.

In contrast to this, unregistered domestic partnerships may seemingly be polygynous.¹² The polygynous nature of unregistered domestic partnerships is implied in the wording of clause 26(4) of the Bill, which states:

“A court may not make an order under this Act regarding a relationship of a person who, at the time of that relationship, was also a spouse in a civil marriage or a partner in a civil union or a registered domestic partnership with a third party”.

The absence of any reference to a customary marriage is significant. The only logical conclusion to be drawn from the wording of the clause is that a relationship involving a person who is already a spouse in a customary marriage may possibly qualify as an unregistered domestic partnership.¹³ The relationship will not, however, qualify as an unregistered domestic partnership if one of the partners is involved as a spouse in a civil marriage or a partner in a civil union.

A further issue that needs to be investigated is whether the Bill is applicable to so-called “care partnerships”.¹⁴ The SALRC recommended that the Bill should not be applicable to such partnerships as it may lead to abuse and exploitation.¹⁵ As such, the SALRC recommended that unregistered domestic partnerships should be defined as “... a relationship between two adult persons *who live as a couple* and who are not related by family”.¹⁶ However, in its current form the Bill simply defines an unregistered domestic partnership as “... a partnership that has not been registered as a domestic partnership under Chapter 3 of this Act”. Without the limitations as proposed by the SALRC, Smith is of the opinion that the current definition is broad enough to imply that the Bill does not preclude persons in a non-conjugal relationship from claiming spousal benefits on an *ex post facto* basis.¹⁷

¹² See cl 26(4) of the Draft Domestic Partnerships Bill. Also see the explanation provided by Smith LLD Thesis (2009) at 468.

¹³ See Smith LLD Thesis (2009) at 468.

¹⁴ For a comprehensive discussion on the issue: see Smith LLD Thesis (2009) at 468-475. Some reference was already made to this dilemma in ch 2 par 2.4 above.

¹⁵ SALRC Report on *Domestic Partnerships* (2006) at 386.

¹⁶ SALRC Report on *Domestic Partnerships* (2006) at 387 (own emphasis added). This definition also appeared in the recommended Domestic Partnerships Bill of 2006 which was attached as annexure E to the SALRC Report on *Domestic Partnerships* (2006).

¹⁷ Smith LLD Thesis (2009) at 470-472 is also of the opinion that the current definition of unregistered domestic partnerships allows for persons in a conjugal relationship, who are related within the prohibited degrees of consanguinity and/or affinity to each other, to conclude an unregistered domestic partnership. He opines that the Bill may have the effect of legally recognising relationships

7.2.3 Registered domestic partnerships

7.2.3.1 Introduction

Registered domestic partnerships are defined as partnerships registered in terms of chapter three of the Draft Domestic Partnerships Bill.¹⁸ Clauses 4, 6 and 8 are of specific importance in this regard as they contain the prescribed registration procedure. Registering a domestic partnership is a fairly simple procedure.¹⁹ After the registration officer²⁰ has confirmed that the parties comply with clause 4 of the Draft Domestic Partnerships Bill, he or she must conduct the registration procedure at official premises designated for that purpose.²¹ Conducting the registration procedure means that the prospective partners must individually and in writing declare their willingness to register their domestic partnership by signing the prescribed documents in the presence of the registration officer.²² After the registration officer has also signed the prescribed documents he or she must indicate on the registration certificate whether the partners had entered into a domestic partnership agreement, and if applicable, also attach a copy thereof to the registration certificate.²³ Thereafter, the registration officer must provide the partners with the registration certificate which will serve as *prima facie* proof of the existence of their partnership.²⁴

Registering a domestic partnership entitles the parties to rights and obligations similar to those of married spouses,²⁵ each of which will be discussed below. As this chapter is aimed at establishing whether the Domestic Partnerships Bill accommodates a contextualised approach to choice, the spousal benefits provided to

that qualify as incest in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. It is, as such, not surprising that he (at 475) calls upon the legislature to correct this “oversight”.

¹⁸ See cl 1 of the Draft Domestic Partnerships Bill.

¹⁹ See cl 6 of the Draft Domestic Partnerships Bill.

²⁰ According to cl 5(1): “The Minister, and any officer in the public service authorised thereto by him or her, may designate any officer or employee in the public service or the diplomatic or consular service of the Republic, to be a registration officer, either generally or for any specified area, by virtue of his or her office and for so long as he or she holds the office”.

²¹ See cl 6(2) of the Draft Domestic Partnerships Bill.

²² Cl 6(3) of the Draft Domestic Partnerships Bill.

²³ Cls 6(4) and (5) of the Draft Domestic Partnerships Bill.

²⁴ Cls 6(6) and (7) of the Draft Domestic Partnerships Bill. Cls 6(8)-(10) require additional requirements of the registration officer such as keeping a register of all registrations conducted by him or her as well as transmitting each registration to the public officer delegated with the responsibility of keeping a population register in his or her district.

²⁵ See eg Bakker 2013 *PELJ* at 135.

domestic partners will be distinguished on the basis of need. This does not, however, mean that the distinction between need-based and non need-based claims is absolute. This is because, as already indicated above,²⁶ need-based and non need-based claims may in some instances overlap. Owing to the fact that the instances where the claims can overlap appear to be the exception rather than the rule, it is contended that such a separation is prudent for the purposes of this chapter.

7.2.3.2 Need-based claims

(a) Maintenance

Registering a domestic partnership has the automatic consequence of creating an *ex lege* reciprocal duty of support between the partners involved.²⁷ This reciprocal duty of support exists not only during the existence of the relationship but may continue after the termination thereof.²⁸ The amount of support that can be claimed is determined by the financial means of the breadwinner on the one hand and the need of the dependant on the other.²⁹

A registered domestic partnership can be terminated in one of three ways, namely, by death, an agreement or by a court order.³⁰ If the relationship is terminated by a termination agreement the partners are allowed to agree on, *inter alia*, the payment of maintenance by one partner to another.³¹ In the absence of such an agreement, the Draft Domestic Partnerships Bill allows a court to determine an appropriate amount of post-termination maintenance.³² The amount determined should be just and equitable and a court should take into account certain factors, such as the age of the partners, the duration of the relationship and the partners' standard of living.³³ If

²⁶ See ch 6 par 6.2.4.3 above.

²⁷ Cl 9 of the Draft Domestic Partnerships Bill.

²⁸ This is significant as unregistered domestic partners do not have the competency to claim support from one another while the relationship has not been terminated, see ch 7 par 7.2.4.2 below.

²⁹ Cl 9 of the Draft Domestic Partnerships Bill.

³⁰ Cl 12(1) read together with cl 13 of the Draft Domestic Partnerships Bill.

³¹ See cl 14(3)(b) of the Draft Domestic Partnerships Bill. Cl 14(3)(b) mimics s 7(1) of the Divorce Act 70 of 1979 which states that a court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

³² Cl 18(1) of the Draft Domestic Partnerships Bill. This clause, in turn, closely resembles the principles contained in s 7(2) of the Divorce Act 70 of 1979.

³³ These factors are contained in cl 18(2) of the Draft Domestic Partnerships Bill and are once again very similar to the factors contained in s 7(2) of the Divorce Act 70 of 1979.

the partnership is, however, terminated by the death of one of the partners, the surviving partner is placed in the same position as a surviving spouse. Clause 19 of the Bill states that any “reference to ‘spouse’ in the Maintenance of Surviving Spouses Act must be construed as to include a registered domestic partner”.³⁴

(b) Intestate succession³⁵

Registered partners are also treated as spouses for purposes of intestate succession. Clause 20 of the Draft Domestic Partnerships Bill states quite simply that any “... reference to ‘spouse’ in the Intestate Succession Act must be construed so as to include a registered domestic partnership”.

7.2.3.3 Non need-based claims

According to clause 7(1) of the Domestic Partnerships Bill no automatic community of property is created between registered domestic partners. This implies that while the domestic partnership still exists and there are joint assets the law of free co-ownership (as explained above)³⁶ will regulate the division of joint property. The Bill, however, places a limitation on the free co-ownership by requiring the written consent of one partner in instances where the other partner wants to dispose of his or her share in property that is jointly owned.³⁷ The result of the aforementioned is that the joint property of registered domestic partners is owned in undivided but divisible shares provided that the relevant consent in terms of clause 10 can be acquired.

Clause 7(3) allows domestic partners to determine their property regime by concluding a registered domestic partnership agreement.³⁸ If domestic partners choose to create a community of property, it is contended that the law of tied co-

³⁴ Cl 19 of the Draft Domestic Partnerships Bill (footnotes omitted).

³⁵ Intestate succession has not authoritatively been categorized as a need-based claim. For purposes of this study, however, it will be categorised as such. The reason being that intestate succession and spousal maintenance, as indicated by Smith (see ch 6 par 6.2.3 above), has the same social objective, namely, to address the needs of the parties involved.

³⁶ See ch 4 par 4.4.4 above.

³⁷ See cl 10 of the Draft Domestic Partnerships Bill.

³⁸ Read together with cl 13 of the Draft Domestic Partnerships Bill. It should, however, be mentioned that these types of agreements may be set aside by a court where the agreement would cause “serious injustice”: see cl 8 of the Domestic Partnerships Bill. Factors to be taken into account to determine whether the agreement will cause “serious injustice” are provided in cl 8(3) and include the terms of the agreement, the contributions made by each party, whether the agreement has become unfair due to changing circumstances, and finally, any other factor which the court considers relevant.

ownership (as explained above)³⁹ will regulate their relationship. The reason being that their relationship will be akin to a marriage in community of property. The result thereof would be that joint property is owned in undivided and indivisible shares.

At termination of the registered domestic partnership, partners are allowed to determine the division of joint and separate property by concluding a termination agreement in terms of clause 14(3)(a) of the Domestic Partnerships Bill.⁴⁰ According to clause 14(2) the agreement between the partners should be in writing and signed by both parties. The agreement may regulate not only the division of joint and separate property but also ancillary matters such as maintenance and arrangements regarding the familial home.⁴¹

In the event of a dispute regarding the division of property at termination, one or both of the registered domestic partners may apply to court for an order to divide their joint or separate property regardless of the partners' property regime.⁴² The order to divide the joint property and/or transfer the separate property must be deemed just and equitable.⁴³ An order for the division of joint property must be deemed just and equitable with regards to all the relevant circumstances, while the transfer of separate property must be regarded as just and equitable in light of the fact that the party approaching the court has made direct or indirect contributions to the property or maintenance of the other party.⁴⁴ When considering an order for the transfer of separate property (as contemplated in terms of clause 22(3)) a court must take into account, *inter alia*, the existing means and obligations of the partners, donations made by one partner to another, the circumstances of each case, and finally, the existence of a registered domestic partnership agreement between the partners.⁴⁵

³⁹ See ch 4 par 4.4.4 above.

⁴⁰ Cl 14(1) read with cl 14(3) of the Domestic Partnerships Bill.

⁴¹ See cls 14(2) and (3) of the Draft Domestic Partnerships Bill.

⁴² Cl 22(1) of the Domestic Partnerships Bill.

⁴³ Cl 22(2) and (3) of the Domestic Partnerships Bill.

⁴⁴ Cl 22(3) and (5) of the Draft Domestic Partnerships Bill. A court is endowed with a similar discretion when spouses divorce: see s 7(3) of the Divorce Act 70 of 1979 which makes it possible for a court to redistribute the assets of spouses. This discretion will be analysed in detail in ch 7 par 7.3.2 below.

⁴⁵ Cl 22(4) of the Draft Domestic Partnerships Bill. These factors are comparable to the factors contained in s 7(3) of the Divorce Act 70 of 1979.

7.2.3.4 Additional provisions

The rights relating to maintenance, intestate succession and property division are by no means the only rights that the Draft Domestic Partnerships Bill provides to registered domestic partners. Other rights and benefits provided to registered domestic partners include the right to claim in terms of the dependant's action,⁴⁶ the right to be regarded as a dependant for the purposes of the Compensation for Occupational Injuries and Diseases Act,⁴⁷ and finally, the right of a male partner in a heterosexual domestic partnership to acquire parental responsibilities and rights of a child born into the partnership as if he was married to the biological mother.⁴⁸

7.2.4 Unregistered domestic partnerships

7.2.4.1 Introduction

Chapter four of the Draft Domestic Partnerships Bill regulates the *ex post facto* recognition of unregistered domestic partnerships. While no rights are provided to unregistered domestic partners during the subsistence of their relationship, the Bill does provide for the extension of certain benefits after the termination of their relationship. These benefits include the right to maintenance, intestate succession, and most importantly for the purposes of the current discussion, the division of joint and separate property.⁴⁹ The investigation to follow will once again differentiate between need-based and non need-based claims regardless of the fact that the claims may in some instances overlap.

A court can only extend the aforementioned rights to an unregistered domestic partner if the court has taken into account all the circumstances of the relationship.⁵⁰ In determining whether such an order should be granted a court may consider, *inter alia*, the nature and duration of the relationship, the nature and extent of the common residence, the ownership, use and acquisition of property, the degree of mutual

⁴⁶ Cl 21(2) of the Draft Domestic Partnerships Bill. The right is understandable considering the *ex lege* duty of support that is created in cl 9 of the Draft Domestic Partnerships Bill.

⁴⁷ 130 of 1993. See cl 21(3) of the Draft Domestic Partnerships Bill.

⁴⁸ Cl 17 of the Draft Domestic Partnerships Bill.

⁴⁹ Cl 26(1) of the Draft Domestic Partnerships Bill.

⁵⁰ Cl 26(2) of the Draft Domestic Partnerships Bill. The fact that the Bill does not identify a specific "threshold criterion" has not gone unnoticed. According to Smith 2010 *PELJ* at 287-288 cl 26 must be amended so as to require a court to take into account the list of factors contained in cl 26(2) to determine whether a particular domestic partnership is sufficiently permanent.

commitment to a shared life, and finally, the care and support of the children of the unregistered domestic partnership.⁵¹

7.2.4.2 Need-based claims

(a) Maintenance

The maintenance claims of unregistered domestic partners are regulated by three separate clauses. Firstly, clause 27, which regulates maintenance claims while the partnership still exists, dictates that "... unregistered domestic partners are not liable to maintain one another and neither is entitled to claim maintenance from the other". This is in direct contrast to the position of registered domestic partners who, by operation of law, owe each other a reciprocal duty of support as soon as their partnership is registered.⁵²

Clause 28, however, regulates maintenance claims after the parties have separated. In terms of this provision a court may order one partner to provide the other with maintenance provided that the court considers it just and equitable to make such an order. When determining whether the order will be just and equitable the court must have regard to certain matters including the age of the partners, the partners' standard of living, the partners' respective contributions to the partnership, the existing and prospective means of each partner, and finally, the future financial needs and obligations of each domestic partner.⁵³

Lastly, clause 29 allows a surviving unregistered domestic partner to institute a claim for maintenance after the death of the other unregistered domestic partner. Clause 28 will, therefore, regulate maintenance where the partnership is terminated by separation, while clause 29 regulates maintenance claims where the partnership is terminated by death. Clause 29(1) limits the amount of maintenance that can be claimed at death to the reasonable maintenance needs of the surviving unregistered domestic partner. When determining "the reasonable maintenance needs" of the

⁵¹ Cl 26(2)(a)-(i) of the Draft Domestic Partnerships Bill.

⁵² See ch 7 par 7.2.3.2 above.

⁵³ See cl 28(2)(a)-(h) of the Draft Domestic Partnerships Bill for a list of all the factors a court must take into account. These factors are comparable to the factors that a court must take into account when determining the maintenance of a registered domestic partner. By implication they are also similar to the factors that a court must take into account in terms of s 7(2) of the Divorce Act 70 of 1979.

surviving unregistered domestic partner, the court may consider the amount in the estate available for distribution, the earning capacity of the surviving unregistered domestic partner, and finally, any other factor which the court deems relevant.⁵⁴

(b) Intestate succession

Unregistered domestic partners' right to intestate succession is regulated in terms of clause 31 of the Draft Domestic Partnerships Bill.⁵⁵ Sub-clause 1 provides an unregistered domestic partner with the right to approach a court for an order allowing him or her to inherit the intestate estate of the deceased. This right is, however, subject to clauses 31(2) and 31(3). The former states that when a deceased is survived by both an unregistered domestic partner as well as a descendant, then the unregistered partner will inherit the greater amount of either a child's share or a value fixed from time to time as provided for in the Intestate Succession Act.⁵⁶ Additionally, clause 31(3) provides a court with the competency to make an order in relation to intestate succession when a dispute arises between a surviving unregistered domestic partner and a customary law spouse. The court must award the benefits in a manner that is just and equitable.⁵⁷ Given their possible polygynous nature, the insertion of clause 31(3) is only necessary in relation to unregistered domestic partnerships as disputes of this kind could not arise in the case of registered domestic partnerships.

7.2.4.3 Non need-based claims

During the existence of an unregistered domestic partnership, joint property will be regulated in terms of the law of free co-ownership.⁵⁸ Unlike registered domestic partners, unregistered domestic partners can freely dispose of their share in joint property without having to acquire some sort of consent (as required in terms of clause 10 of the Domestic Partnerships Bill). There is, as such, no limitation on the free co-ownership that exists between unregistered domestic partners.

⁵⁴ Cl 30(a)-(e) of the Draft Domestic Partnerships Bill. This provision (including the factors that a court must take into account) is similar to s 3 of the Maintenance of Surviving Spouses Act 27 of 1990.

⁵⁵ See cl 31(1)-(3) of the Draft Domestic Partnerships Bill.

⁵⁶ 81 of 1987.

⁵⁷ Cl 31(3) of the Draft Domestic Partnerships Bill.

⁵⁸ As analysed in ch 4 par 4.4.4 above.

At termination of an unregistered domestic partnership, clause 32 (which is similar to clause 22 as discussed above)⁵⁹ provides a court, upon application and in the absence of an agreement to the contrary, with the competency to divide the joint and separate property owned by unregistered domestic partners.⁶⁰ As in the case of registered partnerships in terms of clause 22, the court must make an order that is just and equitable with due regard to all the relevant circumstances when dividing the unregistered partners' joint property.⁶¹ When the court, however, considers the transfer of separate property from one unregistered domestic partner to another the order must be just and equitable by reason of the fact that one unregistered domestic partner made direct or indirect contributions to the maintenance or separate property of the other partner.⁶² In determining whether an order for transfer of separate property will be just and equitable a court must, as in the case of registered domestic partners, have due regard to several factors including, but not limited to, the existing means and obligations of the partners, any donations made by the partners, the vested rights of interested parties in the property concerned, and finally, any other factor which the court deems relevant.⁶³

7.2.5 Concluding remarks on Draft Domestic Partnerships Bill

Although the legislature has thus far failed to enact the Draft Domestic Partnerships Bill, it is the most realistic attempt by government to address the plight of unmarried domestic partners to date. It encapsulates most of the recommendations made by the SALRC and can thus be regarded as an accurate indication of how the legislature aims to regulate domestic partnerships in future.

Before the study can determine whether the Domestic Partnerships Bill has sufficiently adopted a contextualised approach to choice, it should be determined, in light of the existence of the Civil Union Act,⁶⁴ whether it is necessary for the Bill to regulate *registered* domestic partnerships. This question arises considering that the

⁵⁹ See ch 7 par 7.2.3.3.

⁶⁰ See cl 32(1) read together with cl 26 of the Draft Domestic Partnerships Bill.

⁶¹ See cl 32(2) of the Draft Domestic Partnerships Bill.

⁶² See cls 32(1), (3) and (5) of the Domestic Partnerships Bill.

⁶³ Cl 32(4)(a)-(e) of the Draft Domestic Partnerships Bill. This discretion appears to be similar to the one granted to the courts in terms of s 7(3) of the Divorce Act 70 of 1979.

⁶⁴ 17 of 2006.

Civil Union Act⁶⁵ already creates an alternative formalised relationship to marriage, namely, a civil partnership.⁶⁶ As such, it should be determined whether it is necessary (or even advisable) for the Domestic Partnerships Bill to create another, possibly superfluous, registered form of life partnership.

Various opinions⁶⁷ have been expressed on the question whether the Civil Union Act⁶⁸ should exist simultaneously with the Domestic Partnerships Bill if it is enacted. While this academic debate falls beyond the scope of this study, the leading opinions will be outlined in order to contextualise the investigation to follow. Smith and Robinson⁶⁹ argue that the Civil Union Act⁷⁰ should be repealed as its simultaneous existence with the Domestic Partnerships Bill will create an overly complicated legal position that would create no effective, realistic or discernable alternative to marriage. Additionally, if the Domestic Partnerships Bill replaces the Civil Union Act,⁷¹ it would have the effect of removing the legal anomalies that are “created or perpetuated” by the Civil Union Act.⁷² Smith and Robinson conclude by suggesting that same-sex marriage must be accommodated within the Marriage Act⁷³ and secondly, that the Domestic Partnerships Bill must replace the Civil Union Act.⁷⁴ On the other hand, Bakker criticises the possible hierarchy of inter-personal relationships that persists in South African law (and will continue to persist if Smith and Robinson’s suggestions are followed).⁷⁵ Instead, he argues that all inter-personal relationships must be regulated within one secular piece of legislation similar to the Domestic Partnerships

⁶⁵ 17 of 2006.

⁶⁶ A civil partnership is one of two types of civil unions recognised in terms of the Civil Union Act 17 of 2006 – the other being a marriage: see the definition of a “civil union partner” in s 1 of the Civil Union Act 17 of 2006 and the analysis of this issue in ch 3 par 3.3.4.5 above. Also see Smith & Robinson 2010 *PELJ* at 65. Smith & Robinson 2010 *PELJ* at 65 do, however, address the fact that there are some important differences between registered domestic partnerships and civil partnerships eg that the default proprietary system between the two forms of partnership differs.

⁶⁷ See, *inter alia*, Bilchitz & Judge 2007 *SAJHR* at 297; Bakker 2009 *THRHR* 18-19; Smith LLD Thesis (2009) at 783-785 and Smith & Robinson 2010 *PELJ* at 67.

⁶⁸ 17 of 2006.

⁶⁹ Smith & Robinson 2010 *PELJ* at 67.

⁷⁰ 17 of 2006.

⁷¹ 17 of 2006.

⁷² 17 of 2006. Some of the most important anomalies are discussed by Barnard & De Vos 2007 *SALJ* at 821; Bonthuys 2008 *SALJ* at 473-483 and McConnachie 2010 *SALJ* at 424-442. For a more detailed discussion on the anomalies created by the Civil Union Act 17 of 2006, see ch 3 par 3.3.4.5 above.

⁷³ 25 of 1961.

⁷⁴ 17 of 2006. Smith & Robinson 2010 *PELJ* at 67-68.

⁷⁵ Bakker 2009 *THRHR* 18-19.

Bill.⁷⁶ It is clear that in order to achieve this unification the South African law cannot continue to recognise two forms of partnership (namely a civil partnership in terms of the Civil Union Act⁷⁷ and a domestic partnership in terms of the Domestic Partnerships Bill) which would both serve as an alternative to marriage. Not all authors are, however, of the opinion that the Civil Union Act⁷⁸ should be repealed. Bilchitz and Judge, for example, argue that the Civil Union Act⁷⁹ should be retained as it "... de-centres marriage as the primary and privileged social option for committed interpersonal relationships".⁸⁰ By removing the privileged position of marriage, Bilchitz and Judge argue that the Civil Union Act⁸¹ would better reflect the plurality of family forms found in South Africa.⁸²

Irrespective of whether civil partnerships (in terms of the Civil Union Act)⁸³ and registered domestic partnerships (in terms of the Domestic Partnerships Bill) can co-exist, the fact remains that once the Bill is enacted, registered domestic partners can, by undergoing a ceremony of public commitment, be described as *formal* life partners.⁸⁴ Since a domestic partnership is by definition *devoid of any formal legal recognition*, it is doubtful whether registered domestic partners as envisaged by the Bill can be accommodated within the narrow modern definition of domestic partnerships adopted in this study.⁸⁵ The striking similarities between civil partnerships, registered domestic partnerships and marriages (as discussed above)⁸⁶ indicate that registered domestic partnerships most probably fall beyond the scope of this study.⁸⁷ If this conclusion is correct it would imply that it is unnecessary to investigate whether the Bill complies with the principles of the contextualised model of choice as far as registered domestic partners are concerned. Furthermore, if it is indeed correct to regard registered domestic partners as formal life partners, there is no reason why their claims should be limited to need-based claims only. This is

⁷⁶ Bakker 2009 *THRHR* 18-19 and 2013 *PELJ* at 139.

⁷⁷ 17 of 2006.

⁷⁸ 17 of 2006.

⁷⁹ 17 of 2006.

⁸⁰ Bilchitz & Judge 2007 *SAJHR* at 485.

⁸¹ 17 of 2006.

⁸² Bilchitz & Judge 2007 *SAJHR* at 468.

⁸³ 17 of 2006.

⁸⁴ See ch 7 par 7.2.3.1 above.

⁸⁵ See ch 2 par 2.2 above.

⁸⁶ See ch 7 par 7.2 above.

⁸⁷ See for example Bakker 2013 *PELJ* at 139 and Smith 2013 *SALJ* at 544-546 who remark that registered domestic partnerships and marriages are very similar in a legal sense.

because by undergoing a ceremony of public commitment the partners indicate that they accept (perhaps even desire) to extend the consequences of their relationship beyond mere need-based claims.

7.3 Contextualised model of choice and Draft Domestic Partnerships Bill

7.3.1 Introduction

Once it is accepted that the contextualised model of choice should underpin the basis for the recognition and regulation of domestic partnerships,⁸⁸ it is imperative to investigate to what extent the Bill already adopts this approach in relation to unregistered domestic partnerships.

7.3.2 Draft Domestic Partnerships Bill: Unregistered domestic partners and proprietary claims

The contextualised model of choice proceeds from the premise that domestic partners should only be allowed to succeed with need-based claims against each other. The Bill satisfies this criterion by providing unregistered domestic partners with both maintenance claims and claims relating to intestate succession. What is problematic, at least if a contextualised approach to choice is adopted, is that the Bill also entitles unregistered domestic partners to claim division of joint property and the transfer of separate property at the termination of their relationship. It is thus contended that there are at least two reasons why the Bill cannot be reconciled with the contextualised model of choice as far as unregistered domestic partnerships are concerned.

(a) Allowance for non need-based claims

As was established earlier,⁸⁹ the difference between need-based and non need-based claims is based on the fact that need-based claims fulfil a social objective while non need-based claims do not. Furthermore, it was expressly held by Gonthier

⁸⁸ As concluded in ch 6.

⁸⁹ See ch 6 par 6.2.3 above.

J in the Supreme Court of Canada in the *Walsh* case⁹⁰ that the division of assets does not fulfil a social objective as it merely "... aims to divide assets according to a property regime chosen by the parties". As such, the court concluded that "... the decision to live together, *without more*, is not sufficient to indicate a positive intention to contribute to and *share in each other's assets and liabilities*".⁹¹

Since unregistered domestic partners will indeed be living together "without more" there is no justification for them sharing in each other's assets and liabilities. As such, one can contend that the Bill, by providing unregistered domestic partners with the possibility of claiming non need-based claims, conceptually infringes on the contextualised model of choice.

(b) Negation of personal choice

If one has regard to the benefits provided by the Domestic Partnerships Bill, it becomes clear that the Bill not only treats unregistered domestic partners as if they were spouses, but may in fact (once it is enacted) treat them better than spouses. This is especially true if one considers that clause 32 of the Bill seemingly affords a court with a discretion to divide joint and separate property which extends further than the discretion allowed to courts when spouses divorce.⁹²

As far as spouses are concerned, property division is determined mainly with reference to the matrimonial property regime chosen by the spouses. Section 7(3) of the Divorce Act⁹³ provides a court with some leeway to temper the chosen matrimonial property regime by ordering a redistribution of assets.⁹⁴ This discretion is, however, limited in the sense that it only applies to civil marriages that comply with the prerequisites contained in section 7(3) of the Divorce Act,⁹⁵ namely, that the

⁹⁰ See *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR at par 204. This point of view was subsequently referred to with approval by Sachs J in *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) at par 160.

⁹¹ *Nova Scotia (Attorney-General) v Walsh* [2002] 4 SCR at par 154 (own emphasis added).

⁹² See, *inter alia*, s 7(3) of the Divorce Act 70 of 1979.

⁹³ 70 of 1979.

⁹⁴ It is clear from Van Schalkwyk (2011) at 269 that the term "redistribution of property" does not truly entail a "redistribution". Instead, it would rather appear as if s 7(3) of the Divorce Act 70 of 1979 allows one partner to claim separate property of the other spouse without any real "re-arrangement" of the property in question.

⁹⁵ 70 of 1979.

marriage was concluded prior to 1 November 1984⁹⁶ and that the marriage was concluded out of community of property without any form of profit sharing.⁹⁷

The Domestic Partnerships Bill does not, however, limit the redistribution of assets between unregistered domestic partners in a similar manner.⁹⁸ Instead, the discretion provided in terms of clause 32 is subject only to the court considering whether the order is just and equitable by reason of the fact that one partner made direct or indirect contributions to the maintenance or increase of the separate property of the other partner.⁹⁹

By treating unregistered domestic partners in almost all respects as spouses (and in some cases even better than spouses), it is contended that the Domestic Partnerships Bill completely negates the choice of the parties not to marry. Notwithstanding this apparent infringement of personal autonomy, the Bill also seems to create a regulatory system which is not a true alternative to matrimonial law. This is not an insignificant defect considering the overwhelming judicial and academic insistence that cohabitation must be preserved as a true alternative to marriage.¹⁰⁰

As such, if the Bill is not redrafted so as to remove the proprietary consequences that are currently provided for in the Bill, it might cause serious reservations about its constitutionality. This is because it may cause an unjustifiable infringement on the autonomy of one or both of the partners in that their decision not to marry is for all intents and purposes negated.

7.4 Conclusion

The Draft Domestic Partnerships Bill provides for extensive regulation of both registered and unregistered domestic partnerships. While registered domestic partners have to undergo a ceremony of public commitment, they do have the concomitant benefit of being able to claim most spousal benefits, not only during the

⁹⁶ Or 2 December 1988 in the case of blacks.

⁹⁷ S 7(3)(a) of the Divorce Act 70 of 1979.

⁹⁸ This has led Bakker 2013 *PELJ* at 139 to conclude that the Domestic Partnerships Bill places registered domestic partners in a more favourable position than their married counterparts (at least with regards to spouses married in terms of the Marriage Act 25 of 1961 or the Civil Union Act 17 of 2006). It is contended that although Bakker's remarks was made within the context of registered domestic partnerships the same rationale applies in the present context.

⁹⁹ Cl 32(5) of the Draft Domestic Partnerships Bill.

¹⁰⁰ See ch 6 par 6.5 above.

subsistence of their relationship but also at the termination thereof. In contrast to this, the relationship between unregistered domestic partners is recognised only *ex post facto* at termination. These partners may claim some spousal benefits provided a court, which has had regard to all the circumstances of the relationship, finds that an unregistered domestic partnership had indeed existed.

Generally speaking, the Domestic Partnership Bill provides domestic partners with two different types of claims. The first, namely need-based claims, refer to claims for maintenance and, arguably, intestate succession. The second type of claim, which is not based on need, includes claims for division of joint and separate property. While it is accepted, and indeed applauded, that the Bill recognises the need-based claims of domestic partners, the study had to investigate whether it was appropriate for the Bill, within the confines of the contextualised model of choice, to provide domestic partners with claims relating to the division of joint property and the transfer of separate property. It was found that this question only had to be answered in relation to unregistered domestic partners as such partners will be living together “without more”.

If a contextualised approach to choice is adopted, it was found unacceptable to allow unregistered domestic partners to claim division of joint property or the transfer of separate property. This conclusion was reached largely due to the fact that proprietary claims appear not to fulfil a social objective in the same way as maintenance and (arguably) intestate succession do. Furthermore, it was found that extending proprietary rights to unregistered domestic partners may have the effect of duplicating matrimonial property law within the context of domestic partnership regulation. Extending these benefits would not only conceptually infringe on the contextualised model of choice but might also constitute an unjustifiable infringement on the personal autonomy of one or both of the unregistered domestic partners in question. When taking these conclusions into consideration it is recommended that clauses 26 and 32 of the Domestic Partnerships Bill be redrafted so as to prevent unregistered domestic partners from claiming the division of joint property or the transfer of separate property at the termination of their relationship. This does not,

however, imply that unregistered domestic partners cannot avail themselves of the relevant common law remedies which were discussed in chapter 4.¹⁰¹

¹⁰¹ See ch 4 par 4.3-4.4 above.

Chapter 8: Conclusion

8.1 Conclusion

As stated in the introduction, this study had the objective of determining whether the choice argument should continue to serve as the theoretical foundation to underlie the recognition and regulation of domestic partnerships. In order to achieve this aim the legal matrix within which the study would be conducted had to be determined at the outset. To this end it was explained why the modern narrow definition of a domestic partnership was best suited for purposes of this study.¹ According to this definition a domestic partnership should be regarded as a permanent relationship where the parties live together and have chosen not to formalise their relationship by concluding a marriage, or alternatively, a civil union. The definition was adopted because it reflected the core characteristic of such a partnership, namely, that it is informal but permanent. Furthermore, it was concluded that although there are differing opinions as to how a domestic partnership is formed, the requirements demanded by the so-called “proportionality principle” should be incorporated into this study. According to the proportionality principle there should be a broad measure of proportionality between the commitments made by the partners in question and the type of benefits they can avail themselves of. If this line of reasoning is adhered to it would mean that if domestic partners claim benefits with financial implications they should be required to prove not only a *consortium omnis vitae* but also that a reciprocal duty of support existed between the parties. Conversely, if the claim in question does not have any financial implications the parties should only be required to prove the existence of a *consortium omnis vitae*.

Before the study could ultimately determine the future viability of the choice argument, the study had to investigate the *de lege lata* in relation to domestic partnerships. The investigation revealed that South African family law does not, as a general rule, provide for formal legal recognition (in the sense of dedicated national legislation) of domestic partnerships.² As such, they are excluded from any of the ex

¹ See ch 2 par 2.2 above.

² See ch 4 par 4.1 above.

lege protective, adjustive and supportive measures available to spouses. Although domestic partners do not enjoy formal legal recognition, it was shown that both the legislature and the judiciary have extended certain spousal benefits to domestic partners on an *ad hoc* basis.³ While these instances of *ad hoc* recognition certainly ameliorated the legal position of domestic partners, they could hardly be described as a satisfactory means by which domestic partners should continue to be regulated. Moreover, it was found that in order to access spousal benefits, domestic partners had to rely on largely unsuitable regulatory measures and remedies, such as, domestic partnership agreements, universal partnerships and constructive trusts.⁴ This implied that domestic partners could only rely on the aforementioned benefits if they were able to satisfy the requirements of the particular regulatory measure or remedy in question in addition to proving the existence of their partnership. It was this unsatisfactory state of affairs, coupled with the remarkable increase in the number of domestic partners, which prompted the investigation into the future regulation of domestic partnerships. As such, the study had to determine the origins, current application and future viability of the choice argument.⁵

In the past, the choice argument dictated that a person who failed to marry in terms of the Marriage Act⁶ could not claim spousal benefits on an *ex post facto* basis, even if he or she lived with a partner in a relationship akin to marriage. It was premised on the rationale that a person's choice to marry should carry equal weight to a person's choice not to marry. Considering that the choice argument regarded the failure to marry as an express choice, its application could only be interrupted by an objective legal impediment to marriage. As such, mere subjective circumstantial impediments to marriage did not preclude its application. As a consequence of the objective legal impediments to same-sex marriage, based on the partners' sexual orientation, several spousal benefits were awarded to same-sex domestic partners only.⁷ Heterosexual domestic partners were left out in the cold as no objective legal impediment prevented them from marrying.⁸

³ See ch 4 par 4.2 above.

⁴ See ch 4 par 4.3 above.

⁵ Hence the title of this study.

⁶ 25 of 1961.

⁷ See ch 3 par 3.3.4 above.

⁸ See ch 3 par 3.3.3 above.

In the present context, once the objective legal impediment to same-sex marriage was removed by the enactment of the Civil Union Act,⁹ it was anticipated that the legal positions of same-sex and heterosexual domestic partnerships would be harmonised. As such, it was expected that the choice argument would justify the non-recognition of domestic partnerships in general. However, the Constitutional Court in the decision of *Gory v Kolver*¹⁰ created uncertainty in pronouncing that the spousal benefits that were extended to same-sex domestic partners prior to the recognition of same-sex marriage, should continue to be available to them until the position is expressly amended by the legislature. Over and above this seemingly preferential treatment of same-sex domestic partners, several authors became critical of the choice argument insofar as it does not take into account subjective circumstantial impediments to marriage, does not differentiate between informed and uninformed choice and invariably seems to favour the financially stronger domestic partner. As such, the choice argument was shown to be unsuitable to underlie the future recognition and regulation of domestic partnerships.¹¹

The rejection of the choice argument led to an investigation into alternative bases to guide the recognition and regulation of domestic partnerships in future.¹² Three possible solutions were considered, namely, the contextualised model of choice, the function-over-form approach, and finally, the revised contextualised model of choice known as the Smith model. The contextualised model of choice was ultimately preferred as it recognises that very few domestic partners actually have a choice whether or not to formalise their relationships.¹³ As such, it recognises that there may be subjective circumstantial impediments preventing two persons from formalising their relationship. The recognition of such subjective considerations meant that upon proof of a domestic partnership (and by implication the existence of a reciprocal duty of support),¹⁴ one or both of the parties could approach a court to redress their needs rather than their wants. This means that while domestic partners can claim maintenance and intestate succession (which are supposedly based on need), proprietary claims relating to the division of joint or separate property would not be

⁹ 17 of 2006.

¹⁰ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 4 SA 97 (CC) at par 28.

¹¹ See ch 5 par 5.4-5.5 above.

¹² See ch 6 above.

¹³ See ch 6 par 6.5-6.6 above

¹⁴ See ch 6 par 6.2.3 above for further explanation.

tolerated. The reason being that these claims have authoritatively been held not to be based on the fulfilment of any social objective.¹⁵

The final step was to determine whether the South African legislature, as reflected in the Draft Domestic Partnerships Bill, had incorporated a contextualised approach to choice.¹⁶ This investigation formed an integral part of the study as the Draft Domestic Partnerships Bill is a realistic indication as to how the legislature aims to regulate domestic partnerships in future. In its current form the Bill not only affords registered and unregistered partners the opportunity of instituting need-based claims, but also non need-based claims, for example, the division of joint property and the transfer of separate property.

While it is accepted (and indeed applauded) that the Bill provides for the need-based claims of domestic partners, it is debatable whether it is appropriate to provide domestic partners with claims relating to the division of joint property or transfer of separate property which are regarded, at least within the confines of the contextualised model of choice, as not being based on need. In order to determine the appropriateness of extending such proprietary claims to domestic partners, it was contended that registered domestic partners should be ignored.¹⁷ This is because registered domestic partners would, by undergoing a ceremony of public commitment, for all practical purposes formalise their relationship. As a direct result of such formalisation it is doubtful whether registered domestic partners can be accommodated within the modern narrow definition of domestic partnerships as described at the outset. As such, it was determined that it should only be examined whether unregistered domestic partners should be allowed to claim division of joint property or the transfer of separate property. It was concluded that since unregistered domestic partners would indeed be living together “without more” there would be no justification for treating them like spouses in this regard. Furthermore, notwithstanding the apparent conceptual violation of the contextualised model of choice, the Domestic Partnerships Bill would also run the risk of creating a regulatory system which is not a true alternative to marriage. This apparent risk cannot be

¹⁵ See ch par 6.2.3 above.

¹⁶ See ch 7 above.

¹⁷ See ch 7 par 7.2.5 above.

deemed insignificant given the judicial and academic insistence that domestic partnerships should be regulated in a manner different from marital relationships.

8.2 Recommendations

In order to align the Domestic Partnerships Bill with the contextualised model of choice, which was determined to be the best regulatory foundation for the future recognition and regulation of domestic partners, this study recommends that clauses 26 and 32 of the Bill be redrafted. The proposed amendments must have the effect of removing the possibility of unregistered domestic partners claiming, firstly, the division of joint property, and secondly, the transfer of separate property.

If the possibility of these claims is indeed removed from the Domestic Partnerships Bill, unregistered domestic partners would not be left without any form of protection. Firstly, with regards to the division of joint property, unregistered domestic partners would still be able to claim division of joint property by instituting the *actio communi dividundo*.¹⁸ In terms of this action the court will divide the joint property according to the partners' respective shareholdings. Secondly, with regards to the transfer of separate property, unregistered domestic partners will be able to claim separate property if they are able to prove the existence of a universal partnership. Failing that, if one partner incurred costs in relation to the separate property of the other domestic partner, he or she will possibly be able to redress the situation by using the claim for unjustified enrichment.¹⁹ While unregistered domestic partners would thus not enjoy protection on a scale similar to that of spouses, they would still have some recourse in terms of the common law. Limiting their claims in this way accords with the reality that they live together "without more".

These amendments could be effected by redrafting clause 26 in the manner described below as well as completely removing clause 32 from the Domestic Partnership Bill.

¹⁸ See ch 4 par 4.4.4 above.

¹⁹ See ch 4 par 4.3.5 above.

Court application²⁰

“26. (1) One or both unregistered domestic partners may, after the unregistered domestic partnership has ended through death or separation, apply to a court for a maintenance order **[or]** an intestate succession order **or a property division order.**”

²⁰ Proposed insertions are contained in brackets, while proposed removals are underlined.

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