Accessibility to maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990

By

Marcus Anthony Anderson

Student number: 18354212

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LIST OF ABBREVIATIONS

J	Judge
PELJ	*Potchefstroom Electronic Law Journal*
SALJ	*South African Law Journal*
TSAR	*Tydskrif vir die Suid-Afrikaanse Reg*

SUMMARY

It is surmised that the Maintenance of Surviving Spouses Act 27 of 1990 can be classified as a very profound, yet acceptable limitation on a married person's right to freedom of testation. This research provides an exposition as to the background of the Act, the promulgation thereof, as well an exposition of provisions of the said Act and a critical analysis of these provisions.

At common law, before the promulgation of the Maintenance of Surviving Spouses Act, a surviving spouse had no right to claim maintenance from the estate of the first dying spouse. This research shows that the main proponents for the disallowance of a claim for maintenance by the surviving spouse, can be attributed to two prominent features, namely, a person's right to freedom of testation and due to the fact that there was no duty of support on the first dying spouse's estate.

The aim of this dissertation is to give an analysis as to the accessibility to a claim for maintenance in terms of the Maintenance of Surviving Spouses Act, as well as to outline certain issues that have been experienced thus far. As a point of departure, an exposition is given as to the reasoning and the purpose for the promulgation of the Act.

An examination is further made as to what denotes a "spouse" in order to be eligible to qualify for a claim, as the Act has failed in giving a concise definition in this regard. This aspect is investigated from a traditional standpoint, as well from the standpoint based on constitutional principles. The research furthermore focuses on the determination of the claim itself, the factors that must be taken into consideration to ascertain if a claim is allowable against the estate of the first dying spouse and how the executor is to deal with the said claim.

In conclusion, this research provides certain recommendations that could assist in striking a balance between the allowance of a claim against the estate of the first dying spouse, as well as the ultimate beneficiaries who would have benefitted in terms of the will, or in terms of the law of intestate succession.

Chapter 1: Introduction

1 1 Background

Prior to the promulgation of the Maintenance of Surviving Spouses Act,[1] a surviving spouse had no right to a claim for maintenance against the estate of the first dying spouse.[2] This in turn had the effect that financially speaking, such spouse was normally left in an unfavourable and adverse position in that he or she had to make ends meet out of own means, so to say. The reason for this state of affairs, as will be seen, was attributable to two prominent features, namely the right to freedom of testation and due to the fact that the reciprocal duty of support spouses owed one another during the subsistence of their marriage, terminated at the death of either of them.

1 1 1 Freedom of testation

The Law of Succession is that part of the law which regulates the devolution of a person's assets at his or her death.[3] In South African law, this devolution can take place in one of three ways, namely, by the law of intestate succession, the law of testate succession, or in two exceptional instances, by means of a contract.[4] In the case of intestate succession, where a person has failed to leave a will, or if a will was left, but was invalid, the estate will devolve in terms of a specific set of rules which are prescribed by the Intestate Succession Act.[5] Testate succession on the other hand, takes place where a person has in fact left a valid will, and the provisions thereof can be carried out as per the said person's wishes, in this instance the rules governing this type of succession, are prescribed by the Wills Act.[6] As far as succession by contract is concerned, these are generally not valid, nor enforceable, except where they take place in terms of a *donatio mortis causa* (a donation in view

[1] Act 27 of 1990.
[2] Sonnekus "Verlengde onderhoudsaanspraak van die langslewende gade" 1990 *TSAR* 491.
[3] Corbett *et al The Law of Succession* (2015) 1; De Waal and Schoeman-Malan *Law of Succession* (2015) 1; Jamneck *et al The Law of Succession in South Africa* (2017) 1.
[4] Corbett *et al* 1; De Waal and Schoeman-Malan 2 and 3; Jamneck *et al* 1.
[5] 81 of 1987.
[6] Act 7 of 1953.

of death),[7] or in terms of an antenuptial contract.[8] Focus for the purpose of this part of the research, will however be limited to a large extent to the law pertaining to testate succession and matters relating thereto. Section 4 of the Wills Act,[9] states as follows:

> "Every person of age sixteen years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same."

The effect of the above is such, that when executing a will, a person can insert almost any provision in a will and in almost any manner as per his or her wishes in accordance with what is described as the freedom of testation.[10] This principle formed part of our common law and was recognized in both Roman and Roman-Dutch Law and has been incorporated fully in South African law.[11] The right involves drafting a will, or having a will drafted, which may contain provisions that must be effected and carried out.[12] In the case of *Robertson v Robertson's Executors*,[13] the court defined the principle of freedom of testation as follows:

> "Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule or law from doing so."

Even the Constitution of the Republic South Africa,[14] has in fact reiterated this right to freedom of testation, as it is now entrenched in the Bill of Rights in

[7] Corbett *et al* 33; Jamneck *et al* 259; De Waal and Schoeman-Malan 216 and 217.
[8] Corbett *et al* 37; De Waal and Schoeman-Malan 217; Jamneck *et al* 259.
[9] Act 7 of 1953.
[10] Corbett *et al* 39; De Waal and Schoeman-Malan 3; Jamneck *et al* 125.
[11] Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 2014 *Acta Juridica* 14.
[12] Corbett *et al* 39; De Waal and Schoeman-Malan 3; Jamneck *et al* 125.
[13] 1914 AD 503 507.
[14] 1996.

section 25, under ("the property clause").[15] The provision guarantees the right to private property and is inclusive of the rights to dispose of such property during the holder's lifetime, as well as at his or her death.[16] The court in the case of *BOE Trust Ltd NNO*,[17] even went so far as to endorse the right to freedom of testation. In the same case, the court in fact also reiterated that a person's freedom of testation can be linked to his or her right to dignity.[18] However, while this state of affairs is in fact true in most respects, a person's right to freedom of testation, like any other right, is not absolute, as it may be limited by various prescripts as set out in terms of our common law, legislation and the Constitution.[19]

At common law a person's freedom of testation was curbed, in that a will may not contain provisions that are unlawful, *contra bonos mores,* (against public policy), vague, or impossible.[20] Also, in terms of legislation, certain restrictions are placed on a person's freedom of testation, namely in terms of the Pension Funds Act,[21] the Immovable Property (Removal or Modification of Restrictions) Act,[22] the Trust Property Control Act,[23] and the Maintenance of Surviving Spouses Act.[24] Section 36(1) of the Constitution, namely the limitation clause,[25] also states that all rights are not absolute and may be

[15] This section provides that "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".
[16] Corbett *et al* 47; De Waal and Schoeman-Malan 4.
[17] 2013 (3) SA 236 (SCA) par 243 "Freedom of testation is considered one of the founding principles of the South African Law of testate succession: a South African testator enjoys the freedom to dispose of the assets which form part of his or her estate upon death in any manner(s) he deems fit".
[18] De Waal and Schoeman-Malan 5. *BOE Trust Ltd NNO* 2013 (3) SA 236 (SCA) par 27 where the court states: "Indeed, not to give due recognition to freedom of testation, will to my mind, also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away".
[19] Corbett *et al* 40; De Waal and Schoeman-Malan 4; Jamneck *et al* 126-142.
[20] De Waal and Schoeman-Malan 4; Jamneck *et al* 127.
[21] Act 24 of 1956, excluding benefits from the estate of a person that are payable by a pension fund.
[22] Act 94 of 1965, which empowers a court to remove certain restrictions on property placed by a will over such immovable property.
[23] Act 57 of 1988, which authorizes a court to amend, or terminate a trust.
[24] Act 27 of 1990, denoting that a surviving spouse may have a claim for maintenance against the estate of the deceased spouse in certain circumstances.
[25] S 36 provides as follows: "The rights in the Bill of Rights may only be limited in terms of law of general application to the extent that the limitation reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including – (a) The nature of the right; (b) the importance of the right; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose".

limited by law of general application, subject to stated parameters enumerated in the section.

Over the past number of years the question of a person's freedom of testation was also placed in the spotlight in a number of court cases, where the bounds thereof were overstepped. The cases of *Minister of Education v Syfrets Trust NO*,[26] *BOE Trust Ltd NNO*,[27] and *Emma Smith Educational Fund v University of KwaZulu Natal*,[28] are apt examples where the maker of a will should be very vigilant when executing a will, as the rights of other persons, entities, or groups, must be taken into consideration. In all that has been said thus far regarding the freedom of testation and the principles relating thereto, it is not difficult to conclude that it forms a cornerstone of South African law relating to Law of Succession.

This being the case, one may then be prone to ask the question of its applicability to the Maintenance of Surviving Spouses Act. It was stated previously that the right to freedom of testation gives the maker of the will the fullest possible power to word his or her will as he or she wishes, thereby inserting provisions that may not always be challenged by third parties. In exercising this right, the assumption can therefore be made, that as long as the provisions in a will remained within allowable parameters, such provisions remained in force and effect had to be given thereto.[29] Commensurate to the right to freedom of testation, is the right to nominate beneficiaries in a will, meaning that the maker thereof could benefit whomever he or she wished to in terms of his or her will. Unlike some other countries,[30] South African law does not adhere, nor ascribe to what is known as the principle of "forced

[26] 2006 (4) SA 205 (C), provisions in a charitable trust that were discriminatory against persons based on grounds of colour and religion, which provisions were declared void and amended in terms of section 13 of the Trust Property Control Act 57 of 1988.
[27] 2013 (3) SA 236 (SCA), where the freedom of testation was endorsed, but the provisions of the said will in question, overstepped the bounds of the Bill of Rights and was subsequently overturned.
[28] 2010 (6) SA 518 (SCA), provisions in a charitable trust created in terms of a will were set aside because of favouring one group above another which was declared to be in conflict with public policy.
[29] Fn 13. *Robertson v Robertson's Executors.*
[30] France, Germany, Greece, Mauritius and Portugal are examples of countries who all ascribe to the principle of "forced heirship".

heirship",[31] therefore the disherison of a family member, or even a spouse, was considered as being within the required parameters to freedom of testation.[32] In practice, it is only where a person has however died without leaving a valid will, or where his or her will is partly valid, that a spouse and/or family members would be entitled to inherit in terms of the rules of intestate succession and no part is played by the freedom of testation.[33] In conclusion therefore, as was seen, it is partly based on this premise, that a spouse, if not nominated as a beneficiary in terms of a will, had no right of recourse, since he or she had no "right" to inherit, or even lodge a claim to inherit.[34]

1 1 2 Duty of support

One of the reciprocal consequences of a marriage, is the reciprocal duty of support that spouses owe one another during the subsistence of the marriage,[35] meaning that there was a duty on each spouse for financial support.[36] However, this duty, whatever the extent, usually, but not always, only lasted while the marriage subsisted and was terminated when the marriage came to an end, either by death, or divorce.[37] However, this research will concern itself with the duty of support where the marriage was terminated as a result of the death of one of the spouses and whether such duty in fact existed after death. In terms of common law,[38] a surviving spouse did not as of right, have a claim for maintenance against the estate of the first dying spouse's estate regardless of how adverse the financial consequences of such spouse may have been. This fact was based on the premise, as mentioned previously, that during the subsistence of the marriage, spouses owed each other a reciprocal duty of support, which subsequently came to an

[31] Specific beneficiaries being accorded the "right" to inherit in terms of pre-determined rules of law, normally children and in some cases a spouse fell within this category. The only legislation where these beneficiaries feature is in the Intestate Succession Act 81 of 1987.
[32] Jamneck *et al* 133.
[33] S 1 of the Intestate Succession Act. Prescribes who and in what circumstances beneficiaries will inherit, where no will was left or where a will was left, but is only partially valid.
[34] *Glazer v Glazer* 1963 (4) All SA 422 (A).
[35] Halho *South African Law of Husband and Wife* (1985) 134; Boberg *Law of Persons and Family* (1999) 235; Sinclair assisted by Heaton *Law of Marriage* (1996) 442; s23 of the Matrimonial Property Act.
[36] S 23 of the Marriage Act 88 of 1984.
[37] Boberg 235 and 236.
[38] Halho 327 fn 16.

end as and when the marriage terminated, either by death, or divorce.[39] The reasoning for this could be attributed to the fact that at common law, most marriages were concluded in community of property and each spouse anyway owned an undivided half share in the assets forming part of such estate. [40]

It was therefore accepted as trite, that the surviving spouse was not in need of support after the death of the first dying spouse and that such spouse had to make good with what was received out of the marriage.[41] The disallowance of support was in fact reiterated in *Glazer v Glazer*,[42] which dealt with a maintenance claim by the surviving spouse married out of community of property. As the spouse, Mrs Glazer, was not nominated in terms of the will as a beneficiary, she attempted to lodge a claim for maintenance against the estate of the late Mr Glazer on account of her being indigent. The court refused to find in her favour and based on Roman Dutch Law authority, came to the conclusion on appeal, that the merits for a maintenance claim had not been proven, no right existed for post-death support and her appeal was dismissed.[43] It was therefore accepted as a "given" that no duty of support existed against the estate of the first dying spouse, regardless of the fact that the surviving spouse may have been left in an adverse position as far as finances were concerned.

Also in 1991, shortly after promulgation of the Maintenance of Surviving Spouses Act, the stance taken in the *Glazer* case, was again confirmed in *Hodges v Coubrough NO*.[44] Although this case actually dealt with maintenance in terms of a divorce order, the court took the same view as in the *Glazer* case, that no obligation for maintenance could be imputed upon the estate of the first dying spouse. Consequently, the non-recognition, or disallowance of support for a surviving spouse continued until the legislature finally intervened and promulgated the Maintenance of Surviving Spouses

[39] Halho 327 and 352.
[40] Halho 327 fn 16; Sonnekus 1990 *TSAR* 491.
[41] Sonnekus 1990 *TSAR* 491.
[42] 1963 (4) All SA 422 (A).
[43] *Glazer* 52D-52E.
[44] 1991 (3) SA 58D 62J-63A, where Didcott J stated as follows: " The duty of support which each spouse owed to the other, and consequently the liability for maintenance that depended on and gave effect to the duty, were incidents of their marital relationship. The termination of the relationship by either death or divorce left the duty with no remaining basis and brought it in turn to an end".

Act, thereby putting an end to an unfettered freedom of testation and allowing the surviving spouse a claim against if circumstances warranted a claim.

1 1 3 Promulgation of the Act

Due to the above state of affairs and the effects thereof, an argument was made for legislative intervention to remedy the financial position that a surviving spouse was left in at the death of the first dying spouse.[45] In 1969, an attempt was made to remedy the situation in the form of a draft Family Maintenance Bill,[46] with the idea of allowing a dependant to lodge a claim against the deceased estate for maintenance. The Family Maintenance Bill, was based on the same premises as the English equivalent at that time,[47] and if enacted would have made provision for the following: [48]

- Empowering the executor of a deceased estate to award maintenance out of the deceased estate to dependents, (surviving spouses, divorced spouses where maintenance was awarded in terms of a court order, minor children, siblings and major children and siblings not being able to take care of themselves).

- The decision of the executor for granting or refusing a claim would be subject to appeal, first to the master and then to the court.

- An application would have had to be made within 2 months of the appointment of the executor.

- Provision was made for the calculation and manner of payment of maintenance.

[45] Boberg 273 fn 19.
[46] Corbett *et al* 44; Boberg 273 n 20.
[47] Halho 327 n 16; *"The Inheritance (Provision for Family and Maintenance) Act of 1975".*
[48] Boberg 273 fn 20.

The proposal was however, rejected as the Select Committee set up to consider the proposal, saw no need for it,[49] and if promulgated, would be too intrusive on the freedom of testation.[50]

A further attempt was however again made in 1984, where the Law Reform Commission was tasked with an investigation to reintroduce a legitimate portion or maintenance for surviving spouses, in the form of a Matrimonial Property Bill.[51] The Bill would have granted the court powers to award an "equitable portion" of a deceased estate to the surviving spouse, (usually not exceeding a child's portion or a quarter of the estate, whichever is the greater).[52] In terms of this new Bill, more focus would be placed on taking care of the surviving spouse rather than other family members.[53] The proposal was however again rejected on the basis of intruding upon the right to freedom of testation and that it would give the surviving spouse more of a right to maintenance to the detriment of family members.[54] As a counter-measure, in 1986 and 1987, the South African Law Commission produced a Working Paper 13,[55] which made recommendations that a claim be given to a surviving spouse against the estate of the deceased estate by operation of law.[56]

Following this endeavour, the Maintenance of Surviving Spouses Act was eventually promulgated and came into operation on 1 July 1990. It can be concluded that the South African legislature has since made a significant inroad into the allowance of a claim for maintenance against the estate of the first dying spouse by the survivor. The Act has further been described as a profound, yet acceptable limitation on a married person's right to freedom of testation.[57] In what follows will be an investigation of a number of salient factors relating to the accessibility to maintenance in terms of the Maintenance of Surviving Spouses Act, against the estate of the first dying

[49] Corbett *et al* 44.
[50] Lehmann 2014 *Acta Juridica* 14.
[51] Lehmann 2014 *Acta Juridica* 14-15.
[52] Corbett *et al* 44.
[53] Lehmann 2014 *Acta Juridica* 15.
[54] Lehmann 2014 *Acta Juridica* 15-16.
[55] The South African Law Commission Project 22 *Review of the Law of Succession*.
[56] Corbett *et al* 44; Boberg 235.
[57] Lehmann 2014 *Acta Juridica* 15; Sonnekus 1990 *TSAR* 491.

spouse. The investigation will bring to the fore certain issues that the Act does not make provision for, as well as certain practical issues as to the determination and handling of a claim which may warrant attention.[58] This research will subsequently also provide a number of recommendations as to how these issues can perhaps be addressed, to ensure that a balance be struck between the surviving spouse for maintenance needs and the heirs or legatees whose inheritances could be at stake.[59]

1 2 Problem statement

History has shown that a surviving spouse had no right to a claim for maintenance from his or her spouse's estate upon death, regardless of how dire such spouse's financial position may have been for such spouse. The Maintenance of Surviving Spouses Act has in turn provided a certain measure of relief in this regard, in that a surviving spouse now has a right to make a claim for maintenance against the estate of the first dying spouse in certain circumstances. Be that as it may, an important question that needs to be asked at the outset is, can it be said that the Act has indeed achieved the aim and purpose that the legislator had endeavored it would? It would appear from reported cases, that our courts have not yet fully reached consensus as to the implementation of the provisions of the Act with regards to the determination of a claim.[60] This is evident from different decisions based on similar facts, which could pose problems going forward, as little certainty has thus far been created in this regard. To highlight some of the practical issues that have been experienced, two prominent cases will be investigated in an attempt to illicit possible solutions.[61]

Secondly, the Act fails to provide for apt definitions for the concept of what a "spouse", or "marriage" denotes. The problem in this regard as will be seen, is that if taken in the context of when the Act was promulgated, the only spouses who would have a claim for maintenance, would be those whose marriages

[58] See ch 2 and 3.
[59] See ch 5.
[60] See ch 3.
[61] *Oshry NO v Feldman* 2010 (6) SA 19 (SCA); *Friedrich v Smit* 2017 (4) SA 144 (SCA).

were concluded in terms of the Marriage Act.[62] However, since the advent of the Constitution, the meaning of the concept(s) “spouse” and “marriage” in the South African context have developed into a much broader realm, especially when based on different cultures and traditions in the country.[63]

A third issue relates to the role of the executor once a claim has been instituted.[64] The executor in this regard, derives his or her powers from the Administration of Estates Act,[65] as well as in the Maintenance of Surviving Spouses Act and as will be seen are mere guidelines and if not adhered to, are of no substance.

1 3 Research question(s)

In the evaluation of the research problem stated above, this research will focus on addressing and evaluating the following key questions:

1 3 1 Are the concepts “spouse” and “marriage” as they currently appear in the Act, acceptable and in line with Constitutional principles? What about circumstances where the survivor is involved in a same sex relationship, a heterosexual co-habitation relationship, customary marriage, or Muslim and Hindu marriage?[66]

1 3 2 What are the factors that must be taken into consideration for the determination of a claim and how are these to be interpreted?[67]

1 3 3 What role does the executor play in the determination of a claim and how is the claim supposed to be settled?[68]

[62] Act 25 of 1961.
[63] See ch 2.
[64] See ch 3.
[65] Act 66 of 1965.
[66] See ch 2.
[67] See ch 3.
[68] See ch 3.

1 4 Aim and value of the study

The primary aim and value of this study will be to highlight certain issues as indicated in the research questions and to that end, seek to put measures in place to attain the best possible solution as to how maintenance claims can be dealt with in practice.[69] The secondary aim is to perhaps argue for possible amendments to the Act to bring the operation, as well as what the Act aims to achieve, in line with what can be termed as the "best" solution to all parties affected by a claim.[70]

1 5 Research methodology

The research methodology for this dissertation will be conducted by means of case law, handbooks and journal articles dealing with the subject matter. Also, a short comparative study as to how maintenance for surviving spouses is dealt with in other international jurisdictions of law, namely the Netherlands and the United Kingdom.[71]

1 6 Structure/Chapter outline

As the Maintenance of Surviving Spouses Act fails to define what a "spouse" is, chapter 2 will investigate the history and development from a common law perspective leading up to the promulgation of the Constitution and beyond. A number of court decisions will be outlined to evaluate the different meanings of what a "spouse" and "marriage" denotes and the qualifications thereof. In particular, attention will be placed on Customary marriages, Muslim, Hindu and same-sex relationships, as well as heterosexual relationships in ascertaining if these "spouses" are eligible to claim in terms of the Act.[72]

Chapter 3 will investigate the eligibility of a claim in terms of section 2, read with section 3 of the Act, relating to the factors for the determination of

[69] See ch 3
[70] See ch 3.
[71] See ch 4.
[72] See ch 2.

maintenance needs. This chapter will focus on two prominent cases, namely, *Oshry v Feldman*, [73] as well as *Friedrich v Smit*, [74] which dealt with the very essence as to the eligibility of a claim[75] and the criticism relating thereto by Sonnekus.[76] This chapter further deals with the role of the executor in instances where a claim is lodged against the estate of the first dying spouse and how the executor is expected to deal with a claim. Matters incidental hereto, are the powers of the executor in terms of section 2(d) of the Maintenance of Surviving Spouses Act, as well as in terms of sections 32 and 33 of the Administration of Estates Act.[77]

Focus in chapter 4 will be placed on the prescripts of Dutch and English law respectively relating to maintenance for surviving spouses and partners and how this aspect is dealt with in terms of these jurisdictions.[78] [79] The reason for choosing Dutch and English Law, is that the approach followed by these jurisdictions are far more comprehensive, when compared to the Maintenance of Surviving Spouses Act.

After discussion of the above, it will be seen that there are a number of issues in the Maintenance of Surviving Spouses Act that may require attention, or change and in chapter 5 a number of recommendations will be put to the fore, which could possibly provide a more succinct solution to protect all parties concerned.

[73] 2010 (6) SA 19 (SCA).
[74] 2017 (4) SA 144 (SCA).
[75] Sonnekus "Verlengde onderhoudsaanspraak vir langslewende gade geen onbedagte meevaller vir erfgename van aanspraakmaker nie." 2010 *TSAR* 4.
[76] Sonnekus "Verlengde onderhoudsaanspraak van die langslewende gade is geen vrypas tot ongegronde baattrekking nie en dus is skadevergoeding gepas" 2017 *TSAR* 891.
[77] Act 66 of 1965.
[78] *Dutch Civil Code.*
[79] *Inheritance (Provision for Family and Dependents)* Act 1975.

Chapter 2: An analysis of "who" may claim in terms of the Act

2 1 Introduction

In essence, section 2 of the Maintenance for Surviving Spouses Act is prescriptive as to "who" is eligible to lodge a maintenance claim against the estate of the first dying spouse.[80] Eligibility and accessibility in this regard denotes that there must have been a valid marriage and only if the said marriage was dissolved by death, after the promulgation of the Act, would the surviving spouse have a right to lodge a claim for maintenance, however, the concept of "marriage" is not defined. The Maintenance of Surviving Spouse Act also makes a number of references to the word "spouse", but has however, also failed in providing an apt definition as to what this concept denotes. In this chapter an exposition will be given as to the meaning of these concepts and will be investigated on the basis of before and after the advent of the Constitution. As will be seen in the era after the advent of the Constitution, there is a marked difference as to what the concepts of "spouse" and "marriage" denote as these have been given much wider meanings, as opposed to the rigid and narrow prescripts of the common law and the Marriage Act alike.

2 2 Pre-Constitutional marital relationships

As a point of departure, in early Roman law, marriage was defined as *"viri et mulieris coniunctio individuam consuetudiem vitae continens".*[81] Other definitions include, a marriage being a "legally recognized union between a man and a woman to the exclusion of all other persons."[82] Clark,[83] describes a marriage as "a union of one man and one woman who mutually agree to live together as spouses until the marriage is dissolved by the death of one of them or as otherwise provided by law". In light of these definitions, it was trite

[80] S 2 provides as follows: "If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until death or remarriage in so far as he is not able to provide therefor from own means and earnings."
[81] Sinclair 183 n 2 "A union of a man and a woman entailing an indivisible community of life: Inst 1.9.1".
[82] Cronje *et al The South African Law of Persons and Family Law* (1990) 149.
[83] Clark *Family Law Service* (2011) A3.

that in order for a valid marriage to exist, the parties thereto were limited to a marital relationship of opposite-sex partners, to the exclusion of all others. Further provisions for a valid marriage in terms of the Marriage Act, are that marriages have to be solemnized by a duly appointed marriage officer.[84] After the ceremony, the marriage register must be completed and a copy of the register must be submitted to the relevant governmental authority.[85] In terms of the Matrimonial Property Act,[86] and the Divorce Act,[87] particular reference is also made to connotations of "husband and wife",[88] having the effect that these Acts were based on the premise of a marriage being solemnized between opposite sex partners. The question that requires answering in this regard is, "who" may then be eligible to lodge a claim in terms of the Maintenance of Surviving Spouses Act. From what has been said, it may be concluded, that if read in context of when the Act was promulgated, the only spouses who would be eligible to claim maintenance, would be those married in terms of the Marriage Act. Any other so-called "spouse" would not be afforded the same recognition or protection. However, as will be seen,[89] these prescripts are no longer viable or acceptable, as they are far too narrow and rigid and only cater for a certain segment of the population of South Africa, which is especially significant when viewed from a Constitutional viewpoint.

2 3 Post Constitutional marital relationships

With the advent of the Constitution, law in general, as well as the application thereof, have undergone major changes and the main reason for this can be attributed to the supremacy of the Constitution.[90] The effect thereof is that any law as it stands, as well as any law still to be enacted, will be subject to the

[84] S 3 provides – stipulating who may act as marriage officers; s11 – prescriptive nature that a marriage must be solemnized by marriage officer.
[85] S 29A(1) and S29A(2) of the Marriage Act. After the marriage a copy of the marriage certificate must be submitted to the Department of Home Affairs to effectively register the marriage.
[86] Act 88 of 1984.
[87] Act 70 of 1979. S 4(2)(a) dealing with the irretrievable breakdown of the marriage, although referring to "parties" there is reference to living together as "husband and wife."
[88] S 1 "joint estate" meaning the joint estate of a husband and wife who are married in community of property"; s11 and s12 dealing with the abolition of marital power of the husband over his wife; s21(1) dealing with a court application for the change of the couples matrimonial system, reference is made to the husband and wife applying;
[89] See ch 3.
[90] S 2 of the Constitution, "This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

scrutiny of the Constitution and if it is found not conform with the spirit and values the Constitution opines, it will be struck down.

Secondly and equally important in this regard, is Chapter 2 of the Constitution, namely the Bill of Rights. These rights are fundamental in nature and are accorded to each and every individual regardless of who they are, or what their stature, or beliefs are. Proof hereof, as will be seen, has been felt in the law pertaining to succession, marriages and the patrimonial consequences of each of these, alike.[91] However, for the sake of this part of the research, focus will be placed on the term "marriage" and what it denotes to be a "spouse" for the purpose of accessibility to a claim for maintenance in terms of the Maintenance of Surviving Spouses Act.

At the outset, as was stated previously the Act does not define what the terms "spouse" and "marriage" denote and as will be seen, are quite different when based upon constitutional principles. The reason for this is attributable to the fact that the scope thereof is widened in order to fit in with the values the Constitution opines. South Africa is a diverse society which is made up of different races, each having their own customs and traditions, which are practiced and accepted within their own communities. The law relating to marriage and the consequences thereof falling within the ambit of these customs and traditions, are no exception to the rule, when seen in light of "who" is eligible to lodge a claim in terms of the Maintenance of Surviving Spouses Act. To alleviate the misconceptions of what "spouses" or "marriage" denotes, the following prominent cases will be assessed to see how the courts have dealt with the matter, namely*, Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality and thers v Minister of Home Affairs,*[92] *Gory v Kolver (Starke and Others Intervening),*[93] *Laubscher v Duplan,*[94] *Daniels v Campbell,*[95] *Hassam v Jacobs,*[96] *Govender v Ragavayah,*[97] *Volks NO v Robinson*[98] and *Kambule v The Master.*[99]

[91] In this chapter the effect of the Bill of Rights will be seen, where the rights therein have been relied upon to validate what it denotes to be a spouse for purposes of the Maintenance of Surviving Spouses Act, as well as for the purpose of intestate succession.
[92] 2006 (1) SA 524 (CC).
[93] 2007 (4) SA 97 (CC).
[94] 2017 (2) SA 264 (CC).

These decisions form the basis and authority for the provisions of the Maintenance of Surviving Spouses Act, when confronted with the question as to "who" may be eligible to claim maintenance as a "spouse" in terms of the Act. These decisions also serve as proof as to how far the courts are willing to go to uphold the spirit and purport of the Constitution and to uphold and give recognition of the rights enshrined in the Bill of Rights, in that every person should be treated equally and fairly within the constraints of the law.

2 3 1 Same-sex relationships

It was stated previously that in terms of common law and subsequently the Marriage Act, that a marriage was valid only if solemnized between "one man and one woman" and any deviation from this prescript was considered void, non-recognized and was not afforded any protection as far as patrimonial consequences of a "marriage" were concerned. However, as will be seen, this definition is too narrow and prescriptive in that it does not ascribe to the spirit and values of the Constitution.

The concept of "one man and one woman" was for the first time brought under scrutiny, when the constitutionality thereof was tested in the case of *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality and Others v Minister of Home Affairs.*[100] The facts of the case in short were based on the fact that the applicants, Miss Mariè Adriaana Fourie and Miss Celia Johanna Bonthuys, who were partners in a same-sex relationship for more than a decade, had purported to solemnize and register their marriage, to make it official. When they approached the high court,[101] their aim was simply to obtain a declaratory order to recognize their marriage and to oblige the Department of Home Affairs to register the said marriage.

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[95] 2004 (5) SA 331 (CC).
[96] 2009 (11) BCLR 1148 (CC).
[97] [2009] (1) All SA 371 (D).
[98] 2005 (5) BCLR 446 (CC).
[99] 2007 (3) SA 403 (E).
[100] 2006 (1) SA 524 (CC).
[101] *Fourie and Another v Minister van Buitelandse Sake and Another (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (5) SA 301 (CC).

They were however refused relief, on the basis that their proposed marriage fell outside the ambit of what a marriage denotes in terms of the Marriage Act.[102] In an attempt to obtain the relief sought, they subsequently vetted their plight to the Supreme Court of Appeal and subsequently to the Constitutional Court. Prevalent from the facts in this case, as the applicants stated, it was not their intention to undermine the common law, nor the Marriage Act, but rather to develop "it" as the Constitution opines and allow that their proposed marriage be recognized and formally registered.

The Constitutional Court however, decided the matter in their favour, but based its finding on different grounds. The Constitutional Court decided that the common law and Marriage Act prescripts of "one man and one woman", violated the applicant's rights to sexual orientation, equality, dignity and privacy and afforded the applicants the right to marry one another and the marriage be formally registered.[103] The court furthermore suspended its decision giving Parliament a year from the date of the judgment to rectify the non-recognition of same-sex marriages and to enact legislation to afford the required recognition. A year later the matter was however rectified with the enactment of the Civil Union Act,[104] which came into operation on 30 November 2006. The Civil Union Act made provision for same-sex partners to formulate and enter into a "marriage" within the prescripts of the said Act, read in conjunction to the Marriage Act.

In *Gory v Kolver (Starke and Others Intervening),*[105] the issue with regards to same-sex partners was again brought before the court. However, in this case, the court had to decide whether a same-sex partner should be able to inherit in terms of the Intestate Succession Act.[106]

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[102] S 30 of the Marriage Act where the marital formula reads as follows: "Do you A.B., declare that as far as you know there is no legal impediment to your proposed marriage with C.D. here present, and that you call all present to witness that you take C.D. as your lawful wife (or husband)?" As they were both women, they did not fall within the definitional term of "one man and one woman" as described in s 30.
[103] *Fourie* case, 2006 (1) SA 524 (CC) para 34.
[104] Act 17 of 2006.
[105] 2007 (4) SA 97 (CC).
[106] Act 81 of 1987.

The facts in the matter were based on the fact that the applicant, Mr Mark Gory and his deceased same-sex partner, Mr Henry Brookes were involved in a long term permanent relationship and Mr Brookes subsequently died without a will. As Mr Brookes was not survived by a spouse, the applicant wished to inherit in terms of the Intestate Succession Act, but was refused this as he could not be seen to be classed as a "spouse" in the strict sense of the word.

The legal question before the court was to decide whether a same-sex partner in a permanent life partnership could inherit under the Intestate Succession Act. The court's finding was based on the fact that to exclude a same-sex partner under the Intestate Succession Act, amounted to unfair discrimination based on grounds of sexual orientation and marriage as emanated in the Bill of Rights.[107] Accordingly the court decided that same-sex partners who had undertaken a reciprocal duty of support during their relationship, should be afforded the required protection and be allowed to inherit.[108] The Constitutional Court ordered a "reading in" of the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support", after the word "spouse" wherever it appears in section 1(1) of the Intestate Succession Act.

In the case of *Laubscher v Duplan*,[109] the facts were virtually the same as the *Gory* case, save for the fact that the *Gory* case was decided before the promulgation of the Civil Union Act, while the *Laubscher* case afterwards. Also, in the *Laubscher* case the partnership was not registered in terms of the Civil Union Act, as is required by section 12 of the said Act. The question before the court in this regard was whether an unregistered partner in a same-sex relationship could inherit in terms of the Law of Intestate Succession, where there is no surviving spouse.[110]

The court *a quo* found in favour of the applicant, and that the right did however exist to inherit in terms of the Intestate Succession Act. An appeal

[107] S 9(3) of the Constitution.
[108] *Gory* para 19.
[109] 2017 (2) SA 264 (CC).
[110] *Laubscher* para 2.

was made to the Constitutional Court on the basis that the High Court erred in making the decision that it did, as the Civil Union Act made the registration of same-sex relationships mandatory, if recognition thereof was required. The Constitutional Court however, dismissed the appeal and contended that the *Gory* case was still seen as authoritative and any deviation therefrom must be cured by the legislature.[111] It would appear from this case, that even though a same-sex relationship is not registered, it could give rise to a surviving partner being given the right to inherit even though the relationship remains unregistered, as long as the partners had undertaken reciprocal duties of support.

More specifically and for the purpose of recognition of same-sex relationships and a claim for maintenance against the estate of the deceased partner, the court was called upon in *Ripoll-Dausa v Middleton NO,*[112] to decide on this aspect. The basis of the application was for a declaratory order based on the fact that the word "survivor" as it stands in Maintenance of Surviving Spouses Act, is inconsistent with the Constitution and invalid. The court was in turn further called upon to validate the insertion of the words, "or the surviving partner in a permanent same-sex life partnership dissolved by death" after the words, "the surviving spouse in a marriage dissolved by death" as they appear in section 1 of the Act. Although the court reserved its decision for the want of further evidence, it would appear that in subsequent cases it would not be difficult to make an appropriate finding in favour of so-called same-sex partnerships if the facts of the case warrant a claim for maintenance. Also, the probabilities are good that when applied to the Maintenance of Surviving Spouses Act, the surviving partner would be able to put forth a good case to be seen as a "spouse". Section 13 of the Civil Union Act in this regard states that in any law relating to the concept "spouse" in any piece of legislation, will include a partner in a same-sex relationship.

[111] *Laubscher* para 55.
[112] 2005 (3) SA 141 (C).

2 3 2 Muslim and Hindu marriages

For the sake of convenience, Muslim and Hindu marriages will be dealt with as part of this research a single unit, as both have in the same way not be recognized as valid marriages.[113] This is so because they are unique in character and are categorized as "religious marriages" and do not conform to the strict prescripts of the common law and the Marriage Act.[114] A "religious marriage" is described as a marriage entered into between persons based on their "religion", but that they need not comply with the solemnization and registration as prescribed in the Marriage Act.[115] The effect of this is that although Muslim and Hindu marriages were accepted in terms of the rules pertaining to "their own" customs and traditions, they were subsequently not recognized as valid marriages in terms of the Marriage Act.[116] Another reason put forth, is that these marriages are polygamous or potentially polygamous and as such polygamy was classed as being in conflict with the prescripts of public policy.[117]

Marriages conducted by Muslim and Hindu rites were also not solemnized by a recognized marriage officer as prescribed in terms of section 3 of the Marriage Act, nor was the said marriage registered in terms of the said Act.[118] As a matter of fact, there is authority that South African courts shared the same sentiment when it comes to the recognition of Muslim and Hindu marriages. In the case of *Vather v Seedat*,[119] the court classed a Hindu marriage as a putative marriage,[120] and in *Ismail v Ismail*,[121] the court held that a Muslim marriage was void from the outset, due to its polygamous nature. The effect of this classification albeit unfair, was the accepted norm in terms of strict pre-constitutional law relating to marriage and was accepted as

[113] Halho 29; Boberg 165; Sinclair 164.
[114] Boberg 166; Sinclair 165.
[115] Robinson *et al Introduction to South African Family Law* (2012) 40; see fn 86.
[116] Halho 32; Sinclair 263.
[117] Halho 28-29, where Halho describes a polygamous union as being "fundamentally opposed to our principles and institutions" and lacking the exclusivity of a marriage being between "one man and one woman".
[118] Sinclair 263; Halho 32; fn 86.
[119] 1974 (3) SA 389 (N); Sinclair 264; Halho 32.
[120] A marriage that is voidable due to some impediment. In the case Hindu marriages, due to the fact that they were not solemnised in terms of the Marriage Act and by a marriage officer.
[121] 1983 (1) SA 1006 (A).

trite regardless of its consequences. It is for this reason, why in terms of the Maintenance of Surviving Spouses Act, a "spouse" married by Muslim or Hindu rites could not be afforded the same rights to claim maintenance against the estate of the first dying "spouse", as was allowed for spouses married in terms of the Marriage Act. However, since the advent of the Constitution, this state of affairs was challenged in that questions were raised as to the recognition of Muslim and Hindu "spouses". In doing so, Muslim and Hindu "spouses" were now accorded the same protection as afforded to couples married in terms of the Marriage Act and subsequently making it accessible to lodge a claim for maintenance in terms of the Maintenance of Surviving Spouses Act.

In *Daniels v Campbell*,[122] Mrs Daniels was married to Mr Daniels who in the meantime had died without leaving a valid will. The parties were married in terms of Muslim rites, although monogamous in nature, was not solemnized by a duly appointed marriage officer in terms of section 11 of the Marriage Act.[123] The Master of the High Court subsequently refused to recognize Mrs Daniels as a "spouse" in terms of section 1(4) of the Intestate Succession Act, nor as a "survivor" in terms of section 1 of the Maintenance of Surviving Spouses Act, as she was married in terms of Muslim rites.[124] She took the matter to the high court to apply for an order declaring that she be recognized as a "spouse" and "survivor", or in the alternative that the said provisions of the Acts in question, be declared unconstitutional, as she was being unfairly discriminated against on account of being married in by Muslim rites.

The court subsequently found in her favour in that the non-recognition violated her rights to equality in that the law failed to accommodate her beliefs and practices and declared the said provisions unconstitutional. The court subsequently directed that a "new" paragraph (g) be included under section 1(4) of the Intestate Succession Act, containing the words "spouse" shall include a husband or wife married in accordance with Muslim rites in a *de*

[122] 2004 (5) SA 331 (CC).
[123] S 3 of the Marriage Act defines who may be designated as marriage officers, while s 11 of the same Act, states that marriages shall be invalid if not solemnized by duly appointed marriage officers.
[124] *Daniels* para 8.

facto monogamous union".[125] As for the definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act, the court directed that after the words "dissolved by death", the following words be read-in, "and includes the surviving husband of wife of a *de facto* monogamous union solemnized in accordance with Muslim rites".[126] Afraid that she would not end up with the desired relief, Mrs Daniels approached the Constitutional Court for confirmation of the high court's order. The Constitutional Court however, set aside the high court's decision and made an order to the effect that the words "spouse" and "survivor" be given their ordinary meaning and which according to the court, includes parties to a *de facto* monogamous Muslim marriage.[127] Furthermore, that the word "spouse" in the Intestate Succession Act and the word "survivor" in the Maintenance of Surviving Spouses Act, includes the surviving partner to a *de facto* monogamous Muslim marriage.[128]

In *Hassam v Jacobs*,[129] Mrs Fatima Hassam, the applicant in the case, was married to Mr Hassam by Muslim rites, who in turn also married to a second wife, Mrs Miriam Hassam without the knowledge of the first wife, also by Muslim rites. According to the death certificate it showed that Mr Hassam was "never married". The applicant initially approached the high court for an order declaring her a spouse in the marriage for the purpose inheriting in terms of section 1(4)(f) of the Intestate Succession Act and to enable her to lodge a claim for maintenance in terms of the Maintenance of Surviving Spouses Act, as a "survivor".

The applicant further challenged the validity of the said Acts in that she was unfairly discriminated against in terms of the Acts in question in that it should not only provide for spouses in a monogamous Muslim marriage, but also polygamous spouses as well. Following the decision in the *Daniels* case, the court *a quo,*[130] decided in her favour in that it declared the challenged provisions of the Intestate Succession Act and the Maintenance of Surviving

[125] *Daniels v Campbell NO and Others* 2003 (9) BCLR 969 (C) 1005A-E.
[126] *Daniels* paras 1005A-E.
[127] *Daniels* paras 19, 21, 30 and 57.
[128] *Daniels* para 40.
[129] 2009 (11) BCLR 1148 (CC).
[130] Reported as *Hassam v Jacobs NO and Others* [2008] 5 All SA 350 (C).

Spouses Act, being inconsistent with the Constitution and subsequently ordered that the "singular" form of spouse be replaced as "plural".[131]

The matter was subsequently referred to the Constitutional Court for confirmation, where the said court dealt with three issues in reaching its decision.[132] Applying the principles in the well-known *Harksen* case,[133] which dealt so succinctly with the provisions of equality in matters relating to constitutional issues, the court found that there was in fact a differentiation which amounted to unfair discrimination between monogamous and polygamous Muslim unions. The court held further that such differentiation was in fact unfair, in that it was unacceptable and unjust to grant a widow protection in a monogamous Muslim union, while at the same time excluding widows of polygamous Muslim unions.[134] As for a cure to the defect, the Constitutional Court however, found it incapable of applying the premise in the *Daniels* case, by simply giving the word "spouses" its ordinary meaning, as the plural form, would amount to a significant departure from the ordinary, commonly understood meaning of the word.[135] The court however, opted that the word "spouses" be read-in, making it possible for more than one spouse in a *de facto* Muslim marriage to inherit intestate and be eligible for a maintenance claim in terms of the Maintenance of Surviving Spouses Act.

In *Govender v Ragavayah*,[136] the applicant, Mrs Govender, sought a declaratory order based on the fact that she was a "spouse" in a marriage by Hindu rites and that she be declared as such in terms of the Intestate Succession Act.[137] Pertinent to this case was that the union between the applicant and the deceased was a monogamous one in accordance with the rites, traditions and customs of the Hindu religion. The respondents

[131] *Hassam* para 23 of the high court decision.
[132] *Hassam* para 20 a)–c) of the Constitutional Court decision. Whether the exclusion of spouses polygamous Muslim marriages is a violation of section 9(3) of the Constitution; if there is a violation, can the word "spouse" be read to include spouse in a polygynous Muslim marriage; if not, what would the appropriate relief be.
[133] *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC), the landmark decision dealing with the principles of discrimination *per se* and if such discrimination is in fact unfair in any given set of circumstances.
[134] *Hassam* para 39 of the Constitutional Court decision.
[135] *Hassam* para 48 of the Constitutional Court decision.
[136] [2009] (1) All SA 371 (D).
[137] *Govender* para 1.

themselves admitted that all the required rites, traditions and customs in terms of the Hindu religion had been adhered to.[138]

Also, it was noted that the couple had respected the vows that they had taken to remain faithful and committed to each other in a monogamous union, but the union was however, not registered in terms of the Marriage Act.[139] The result thereof was that the marriage was not recognized, nor was the applicant considered a "spouse" in terms of the Intestate Succession Act and subsequently she could not inherit. For the sake of clarity, the applicant relied on the decision reached in the *Daniels* case,[140] while the respondents relied on the premise that the union was not registered in terms of the Marriage Act and ought not to be valid.[141] It was argued by the applicant that in terms of the tenets of the Hindu tradition, registration of the union was not a requirement for validity thereof.[142] On the other hand, if so required, it would in all respects be discriminatory especially in light of the decision of the *Daniels* case, where the union was not registered. Reliance was also placed on the provisions contained in the Recognition of Customary Marriages Act, where failure to register the marriage would not amount to invalidity.[143]

The court in this regard also applied the test laid down in the *Harksen* case, when it dealt with the equality issue *in casu.*[144] The court reiterated, that although the test dealt with section 8 of the Interim Constitution to test for differentiation, there was no reason why it could not find application in terms of section 9 of the 1996 Constitution, "notwithstanding certain differences in the wording of the provisions".[145] It was also submitted, that just as in the *Daniels* case, the word "spouse" in a Hindu union should also be given its literal or ordinary meaning. Lastly, it was argued on behalf of the applicant that failure to interpret the word "spouse" in terms of the Intestate Succession Act to include persons in Hindu unions, would result in an infringement of

[138] *Govender* para 12.
[139] *Govender* para 12.
[140] *Govender* para 17.
[141] *Govender* para 19.
[142] *Govender* paras 28 and 29.
[143] *Govender* para 30.
[144] Fn 134.
[145] *Govender* para 33.

sections 15, 30 and 31 of the Constitution.[146] The court, after considering all the facts, held that the union of the applicant and the deceased had at all the essential elements of a South African marriage, which is a voluntarily union for life of one man and one woman while it lasted.[147] The court went on to remark that although the marriage by Hindu rites is invalid, as it is not registered in terms of South African law, the court held that the validity of the marriage is not required for the relief that the applicant seeks in this matter.[148] The court therefore declared that for the purposes of section 1 of the Intestate Succession Act, the applicant be declared as a "spouse" and that she could subsequently inherit the estate.

2 3 3 Heterosexual co-habitation relationships

Uncanny to popular belief, in South Africa there is no such thing a "common law spouse" or a "common law marriage" based on sound legal principles.[149] Although couples choose to live together as such, they have no legal footing to stand on,[150] regardless of their beliefs, or the length of time they have been together, they acquire no protection by law as far their patrimony is concerned, should the relationship end for some unforeseen reason.[151] Halho, contends further, that regardless of the time the relationship endures, there is no reciprocal duty of support between the couple, they acquire no rights as far as the laws of intestate succession is concerned and children born from the relationship are regarded as illegitimate.[152] On the other hand, partners in these relationships however, could enter into what is known as a "universal partnership agreement", in which they can agree to regulate patrimonial, as well as other aspects of their relationship, thereby making it enforceable

[146] *Govender* para 35. In terms s 15, recognition is given to marriages concluded under any tradition; in terms of s 30, recognition is given to participate in the cultural life of a person's choice; in terms of s 31(1) recognition is given to persons belonging to a cultural, religious or linguistic community to enjoy their culture, practice their religion and use their language.
[147] *Govender* para 42.
[148] *Govender* para 42.
[149] Boberg 36, the term also described as "concubinage" and "connotes the relationship of a man and a woman who live together ostensibly as man and wife, without having gone through a legal ceremony of marriage".
[150] Hahlo 36-37; Himonga and du Bois in *Wille's Principles of South African Law* (2007) 364.
[151] Sinclair 274; Wille's 364; Hahlo 37.
[152] Halho 37.

between each other.[153] For the purpose of this research however, and based on the above premises, of concern here, is whether a surviving partner in a heterosexual co-habitation relationship, may have a claim for maintenance in terms of the Maintenance of Surviving Spouses Act.

In the case of *Robinson and Another v Volks NO and Others,*[154] the court was petitioned to hear a matter where the surviving partner had lodged a claim for maintenance against the estate of the deceased partner in terms of the Maintenance of Surviving Spouses Act. The applicant, Mrs Ethel Robinson, lodged a claim for maintenance against the estate of her late partner, Mr Archie Shandling, with whom she was involved in a long term relationship until his death.[155] Essential to this case, was that the relationship was completely monogamous, the couple lived together in the same home at the time of the deceased's death and they were accepted as a couple by their peers.[156] Also prevalent from the facts is that the deceased had supported the applicant financially and she was registered as a dependent on his medical aid scheme.[157]

Mrs Robinson, on the other hand cared for the deceased through his illness and also purchased household necessaries and groceries.[158] For the sake of completeness, it could be said that the parties considered themselves as permanent life partners bearing reciprocal duties of support and it was based on this assumption that the applicant had lodged the claim.[159] The executor however, refuted the claim on the basis that the applicant was not eligible to claim maintenance as she was not classified as a surviving spouse as stipulated in the Maintenance of Surviving Spouses Act.[160] Mrs Robinson then vetted her plight to the Cape High Court, where she petitioned the court for an

[153] Sinclair 274 opines that cohabiting *per se* does not give rise to automatic rights, but the couple could enter into a contract to regulate their patrimony. In this case the ordinary rules of contract could be invoked.
[154] 2004 (6) SA 288 (C); 2004 (6) BCLR 671 (C).
[155] *Robinson* para 63h.
[156] *Robinson* para 63j.
[157] *Robinson* para 63j.
[158] *Robinson* para 63j.
[159] *Robinson* para 63j.
[160] *Robinson* para 64b-f.

order declaring that her claim be recognized in terms of the Maintenance of Surviving Spouses Act.

Alternatively, she sought an order declaring that the omission of words "and include the surviving partner of the life partnership" after the words "survivor" and "spouse" in section 1 of the Act, be declared unconstitutional and invalid in that her rights in terms of section 9(3) and section 10 of the Constitution were infringed.[161] She further adduced in her application that the unconstitutionality be cured by the addition of the words "and include the surviving partner of the life partnership" after the words "survivor" and "spouse". The court in this regard found in favour of Mrs Robinson and ordered the executor to accept her claim based on the fact that her rights to equality and dignity were infringed by the disallowance of the claim.[162] However, as with any aspect dealing with the unconstitutionality of a piece of legislation,[163] the case was referred to the Constitutional Court for confirmation.

In *Volks NO v Robinson,*[164] the Constitutional Court was approached by the executor of the estate to appeal the Cape High Court's decision, as well as for an order opposing the confirmation of the unconstitutionality as was decided by the court *a quo.* Although the executor abandoned his actions and conceded to the correctness of the Cape High Court's decision, the Constitutional Court had to still consider the constitutionality of the matter.[165]

What is unique in this situation, is the Constitutional Court's about-turn stance that it took in setting aside the finding of the High Court, one would have indeed have expected that the decision would be confirmed. In this regard, the High Court was satisfied that Mrs Robinson had in fact proven that there

[161] S 9(3) of the Constitution states: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, age disability, religion, conscience, belief, culture, language and birth"; s10 of the Constitution states: "Everyone has inherent dignity and the right to have their dignity respected and protected".
[162] *Robinson* para 73a-f.
[163] S 172(2)(a) of the Constitution.
[164] 2005 (5) BCLR 446 (CC).
[165] *Volks* para 26.

was strong a measure of support given to her by the deceased and also that she was entitled to claim maintenance against the estate of Mr Shandling. The majority of the Constitutional Court judges however, viewed the circumstances differently and dismissed the decision. In reaching its decision, the majority,[166] dealt with three prominent issues, namely, whether from the interpretation of the Maintenance of Surviving Spouses Act, Mrs Robinson should be seen as a "surviving spouse" for purpose of claiming maintenance?[167] Secondly, was Mrs Robinson in fact being discriminated against and if so, whether such discrimination was unfair in the circumstances?[168] Lastly, the majority also dealt with the likelihood of whether her rights to dignity were infringed upon as she contended.[169]

On being classed as a "surviving spouse", the majority opined that the meaning of "surviving spouse" should mean and at the same time, be limited to couples in legally recognized marriages either by law or religion[170] and should therefore not be extended to include heterosexual life partners. [171] The majority went on to state that to include heterosexual partners, would be "unduly strained and manifestly inconsistent with the content and structure of the text" and concluded that the Act is incapable of being interpreted to include heterosexual partners.[172]

As for being discriminated against, the court referred to the principles of the *Harksen* case to ascertain whether there was in fact discrimination and if such discrimination was unfair.[173] The majority found that there was a basis for discrimination, in that there was a differentiation between married and

[166] Majority referring to Skweyiya J and Ngobo J with Chaskalson J, Langa DCJ, Moseneke J, van der Westhuizen J and Yacoog J concurring with the judgement of Ngobo J (hereinafter referred to as the majority for the case of *Volks v Robinson*).
[167] *Volks* paras 40-45.
[168] *Volks* paras 46-60.
[169] *Volks* paras 61-62.
[170] *Volks* para 41. The court interprets words "spouse" and "survivor" in the context of when the Maintenance of Surviving Spouses Act was promulgated and came to the conclusion that the legislature did not mean anything other than being married in the strict sense of the word as being recognized by either "law" or "religion".
[171] *Volks* para 42. The court makes reference to the case of *Satchwell v President of South Africa and Another* 2002 (6) SA 1(CC); 2002 (9) BCLR 986 (CC), in that the word spouse must be taken to mean a party to a marriage recognized in law and not be given a wider meaning beyond that.
[172] *Volks* para 45.
[173] Fn 133, for particulars regarding the test for discrimination.

unmarried persons, but it had to then be established if it was in fact unfair.[174] The majority went to great lengths when it described a marriage and referred succinctly to the sanctity thereof and equated marriage as being an important institution in our society having a central and special place, forming an important base for family life.[175] The majority further referred to a marriage as an internationally recognized social institution and because of this, it allows the law to distinguish between married and unmarried persons, thereby according certain benefits to married persons which are not accorded to unmarried persons.[176] The relationship of Mrs Robinson and the deceased, according to the majority, could not be equated to the mentioned principles, as they were free to come and go as they pleased, there were no obligations on the couple, nor any other legal formalities that needed to be adhered to.[177] The majority stated that in the case of heterosexual relationships, there was no duty of support that the couple owed each other, compared to their married counterparts and based on the premises of the Maintenance of Surviving Spouses Act, the duty could be imputed on the deceased estate, as with a married couple.[178] Accordingly, in a marriage there are other obligations and rights that attach to a marital relationship by operation of law, compared to a permanent life partnership, where no such rights or obligations or rights existed.[179] The court therefore concluded that it was not unfair to distinguish between survivors of a marriage and survivors heterosexual life partnerships.[180] As for an infringement to her right to dignity, based on a failure to make provision for persons in permanent heterosexual relationships, the majority however, shared a different sentiment.[181]

According to the majority, Mrs Robinson is not being told that her dignity is worthless when compared to a married person, the court simply says that her relationship is different when it comes to a claim for maintenance.[182] The difference lies in the fact that in a marriage, people are obliged to maintain

[174] *Volks* paras 49-50.
[175] *Volks* para 52.
[176] *Volks* paras 53-54.
[177] *Volks* para 55.
[178] *Volks* para 56.
[179] *Volks* para 56.
[180] *Volks* para 56.
[181] *Volks* para 61.
[182] *Volks* para 62.

each other and this obligation is subsequently imputed on the estate of the deceased spouse, whereas in a permanent life partnership, there is no obligation.[183] In conclusion, the majority dealt with the question of the surviving partner's "vulnerability and economic dependence", especially where it concerns women in relationships where they are normally seen as being weaker.[184] The majority in this regard indicated that their plight would not necessarily be assisted by an extension of the Maintenance of Surviving Spouses Act to heterosexual life partners, nor that they would be unfairly discriminated against, if not taken care of in terms of the Act.[185]

The minority,[186] on the other hand however disagreed with the majority and were of the opinion, that by not confirming Mrs Robinson's claim in terms of the Maintenance of Surviving Spouses Act, it was discriminatory towards her and that such discrimination was in fact unfair.[187] In reaching its decision, the minority took a number of factors into consideration that were prevalent in the relationship between Mrs Robinson and Mr Shandling.[188]

Accordingly, the minority concluded that Mrs Robinson and Mr Shandling had considered themselves permanent life partners in which there was clear that there was mutual support and care for one another.[189] Their reasoning was furthermore based on the premise that where a relationship is "socially and functionally similar to marriage", but are not regulated, or treated in the same manner as a marriage, then discrimination on the grounds of marital status occurs.[190] Based on the facts of the case, the minority considered the relationship of Mrs Robinson and Mr Shandling as being "socially and functionally similar to marriage" and due to the fact that they were not

[183] *Volks* para 62.
[184] *Volks* para 63.
[185] *Volks* para 68.
[186] Minority referring to Sachs J and Mokgoro and O'Regan JJ (hereinafter referred to as the minority for the case of *Volks v Robinson*).
[187] *Volks* para 136.
[188] *Volks* para 104. The minority considered the duration of the relationship, being sixteen years; payment of an allowance to Mrs Robinson to pay for household expenses; declaring Mrs Robinson as a dependent on his medical aid; the undisputed closeness and intimacy of the relationship and the fact that Mrs Robinson nursed Mr Shandling while he was ill.
[189] *Volks* para 104.
[190] *Volks* para 108.

accorded the same treatment and measure of protection, it was considered as *prima facie* discriminatory.[191]

Closely related to the facts unique to this case, was the question of financial vulnerability of the surviving partner, when the other partner was to die, especially where it was established that there was a reciprocal duty of support.[192] The surviving partner, if not financially taken care of by the estate, would be left in a dire financial situation and it is for this reason that such survivor should be taken care of in terms of the Maintenance of Surviving Spouses Act.[193] The minority therefore concluded that where there are no regulations to ensure equitable protection for heterosexual partners, whose relationship was long-standing and where a measure of dependence had been established, the failure to do so is accordingly unfair.[194] The minority further concluded that the discrimination against Mrs Robinson was unfair and it had to establish whether the unfairness was reasonable and justifiable in terms of the limitation clause as per section 36 of the Constitution and held that it was not.[195]

Their reasoning was based on the purpose for enactment of the Maintenance of Surviving Spouses Act, being a remedy to alter common law anomaly with regards to the non-recognition of a maintenance claim against the estate of the first dying spouse.[196] They contended that although the purpose was important, they saw no reason why not to include unmarried heterosexual partners on the same footing as married couples, especially where duties of support have been established and there is financial need. The minority therefore came to the conclusion that not recognizing Mrs Robinson's claim was indeed an unfair discrimination that could not be cured by the limitation clause and subsequently upheld the Cape High Court's decision to grant the

[191] *Volks* para 108.
[192] *Volks* para 133.
[193] *Volks* para 133.
[194] *Volks* para 133.
[195] *Volks* para 136.
[196] *Volks* para 136.

relief sought.[197] However, as the majority had decided differently, the relief could not be given.

In *du Toit v Greyling*,[198] the court was again called upon to make a decision regarding the recognition of a maintenance claim by the surviving partner in a heterosexual partnership. In this case the plaintiff, Miss Martha Louise du Toit and the deceased had lived together for a substantial period and contended that she was fully supported by the deceased and on this basis, she be allowed to claim maintenance against the deceased estate. Her application was further based on the fact that the legislator had failed to enact the Domestic Partnership Bill,[199] which would have afforded her the required protection and subsequent success in her claim.[200] The court however, viewed the matter differently and refused to grant the order to allow the claim.[201] The basis of the court's contention in this regard was that it was bound by the decision reached in the *Volks* case and that it could not be seen to amend the law that was already decided and allow the claim simply because of the failure on the part of the legislator to enact the Domestic Partnership Bill.[202] The court went further to state that the applicant must however take it upon herself to contest the fact that the legislator had in fact failed to promulgate the said Bill, in terms of the powers provided by the Constitution.[203] The claim was subsequently dismissed and in effect the plaintiff was refused the required relief.

Both the *Volks* and *du Toit* decisions, although they don't seem fair, are for now taken as trite, that couples in a heterosexual co-habitation relationship cannot be seen to enjoy the same protection as their married counterparts in

[197] *Volks* paras 143 and 144.
[198] (78173/2014)2016 ZAGPPHC 892.
[199] Domestic Partnership Bill 2008 (GN36GG30663/14-1-2008), making provision for opposite sex partners to have their partnership regulated by legislation.
[200] The Domestic Partnership Bill, if it was promulgated, would have made provision for both registered and unregistered domestic partnerships. Consequently, in both instances it would then have been possible for a surviving partner to make a claim against the deceased partner's estate in terms of the Maintenance of Surviving Spouses Act. In this regard, s18(1)(a) read with s19 would have been applicable to registered partners, whereas s 29(1), would have made it possible for an unregistered partner to make a maintenance claim upon application to court.
[201] *Du Toit* para 1.
[202] *Du Toit* para 17.
[203] *Du Toit* para 22, s 167(4)(e). "Only the Constitutional Court may – decide that Parliament or the President has failed to fulfil a constitutional obligation".

having access to a claim in terms of the Maintenance of Surviving Spouses Act. This being the case, the decision in *Volks* has however been on the receiving end of much criticism.

In *Laubscher v Duplan*,[204] Froneman J, was of opinion that the *Volks* decision was incorrectly decided especially as the circumstances were similar to the *Laubscher* case.[205] He goes on to elaborate that the basis for his criticism is twofold, firstly in that it was incorrect for the court in *Volks* to have avoided the discrimination issue against unmarried heterosexual cohabitants and secondly, for not giving recognition to a factual reciprocal duty of support as portrayed in *Volks*.[206] Smith,[207] on the other hand criticizes the decision in *Volks* on the basis of two premises, namely that the majority in *Volks* based their finding on the "choice argument" and secondly, that there was a lack of recognition for the value which should be ascribed to a factual duty of support.[208] The reasoning for these contentions are firstly, based on the fact that parties have chosen not to marry, cannot be seen as sufficient to disallow them to the right to claim maintenance.[209]

Secondly, he contends that Sachs J was correct, when he made a distinction between a legal duty of support, compared to a factual duty of support. In the case of the former, it is brought about by an official document namely a marriage certificate, while the latter is based on "the existence of an express or tacit duty of support".[210] According to Smith, the latter should also be taken into account to ensure a fair outcome and on this basis should have been the deciding factor. Coetzee Bester and Louw,[211] on the other hand, also base their criticism on the application choice argument as which was the basis of

[204] 2017 (2) SA 264 (CC) para 60.
[205] *Laubscher* para 60.
[206] *Laubscher* para 80.
[207] Smith "Rethinking *Volks v Robinson*: The Implications of Applying a Contextualised Choice Model" to Prospective South African Domestic Partnerships Legislation" 2010 *PER/PELJ* 238
[208] Smith 2010 *PER/PELJ* 13 243 and 247.
[209] Smith 2010 *PER/PELJ* 13 244.
[210] Smith 2010 *PER/PELJ* 13 247.
[211] Coetzee Bester and Louw "Domestic Partners and "The Choice Argument": Quo Vadis?" 2014 *PER/PELJ* 17 (6).

Ngcobo J's decision in the *Volks* case.[212] The authors in this regard are of the opinion, that should the choice argument be applied to heterosexual cohabitants, while at the same time not applied to same-sex partners, then this amounts to an unjustified infringement of their rights to equality.[213]

This line of thinking is especially makes sense if compared to the decision of *Laubscher v Duplan* is considered, where after the promulgation of the Civil Union Act, there was no registration of the union between the applicant and the deceased, yet the applicant was considered eligible as the only intestate heir. Be that as it may, the promulgation of the Civil Union Act,[214] has provided some measure of relief to heterosexual cohabitants, in that their relationships can also be given legal stature. However, in light of the decision of *Laubscher v Duplan* which was decided after the Civil Union Act was promulgated, one can most certainly deduce that it would not be too farfetched to contest the decision reached in *Volks,* but on a different basis.

2 3 4 Customary law marriages

Prior to the Recognition of Customary Marriages Act,[215] customary marriages, like marriages in terms of Muslim and Hindu rites were not recognized as valid in terms of South African Law.[216] Customary marriages, like Muslim and Hindu marriages, were only accepted in terms of the rules pertaining to "their own" custom and tradition and were not recognized as valid marriages in terms of the Marriage Act.[217] Customary marriages are also polygamous or potentially polygamous and as such polygamy was classed as being in conflict with the prescripts of public policy.[218] The result is that "spouses" in customary marriages did not enjoy the same protection that was afforded to

[212] *Volks* paras 91-96. Where the inference is made that should hetrosexual cohabitants choose not to enter into marriage for some or other reason, how can they expect to receive protection that is offered to married couples.
[213] Coetzee Bester and Louw 2014 *PER/PELJ* 17 (6) 2956. The authors are further of opinion that the choice argument should be discarded as it fails firstly, to take into consideration the circumstances in which the choice is made; secondly it fails to respect the autonomy of both partners and thirdly, as there is no way to differentiate between an informed and uninformed choice, it does not take into account whether the choice was made in error or out of ignorance 2952-2957.
[214] Act 17 of 2006.
[215] Act 120 of 1998.
[216] Boberg 162-166; Halho 29; Sinclair 164;
[217] Halho 32; Sinclair 263.
[218] Fn 118.

their married counterparts who were married in terms of the Marriage Act. This in turn had the effect that such "spouses" were also often left in an adverse position in matters relating to the patrimonial consequences of the "marriage". Turning to a claim for maintenance in terms of the Maintenance of Surviving Spouses Act, spouses in customary marriages would not have been able to lodge a claim as their unions were not recognized as valid marriages due to the non-conformity with the Marriage Act. The Recognition of Customary Marriages Act has however removed all past uncertainty relating to the recognition of customary marriages.[219] The effect of the Act has now removed any impediments as to the eligibility for a spouse married by customary law to lodge a claim against the estate of his or her deceased spouse's estate.[220]

In the case of *Kambule v The Master and Others,*[221] the applicant, Mrs Kambule, was married to the deceased, Mr Baduza, by customary rites in terms of the Transkei Marriage Act on 25 May 1985,[222] while at the same time, he was also married to Mrs Baduza, by civil rites in terms of the repealed Black Administration Act,[223] on 03 October 1956. The second marriage was however, never registered in terms of the Transkei Marriage Act. The basis of the application before the court related to an objection by Mrs Kambule against the Liquidation and Distribution Account for not recognizing her claim for maintenance against the estate of the late Mr Baduza and that the Master of the High Court did not take a decision in response to the said objection. In deciding the matter, the court was faced with two questions, firstly whether failure to register the customary marriage resulted in the invalidity thereof and secondly, if the customary marriage was in fact valid, whether the applicant is to be considered as a "survivor" in terms of the Maintenance of Surviving Spouses Act.

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[219] S 1 of the Recognition of Customary Marriages Act defines a customary marriage as "a marriage concluded in terms of customary law", while customary law is in turn defined as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which forms part of the culture of those peoples".

[220] S 2 of the Recognition of Customary Marriages Act, giving recognition as to the validity of customary marriages that existed prior to the Act, as well as those entered into after the Act.

[221] 2007 (3) SA 403 (E).

[222] Act 21 of 1978.

[223] Act 38 of 1927.

On the first aspect, the court came to the conclusion that there was in fact a valid customary marriage, although there was no formal registration thereof. In reaching this decision the court took cognizance of a number of cases that were decided in the High Court of the Transkei,[224] where it was decided unanimously that failure to register a customary marriage in the Transkei, did not render the marriage invalid. The basis of the court's decision was not based solely on cited case law; it in fact also took cognizance of section 4(9) of the Recognition of Customary Marriages Act,[225] which accordingly states that failure to register the marriage, did not affect it validity thereof. Counsel for the respondents put forth the contention to rebut, in that section 4(9) was however, only applicable to customary marriages concluded after the Recognition of Customary Marriages Act came into operation and subsequently contended on this basis that the marriage was not valid. However, this according to the court, is refuted in sections 2(1) and 4(3)(a) of the said Act, which contains no provision as to invalidity if not registered and that the applicability of the Act also provides authority for recognition before the Act.

On this basis the court declared the customary marriage between the deceased and Mrs Kambule as valid. As for being seen as a "survivor" in terms of the Maintenance of Surviving Spouses Act, the court declared Mrs Kambule as such by virtue of the fact that she was declared a "spouse" in terms of section 2(1) of the Recognition of Customary Marriages Act.

[224] *Shwalakhe Sokhewu and Another v Minister of Police* (unreported – Transkei Division case no. 293/94); *Feni v Mgudlwa and Others* (unreported case no 21/02 dated 5 December 2003) and a decision not referred to by counsel in the present case, namely *Nomaza Mvunelo v Minister of Home Affairs and Others* (unreported Transkei Division case no 744/2002).
[225] Act 120 of 1998.

Chapter 3: Determination of the claim

3 1 Introduction

Once it has been established that the surviving spouse or partner is eligible to lodge a claim for maintenance, the investigation needs to be taken a step further. In this chapter, an exposition will be given as to the determination of the claim itself, as well as the factors that must be considered in order to ascertain whether a claim should be allowed or not.

At the outset, a claim for maintenance can be lodged against the deceased estate, regardless of whether the estate devolves in terms of the law of intestate succession or testate succession and regardless, if the marriage was in or out of community of property.[226] From the unreported case of *Jewaskewitz v Master of the High Court, Polokwane,*[227] it became eminent that in an action where a claim has been lodged against a deceased estate, the court made it clear that a two pronged approach should be followed in order to ascertain if a claim should be allowed or not.[228]

The first involves an investigation as to whether the surviving spouse, as claimant, is "legally" entitled to claim maintenance and only if the answer to this is in the affirmative, only then, would such spouse be able to lodge a claim.[229] The legality entitlement, simply involves the question of whether there was in actual fact a marriage that existed at the death of the first dying spouse?[230] As was discussed in chapter 2, save for heterosexual life partners, any spouse or partner who can prove that they were "married", or in a recognized union with the deceased at the time of his or her death, would be eligible to lodge a claim.

The second leg of the approach simply entails whether the surviving spouse would "factually" be entitled to claim maintenance against the estate of the

[226] Sonnekus "Verlengde onderhoudsaanspraak van die langslewende gade" 1990 *TSAR 501*.
[227] 2013 JDR 1270 (GNP) para 10-13.
[228] *Jewaskewitz* paras 11 and 12.
[229] *Jewaskewitz* para 11.
[230] *Jewaskewitz* para 11.

first dying spouse.[231] According to the court, this must involve a factual evaluation of the circumstances commensurate to the factors as stipulated in section 3 of the Act.[232] At the outset, the Maintenance of Surviving Spouses Act stipulates that a surviving spouse has a right to a claim for reasonable maintenance needs in certain circumstances and secondly, only if such needs cannot be met from the survivor's own means and earnings.[233] In the evaluation of a claim for maintenance against the estate of the first dying spouse, two prominent reported cases, will be examined to highlight the court's approach to a claim and whether such claim should be allowable, or not.

3 1 1 *Oshry NO v Feldman*[234]

An elderly testator, Mr Feldman, in his will nominated his children, save for a cash legacy of R150 000, as the only residuary heirs in terms of his will to the exclusion of his wife, Mrs Feldman. The parties were married out of community of property and it was a second marriage for both parties. At the time of Mr Feldman's death, he was 89 years and Mrs Feldman was 78 years and their marriage subsisted for a little over eighteen years. Both spouses were retired at the time of their marriage so their means according to the facts was very mediocre and deteriorated as the marriage continued until the demise of Mr Feldman. It also emanated from the facts, that based on the deterioration of the couple's finances and also the main reason why the will was drawn as it was, was based on the premise that Mrs Feldman's sons would carry the responsibility of taking care of her. As this was now allowable in terms of the Maintenance of Surviving Spouses Act, Mrs Feldman lodged a claim against the estate which was rejected by the executors, being Mr Feldman's daughter and son-in-law. The salient question before the court, taking the facts into consideration, was whether a claim should be allowed in that the duty of support is now imputed on the deceased estate. The court, in its evaluation of the claim, touched on a number of factors as stipulated in the

[231] *Jewaskewitz* para 12.
[232] *Jewaskewitz* para 13.
[233] S 2(1) of the Maintenance of Surviving Spouses Act.
[234] 2010 (6) SA 19 (SCA).

Maintenance of Surviving Spouses Act and how these should be weighed up against the facts whenever faced with a claim.

3 1 2 *Friedrich v Smit*[235]

Mr Friedrich in his will nominated his children as the only beneficiaries to the exclusion of Mrs Friedrich. The parties were married out of community of property without accrual and their marriage subsisted for just over three years prior to Mr Friedrich's death. At the time of Mr Freidrich's death, Mrs Friedrich was 43 years old and 46 years old at the time of the application going to the court of first instance. It emanated from the facts that Mrs Friedrich was unemployed, but it was however at the behest of Mr Friedrich that she resigned from her employment and because of personal reasons, she subsequently chose not to work again. It also emanated from the facts that Mrs Friedrich had received substantial amounts from the estate and otherwise, while the administration process was ongoing and yet she still contended she was in need of maintenance. As will be seen, the court followed the same line of thought as in the *Oshry* case, yet reached a different outcome for reasoning quite different.

3 2 Reasonable maintenance needs

Section 2 of the Maintenance of Surviving Spouses Act makes it quite clear that a surviving spouse shall have the right to make a claim for maintenance against the estate of the first dying spouse for his or her "reasonable maintenance needs".[236] From the prescriptive nature of the wording in section 2, it can without a doubt be surmised that the test for "reasonableness" is objective in nature and would be based on a purely factual evaluation.[237] In other words, the circumstances as they exist at the moment of death of the first dying spouse, must be taken into consideration

[235] 2017 (4) SA 144 (SCA).
[236] S 2 provides as follows: "If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until death or remarriage in so far as he is not able to provide therefor from own means and earnings."
[237] Sonnekus "Verlengde onderhoudsaanspraak van die langslewende gade is geen vrypas tot ongegronde baattrekking nie en dus is skadevergoeding gepas" 2017 *TSAR* 891.

to determine if a claim should be allowed or not. In this regard, the surviving spouse bears the onus of proving on a balance of probabilities that he or she is actually in need of maintenance and that such need is in fact reasonable in the circumstances.[238]

This would involve taking into account the facts as they actually exist and which can be proven and not what the surviving spouse perceives. Sonnekus' viewpoint in this regard involves a two part approach to the investigation.[239] Firstly he says, that it must be established if the first dying spouse was in actual fact responsible for the maintenance needs of the surviving spouse during the marriage and secondly, whether the survivor in actual fact has a legal claim against the estate of the first dying spouse that should continue after death.[240]

It would seem to be appropriate that an investigation would entail what the circumstances were during the subsistence of the marriage and if these are to continue after death. Sonnekus goes further to state that only if both these factors are present, then only can it be expected of the executor to allow the claim against the estate of the first dying spouse.[241] In ascertaining what "reasonable" entails, it must be given its literal meaning, in that the claim must be just, appropriate and based on sound judgement and must have a bearing on the facts as they exist. Taking this a step further, Sonnekus is further of the view, that a maintenance claim must never be seen as a means to enrich the estate of the surviving spouse, or that the claim should be of such a nature, with the only motive being, that it form part of the survivor's estate to eventually devolve upon the said survivor's heirs.[242] In *Friedrich v Smit*, the court also made it quite clear as to what should be classed as "reasonable" where a claim is lodged against the deceased estate.[243]

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[238] *Friedrich* para 17.
[239] Sonnekus "Verlengde onderhoudsaanspraak vir langslewende gade geen onbedagte meevaller vir erfgename van aanspraakmaker nie." 2010 *TSAR* 4.
[240] Sonnekus *TSAR* 2010 809.
[241] Sonnekus *TSAR* 2010 809.
[242] Sonnekus *TSAR* 2010 809.
[243] *Friedrich* para 17. Where the court states as follows: "Reasonable maintenance must exclude extravagant demands of maintenance and a surviving spouse who cannot show that he or she is not able to maintain him of herself is not eligible for maintenance from the deceased estate".

The deduction can therefore be made that an appropriate amount for maintenance must be calculated, commensurate to the needs of the surviving spouse and not be such as to allow the surviving spouse to live in luxury at the expense of the deceased estate.

Section 2 makes further reference as to the duration of the claim, in that it must be calculated until death or remarriage.[244] In practice, this would involve an actuarial calculation to quantify the claim and is not simply based on what the surviving spouse perceives the amount to be. In the *Jewaskewitz* case, the court made it quite clear that although it was established that the surviving spouse had a claim for reasonable maintenance needs.[245] In this regard, the court was not prepared to simply accept the amount as such without an actuarial claim to make a proper quantification to ascertain whether the claim was reasonable or not.[246] This in turn also serves as proof that a claim will not simply be based on the subjective notions of the claimant, but rather what the facts are in any given situation.[247]

3 3 Inability to provide therefor from "own means and earnings"

The second leg of the test, as to the eligibility of the claim, is such that the surviving spouse must be unable to provide for him or herself out of his or her "own means and earnings".[248] A surviving spouse's "own means and earnings" is defined in section 1 of the Maintenance of Surviving Spouses Act.[249] The definition must be given a literal meaning and is in essence also a

[244] S 2 of the Maintenance of Surviving Spouses Act.
[245] *Jewaskewitz* para 14.
[246] *Jewaskewitz* para 14.
[247] In the *Oshry* case, extensive proof was submitted to the court as to the financial circumstances in which Mrs Feldman found herself in and that there was an actual need for maintenance, in that her sons gave assistance where they could and the modest benefits she received from the estate and from outside the estate in the form of an annuity and meagre returns on her investment. Proof was also provided of the couple's financial situation deteriorating once Mrs Feldman stopped working. In the *Friedrich* case however there was accordingly no proof provided other than an actuary's claim which the court did not take into consideration and classed the report as hearsay evidence. Also, Mrs Friedrich provided no proof as to her financial situation to make a determination as to if she was in need of maintenance.
[248] S 2 of the Maintenance of Surviving Spouses Act.
[249] S 1 of the Maintenance of Surviving Spouses Act defines "own means and earnings" as follows: "any money or property or financial benefit accruing to the survivor in terms of matrimonial property law or the law of succession or otherwise at the death of the deceased".

question of fact, which would involve an objective investigation of the facts that present themselves at the death of the first dying spouse. The implication of this aspect is based on the premise that the surviving spouse must utilize his or her own income before looking to the estate for support.[250] Accordingly, this aspect involves not only income earned, but also assets of capital nature that can be utilized to earn such income, for example rental property, fixed deposits and other investments where interest is earned.[251] It can therefore be taken as a given that "all" forms of assets that can generate income, are to be taken into consideration to determine if the surviving spouse is need of support, even if capital may be exhausted to assist with the required support.[252] When determining "own means and earnings", the court in the *Oshry* case reiterated this aspect,[253] when it refused to recognize the financial assistance received by Mrs Feldman from her major sons. This argument was in fact raised by the executors in that such acts of generosity by the sons should be classed as "existing and expected means", but the court was however, not in favour of this contention and reiterated that it must culminate out of "own means".[254] In doing so, the court answered an age old contention in that the executor in case of a claim for maintenance by the surviving spouse, actually steps into the shoes of the predeceased spouse and concluded that the estate in actual fact does take over the duty of support.[255] It would appear from the court's decision that it is settled, the only funds to be taken into consideration would be the survivor's "own", payable from his or her own pocket and should exclude any financial assistance from other persons.

3 4 Factors for the determination of reasonable maintenance needs

Section 3 of the Maintenance of Surviving Spouses Act prescribes what factors should be taken into consideration in order to ascertain whether a surviving spouse would be entitled to lodge a claim against the estate of the

[250] Sonnekus *TSAR* 1990 502.
[251] Sonnekus *TSAR* 1990 502.
[252] Sonnekus *TSAR* 1990 502; Corbett *et al* 45.
[253] *Oshry* para 35.
[254] *Oshry* para 35.
[255] *Oshry* para 27 and 35.

first dying spouse's estate for his or her maintenance needs.[256] In order to determine whether the surviving spouse is in fact in need of maintenance, involves taking an objective stance, meaning that the facts should be taken as they are and not as they are perceived, or as the spouse would like them to be.[257] The court in the *Friedrich* case stated that the factors in section 3, as well as any other factor that may be relevant, should be taken into account to determine if a surviving spouse wants his or her claim to succeed.[258]

As for the wording of sub-sections 3(b) and 3(c), the inclusion of the word "and" between the said sub-sections, denotes that all of the factors must be taken into account as a whole and not just certain of the factor/s or as perhaps as chosen. In other words the factors should be read as a unit and not in the alternative to ascertain of the claim is to be allowed, or not.

3 4 1 Amount available for distribution to heirs and legatees

In short this provision relates to the question whether the estate has sufficient funds to pay the maintenance claim, as well as allowing the heirs or legatees to receive what is theirs as directed in terms of the will, or in terms of the rules of intestate succession.[259]

3 4 2 Existing and expected means, earning capacity and the age of the survivor

It was earlier that section 1 of the Maintenance of Surviving Spouses Act, that the definition of "means" entails "any money, property or financial benefit

[256] S 3 of the Maintenance of Surviving Spouses Act states as follows: "In the determination of reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account: (a) The amount in the estate of the deceased spouse available for distribution to heirs and legatees; (b) the existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage; and (c) the standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse".
[257] Sonnekus *TSAR* 1990 508.
[258] *Friedrich* para 17.
[259] *Oshry* para 30. The court in this regard stated that s 3(a) relates to the ability of the estate being able to pay the maintenance claim, while s 3(b) and s 3(c) relates the surviving spouse's needs and ability to maintain him or herself.

accruing to the surviving spouse in terms of matrimonial property law, law of succession or otherwise at the death of the deceased spouse". The point of departure in this regard would involve an investigation as to what "means" or "resources" the surviving spouse has at his or her disposal as at date of death of the first dying spouse and could take any form, as long as it accrues or would accrue to the survivor.

This would in fact involve what the survivor has at his or her disposal, as well as what he or she may receive from other resources in the near future, whether it is in the form of proceeds from pension funds, group life funds, policy pay-outs or other resources. A half-share of the estate culminating from the marriage, if the spouses were married in community of property,[260] or if the accrual system were applicable to their marriage, [261] would also be suffice, as it is expected to flow from the division of the estate. An inheritance or other advantage that has vested, but not yet received, could probably also suffice as an "expected means".[262]

Of importance, as was indicated in the *Oshry* case,[263] was that the "means", whether "existing or expected" must culminate from the surviving spouse's "own" resources and must not be incumbent from the assistance of a third party.[264] A surviving spouse's earning capacity and age can be closely linked to what may be termed as "expected means".[265] In this regard, the point of departure would be, whether the survivor was employed, or a homemaker, taking care of the household needs as at date of death of the deceased spouse. If not employed, would it then be possible in the circumstances to be

[260] Boberg *Law of Persons and Family* (1999) 185. Where spouses married in community of property, spouses own the assets forming part of the estate on an equal basis and are divisible as such upon death or divorce.
[261] Accrual claim in terms of s 4 of the Matrimonial Property Act 88 of 1984.
[262] Where assets vest in the surviving spouse, where he or she may have inherited testate or intestate, but have not yet been received.
[263] *Oshry* para 35. Where the court states "Contextually, "the existing means and expected means" must be those of the surviving spouse".
[264] *Oshry* para 35. The court refused to take cognizance of the financial contributions by Mrs Oshry's sons and stated that "existing and expected means", must be those of the surviving spouse.
[265] In both the *Oshry* and *Friedrich* cases, this factor was of utmost importance. In the *Oshry* case, the surviving spouse was already 78 years old and in retirement, while in the *Friedrich* case, the surviving spouse was only 46 years old. In this regard, because of her age, Mrs Feldman could not be expected to work again, while Mrs Friedrich was much younger and would perhaps still be able to find employment.

able to find employment.[266] This would further be incumbent as to whether the surviving spouse has completed some form of qualification upon which she can perhaps rely to obtain employment, if not employed, or to obtain better employment if greater means are required. In essence it can be said that a person of lower age would have a better chance to find suitable employment or better employment in the market place. The age of the survivor also has bearing on whether she can learn or be taught new skills in order to assist him or her to find employment if no qualification was obtained.

In the *Friedrich* case this was one of the main factors that led to the surviving spouse's claim being rejected. The court in this regard, dealt extensively with the surviving spouse's contentions as to why she was unemployed. [267] She was a qualified estate agent and contended that she had applied for a number of positions which were all unsuccessful, but she never provided any proof to the court thereof.[268] On the other hand, when compared to the facts in the *Oshry* case, it could not be expected of the surviving spouse, Mrs Feldman, to find employment or to learn a new skill to assist her in finding employment, as she was already 78 years old and in the prime of her life, so it would have been almost impossible for her to find employment even if she wanted to. As can be seen, the courts in both the *Oshry* and *Friedrich* cases based their decisions, albeit different, solely on the facts that were placed before them and disregarded subjective notions or views of the surviving spouse.

3 4 3 Standard of living of the survivor during the subsistence of the marriage and financial needs and obligations of the survivor and the subsistence of the marriage

This part of the investigation involves "how" the spouses lived and what their standard of living and lifestyle was during their marriage. It can be expected that if the couple were living an affluent lifestyle, that the standard of living of

[266] *Kroon v Kroon* 1986 All SA 423 (E) para 441. Although this case dealt with a divorce matter, the statement was made by the that where a person claiming maintenance, can be trained, or re-trained to earn an income, then this factor must be taken into account when making an award.
[267] *Friedrich* para 19.
[268] *Friedrich* para 19.

the surviving spouse should, if possible, be continued after the death of the deceased spouse.[269]

In analyzing this factor, it would not be difficult to ascertain what the spouse's standard of living was during the marriage. The surviving spouse would have to adduce evidence to the effect that in granting the order against the deceased estate, he or she must be placed in the same position as to which they were accustomed during the marriage. However, as was stated in the *Friedrich* case, the surviving spouse cannot be expected to rely on living an extravagant lifestyle and that the claim must still be seen to be reasonable in the circumstances. [270] However, this is a question of fact and the surviving spouse would have to show that without the maintenance claim he or she would be left in an adverse position in that he or she would not be able to make ends meet so to say.[271]

In attaining this, the surviving spouse would need to provide documentary evidence probably in the form of a budget as to any household expenses and liabilities that must be met on a monthly basis to keep the household afloat.[272] In the *Oshry* case it was seen that the claim would more readily be granted as the required evidence was adduced in that all forms of income was placed before the court and proven.[273]

The duration of the marriage is an important factor and relates to the standard of living and whether a claim for maintenance should be allowed or not. As displayed in both the *Oshry* and *Friedrich* cases, the duration of the respective marriages played an important role in awarding the maintenance claims. In this regard it would be correct to deduce that it is less likely that a surviving spouse would succeed with a claim where the marriage was of short duration as in the *Friedrich* case, compared to a longer marriage, as in the *Oshry* case.

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[269] *Pommerel v Pommerel* 1990 (1) SA 110 (A) para 613. The court reasoned that spouses can expect the same standard of living that they were accustomed to during the marriage, although in each given set of circumstances this may not always be possible.
[270] *Friedrich* para 17.
[271] *Friedrich* para 17.
[272] *Friedrich* para 18.
[273] *Oshry* para 34.

3 5 Role of the executor in the determination of a claim

Commensurate to the determination of the claim, the role of the executor is of utmost importance when dealing with a claim for maintenance against the deceased estate by the surviving spouse. It is in actual fact the executor who has to deal with the claim in collaboration with the surviving spouse and make decisions as to how the claim must be dealt with in any given situation when the claim is lodged.

In terms of the Administration of Estates Act,[274] the executor is described as the person who is authorized to act under the Letters of Executorship and is appointed by the Master of the High Court. Such person is usually nominated in terms of a will, or appointed by the Master of the High Court, should there not be a will.[275] The role of the executor is to administer the estate of the deceased person and as such is mandated in terms of the Administration of Estates Act to finalize the affairs of the deceased person as a reasonable executor. In accordance with the said mandate, an executor may never act beyond the rules of what the law allows, as this may result in him or her being held personally liable, should damages result from impermissible actions.[276]

When confronted with a claim for maintenance by a surviving spouse, the executor must deal with it as stipulated in the Administration of Estates Act,[277] as well as in accordance with the Maintenance of Surviving Spouses Act.[278] A claim for maintenance by a surviving spouse in practice takes the same form and is subject to the same procedure as a normal claim lodged by a creditor in terms of section 29 of the Administration of Estates Act.[279]

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[274] S 1.

[275] Rule 7.9(a)(i)-(v) Chief Master's Directive 2 of 2015. "Appointment of Executors and/or Master's Representatives in Deceased Estates by the Master". This rule deals with appointments of executors where the deceased died without leaving a valid will; where no executor has been nominated in terms of a will; where the executor is unable or refuses to act as such; where the executor is deceased; where the executor fails to take up appointment after being called upon by the Master to act as such.

[276] Sonnekus 2017 *TSAR* 894, where reference is made in the case of *Coetzee v Gelb* 1981 (1) SA 288 (W) paras 295C-E, that an executor acts in a fiduciary capacity and can be held accountable for damages on account of maladministration of the estate if damages are caused to the estate and subsequently to beneficiaries.

[277] S 32 and s 33 of the Administration of Estates Act.

[278] S 2(d) of the Maintenance of Surviving Spouses Act.

[279] Sonnekus *TSAR* 1990 503-504. Like any creditor, the surviving spouse must lodge his or her claim against the deceased estate like any other creditor within and failure to do so may result in the claim

Upon receipt of the claim, the executor may either dispute or reject the claim, or he may accept it and include it in the liquidation and distribution account, along with any other claim against the estate.[280] In terms of section 32 of the Administration of Estates Act, where an executor disputes a claim, he or she must forthwith report to the surviving spouse that the claim is disputed and what the reasons are for such dispute.[281] This could be as a result of, for example, that the spouse is perhaps not legally entitled to lodge a claim, or that the claim does not comply with, or fit the criteria for a valid claim, or that the claim is perhaps not proven satisfactorily due to a lack of information. In the notice, the executor would then require the surviving spouse to lodge, by means of an affidavit, what the material details of the claim are in support thereof.[282]

The executor must forthwith inform the surviving spouse that he or she is to appear at a certain date and time, before the Master of the High Court, or a magistrate to answer questions relating to the claim in order to ascertain whether the claim should be allowed or not.[283] The second option is that the executor may outright reject a claim,[284] in which case the executor should again inform the surviving spouse by registered mail of the reasons for rejecting the claim.

It is usually then at this point in the administration process that the surviving spouse either accepts the decision of the executor, or informs him or her of an intention to refer the matter to the Master of the High Court, or to the High Court.[285] The question that should therefore asked at this point in time, is whether it can be said that the executor is indeed equipped to deal with a claim for maintenance before making a decision to either accept, dispute or

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not being recognized. Of importance in this regard is s 2(2) of the Maintenance of Surviving Spouses Act, in that where the surviving spouse has not lodged a claim and the estate has been finalised, he or she shall not have a claim against any heirs or legatees.

[280] S 32 and s 33 of the Administration of Estates Act.

[281] S 32 of the Administration of Estates Act; Sonnekus 1990 *TSAR* 503.

[282] S 32(1)(a) of the Administration of Estates Act; Sonnekus 1990 *TSAR* 503.

[283] S 32(1)(b) of the Administration of Estates Act; Sonnekus 1990 *TSAR* 504.

[284] S 33 of the Administration of Estates Act.

[285] S 35(10) of the Administration of Estates Act; Sonnekus 1990 *TSAR* 504.

reject a claim? The matter is further complicated by the fact that the executor may only act on the information provided to him by the surviving spouse and subsequently has very little, or no insight into the viability of such information.[286] The executor also has no insight as what the standard of living or lifestyle of the surviving spouse and the deceased was during their marriage.[287]

A further question that also needs to be asked is if the executor can make an informed decision as to whether a claim should be allowed or rejected. In this regard, should the executor disallow or dispute the claim, he or she may be sued by the surviving spouse and if allowing the claim, he or she may be sued by the heirs or legatees in the estate. In the *Oshry* case, the executors, being the daughter and son-in-law of the deceased, rejected the claim based on the contention that the estate was not liable for maintenance for the surviving spouse as she had not shown that she was in need of maintenance.[288] It was contended by the executors, that the duty to maintain the surviving spouse, shifted to her major sons and that the estate was no longer liable for support.[289] The court in the matter however, decided differently and found that the claim was valid and the duty of support in fact did shift on the estate and not on her sons as contended by the executors.[290] Having found in favour of Mrs Feldman and allowing the claim, the court penalized the executors with a cost order *de bonis propriis,*[291] on attorney and client scale for the appeal and cross-appeal.[292] From the court's standpoint, the reason why the executors were penalized, was due to the fact that although a claim was proven, the executors "adopted an intractable and obstructive" approach in failing to allow the claim.[293] The court went further to state that the executors should have

[286] In the *Friedrich* case para 18, this factor was seen as a contention as to why the SCA disallowed the claim because no evidence was led as to Mrs Friedrich's lifestyle, standard of living, expenditure, accounts ect. If the court turned the claim down where proof is supposed to be submitted, one can only imagine the problem faced by the executor, should this information not be provided.
[287] *Friedrich* para 18.
[288] *Oshry* para 17.
[289] *Oshry* para 17.
[290] *Oshry* paras 27 and 35.
[291] *Oshry* para 72, *de bonis propriis* meaning that the cost order be paid out of the party's own pocket, in this case by the executors on a personal basis and not as part of the administration costs against the estate.
[292] *Oshry* para 71.
[293] *Oshry* para 68.

acted in the interests of the estate and not be motivated by a "selfish personal interest" which could have avoided a lengthy litigation process and a waste of money.[294]

The Supreme Court of Appeal in the *Friedrich* case, overturned both the High Court, as well as the Appeal Court's decisions to allow for the claim of Mrs Friedrich to be lodged against the estate. The court based its decision on the fact that Mrs Friedrich failed to prove that she was in fact entitled to or in need of maintenance.[295] The executor in this regard, although this state of affairs was prevalent, nevertheless accepted the claim and allowed it to form part of the liquidation and distribution account, leading to the beneficiaries' application to court to contest the said claim. Sonnekus also criticizes the executor's actions in the *Friedrich* case for allowing the claim to begin with and brands the acceptance of the claim as being nothing short of wrongful.[296] His reasoning is based on the fact that although there were no grounds, nor any proof for allowing the claim, the executor nevertheless accepted same and let it form part of the liquidation and distribution account.[297] Sonnekus further contends that the executor's actions were negligent and wrongful towards the beneficiaries in that it unduly infringed their rights to receive their inheritance by the erroneous acceptance of the claim.[298]

In this regard, Sonnekus is of the opinion that the executor should be brought to book so to say, by a claim based on possible damages suffered by the beneficiaries in the allowance of the claim in the first place and the interim payments.[299] Fortunately for the beneficiaries, the Supreme Court of Appeal righted the wrong and ordered that the claim be removed in totality, thereby disallowing the claim completely. What is more fortunate, the executor may well have been penalized with a cost order much the same as in the *Oshry* case, but the court however, ordered that the costs be paid by Mrs Friedrich.

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[294] *Oshry* para 68.
[295] *Friedrich* para 18.
[296] Sonnekus 2017 *TSAR* 894.
[297] Sonnekus 2017 *TSAR* 894.
[298] Sonnekus 2017 *TSAR* 894.
[299] Sonnekus 2017 *TSAR* 894. Sonnekus finds authority for this statement in the case of *Coetzee v Gelb* 1981 (1) SA 288 (W) PAR 295C-E, where Coetzee J states that in terms of common law, an executor may be sued for maladministration of the estate based on his or her fiduciary duties in the administration of the estate if losses have been suffered by the beneficiaries.

Upon acceptance of the claim, the executor is given certain powers in terms of section 2(3)(d) of the Maintenance of Surviving Spouses Act.[300] The effect of this provision is that it allows the executor, in collaboration with concerned parties, being the surviving spouse, heir/s and/or legatee/s to enter into a compromise by means of an agreement for the settlement of the maintenance claim.

This agreement can take any form and could include the creation of an *inter vivos* trust,[301] of which the surviving spouse would be a beneficiary.[302] The founder of the trust would be the executor of the estate and the heirs, legatees, the surviving spouse, or an independent party or parties could be the trustees of the trust.[303] A further provision in this regard is that the calculated amount and/or assets in lieu of the maintenance claim, would be transferred to the trust, from which the surviving spouse would receive income on a regular basis commensurate to his or her needs.[304] The surviving spouse, as part of the provisions of the trust, could be allowed to occupy the family home rent free, if the said home forms part of the assets that were transferred to the trust.[305] What is however, unique of this methodology satisfying the claim, is that the income and/or rights accorded, could be given until death, remarriage or until the surviving spouse enters into a co-habitation relationship with another party. In this way the assets would still protected and the terms thereof, are still line with provisions of section 2 of the Act, as to the duration of the claim and the provision of maintenance as per the agreement.[306] When the trust does eventually terminate as per the agreement, the balance of the assets which formed part of the trust would

[300] S 2(3)(d) states as follows: "the executor of a deceased estate shall have the power to enter into an agreement with the survivor and the heirs and legatees having an interest in the agreement, including the creation of a trust, and in terms of the agreement to transfer assets of the deceased estate, or right in the assets, to the survivor or the trust, or to impose an obligation on an heir or legatee, in settlement of the claim of the survivor or part thereof"; Sonnekus 1990 *TSAR* 511.
[301] Du Toit et al *Fundamentals of South African Trust Law* (2019) 8. An *inter vivos* trust is described as a trust created while the founder is still alive in terms of a trust deed to administer property as a consequence where the trustee is the owner, or where the trustee simply manages the trust assets.
[302] Du Toit et al 193.
[303] These provisions, (trustees and beneficiaries), would in all probability form part of the agreement that the executor and other interested parties will enter into.
[304] Du Toit et al 193; Sonnekus 1990 *TSAR* 511.
[305] Sonnekus 1990 *TSAR* 512.
[306] Sonnekus 1990 *TSAR* 512.

then revert back to the ultimate beneficiaries as were nominated in terms of the first dying spouse's will.

Section 2(3)(d) also provides for the transfer of a "right in assets" to the surviving spouse, meaning that the ultimate beneficiaries, being the heirs or legatees retain ownership of the assets, giving the survivor limited rights over the said assets. Sonnekus,[307] suggests that these rights can take the form of a right of *usufruct*,[308] right of *usus*,[309] or right of *habitatio.*[310]

In practice, the surviving spouse would essentially be the holder of the said rights over the assets forming part of the agreement, while the heir/s and/or legatee/s remain the owners thereof and could take the form of monies, the family home or household effects. A unique feature of these rights, is that they can be given for any duration, while at the end of the term of enjoyment, the assets are returned to the owners thereof, being the heirs and or legatees. Sonnekus, finds favour with this method as it denotes that only a limited rights are transferred to the surviving spouse, while ownership of the assets remain with the heir/s or legatee/s, meaning that the ownership of the assets are not lost.[311]

A third option according to section 2(3)(d), involves the imposition of an obligation on an heir or legatee. In essence this is not defined in section 2(3)(d), but could involve the obligation on heir/s or legatee/s, for allowing the assets to be transferred as discussed, while at the same time only enjoying limited ownership themselves.

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[307] Sonnekus 1990 *TSAR* 512.

[308] Corbett *et al The Law of Succession* (2015) 366; De Waal and Schoeman-Malan *Law of Succession* (2015) 163. A *usufruct* is a personal servitude which grants the holder thereof a limited real right to use the property of another and the fruits thereof with the obligation to eventually return the thing essentially intact to the owner. The right can be established over immovable property or movable property denoting that the holder of the right can use and enjoy the object and the fruits of the thing.

[309] Corbett *et al* 385; De Waal and Schoeman-Malan 166. A *usus* is a right which entails the entitlement of the holder to use the thing of another person for the benefit of the holder and his household. The extent of the right entitles the user to only collect what is required for day-to-day needs.

[310] Corbett *et al* 385; De Waal and Schoeman-Malan 166. A right of *habitatio* entails the entitlement of the holder thereof to occupy the house of a third party.

[311] Sonnekus 1990 *TSAR* 512.

Other obligations could involve the payment of an annuity by the heir/s and/or legatee/s for a certain duration as provided for in the agreement, while at the same time retaining the assets forming part of the estate.

To conclude, a claim for maintenance by a surviving spouse against the deceased estate, a claim shall only lie against the deceased estate[312] and rank equally with other claims.[313] In cases where a claim has not been submitted within the allotted time as previously discussed, the surviving spouse shall have no right of recourse against creditors, heirs or legatees to whom claims have been paid, or to whom benefits have been transferred.[314] It is further held, that where there is a claim against the estate for maintenance by a surviving spouse, as well as for a minor dependent, both claims will rank equally and where there are insufficient funds available for both claims, each claim will be reduced proportionately.[315] However, in the case of a conflict between a minor's claim and that of the surviving spouse, the matter will be dealt with by the Master of the High Court who may defer the matter, until the High Court has made a recommendation in this regard.[316]

[312] S 2(2) of the Maintenance of Surviving Spouses Act.
[313] S 2(3)(b) of the Maintenance of Surviving Spouses Act.
[314] S 2(2) of the Maintenance of Surviving Spouses Act read with s 34(11) and s 34(12) of the Administration of Estates Act.
[315] S 3(3)(b) of the Maintenance of Surviving Spouses Act.
[316] S 3(3)(c) of the Maintenance of Surviving Spouses Act.

Chapter 4: A comparative analysis with reference to aspects of Dutch and English Law

4 1 Introduction

The purpose of this chapter is to draw a distinction between Dutch and English law, in comparison to South African law when dealing with matters pertaining to the maintenance of surviving spouses and partners. The main reason for this is that historically our law originates mainly from these two jurisdictions in many respects and when courts are faced with legal questions, they often still refer to legal principles of Dutch and English law as authority. A second reason for choosing these jurisdictions is due to the fact that their approach to taking care of a surviving spouse or partner, although having certain similarities with the Maintenance of Surviving Spouses Act, as will be seen, is however, far more comprehensive.

4 2 Dutch Law

In the Netherlands, civil law is dealt with in a codified manner and is governed by what is known as the *"Dutch Civil Code".*[317] In terms of this *"Code"* different aspects pertaining to civil law in the Netherlands are divided up into what are known as *"Books"* and each of these *"Books"* in turn deal with a specific subject matter in an organized fashion.[318] For purposes of this research however, the main focus will be drawn to matters relating to testate and intestate succession, as well as matters incidental thereto and are dealt with specifically in *"Book 4"* of the *"Code".* Furthermore, this research will not investigate on matters pertaining to Dutch prescripts for succession *per se*, but rather a basic outline will be given as to how provision for surviving spouses are dealt with and how these are exercised in practice.

[317] *Dutch Civil Code (Civil Code of the Netherlands)*; www.dutchcivillaw.com.
[318] "When referring to a provision from the civil code, it is common practice to place the number of the Book before the number of the provision (Article) involved, dividing the two numbers by a colon. Article 230 of Book 6 is, for instance cited as Article 6:230 DCC (Dutch Civil Code) and Article 1576 of Book 7A as Article 7a:1576 DCC".

4 2 1 Spouse or registered partner

In terms of the *"Code"*, provision is made for two types of intimate relationships, namely, marriages in the normal civil law context,[319] as well as relationships by means of a registered partnership, either of same-sex, or of heterosexual.[320] The effect of this state of affairs makes it quite clear that there can only be two types of relationships under Dutch law and therefore no practical issues need exist in this regard. Also under Dutch law, all marriages, or registered partnerships must be monogamous, therefore having more than one spouse or partner is unknown and not allowable.[321] The concept of "spouse" for all intents and purposes described as a person being married in terms of Article 1:31, as well as a registered partner in terms of Article 1:80a. The result hereof is that whenever reference is made in the "Code" to the concept of "spouse", this will include a "spouse" in terms of a marriage, as well as a partner in a registered partnership.[322]

4 2 2 Determination of needs

In terms of the *"Code"* the rules of succession are contained in *"Book 4"* and are dealt with in terms of Articles 4:28 to 4:33 and make provision for both testate as well as intestate succession. At the outset, Article 4:28 makes provision for mandatory allowance of the surviving spouse to continue to make use of the property and its contents for a period of six months from date of death, if such property formed part of the deceased estate, or was part of the community estate, or if the deceased spouse were allowed to occupy such residential space, other than by lease. Article 4:29 makes further provision for a mandatory registration of a usufruct for the surviving spouse, over the residential space and its contents which formed part of the deceased estate, but that such property was bequeathed to other heirs or legatees, for a period of six months from date of death.

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[319] Article 1:31, "A marriage may be entered into by two persons of a different or of the same gender (sex)."
[320] Article 1:80a, "A person may at the same time only be united in a registered partnership with one other person, either of the same or of another gender."
[321] Article 1:33 and Article 1:80a.
[322] Article 4:8, prescribes that the terms "marriage", "married", "matrimonial community of property", "marriage vow" and "divorce" are all used interchangeably to include a partner in a registered partnership.

Furthermore, in terms of Article 4:30, the surviving spouse may request the heirs to enter into an agreement for the registration of a usufruct over any other property forming part of the deceased estate which is not dealt with specifically in terms of Article 4:29. However, there is a proviso that is coupled to the request in terms of the said Article 4:30, is that the surviving spouse must be in need of care and support and it can be assumed that such surviving spouse must subsequently be unable to take care of him or herself financially. In ascertaining the needs of the surviving spouse, all property, whether cash and/or property, are taken into consideration to determine if the usufruct should be allowable over the other assets in the estate. Also unique in terms of the *"Code",* the heirs and/or legatees are obliged to enter into the agreement when a usufruct is requested and failure to do so, or where a proper agreement cannot be reached, the parties concerned may approach the Sub-district Court for a decision on the matter.[323] The Sub-district court, when considering the matter may in turn make any finding in the best interests of all parties concerned, which finding will be made with utmost fairness and without prejudice to affected parties. Factors such as the age of the spouse, the composition of the household, the possibilities of the spouse to maintain him or herself through work, a pension, his or her own property or other means and resources and what is appropriate in the circumstances.[324] In conclusion, the *"Code"* makes provision for a prescription period,[325] meaning that the surviving spouse has a year and 3 months within which to request the usufruct and if not done within this period loses his or her right to such claim.

4 3 English Law

The English law equivalent for the protection of a surviving spouse is made under the *Inheritance (Provision for Family and Dependents)* Act 1975. The provisions of the said Act are however, very specific and make provision for claims by a surviving spouse from a solemnized civil marriage, as well as partners to a civil partnership a under same-sex relationship governed by the

[323] Article 4:30-6.
[324] Article 4:33-5d.
[325] Article 4:31-3.

Civil Partnership Act.[326] Although, as the said Act denotes, it is applicable to "all" family and dependents, however, for the sake of this research, the only parties that will be focused upon, will be spouses in terms of English civil law and partners in a civil partnership.

4 3 1 Spouse or registered partner

As stated, in terms of the *Inheritance (Provision for Family and Dependents)* Act, provision is only made for two types of intimate relationships, namely, marriages in the normal civil law context, as well as partners in terms of *Civil Partnership Act.* What is unique in this regard is that the *Inheritance (Provision for Family and Dependents)* Act only gives recognition to couples married in terms of civil law, as well as same-sex partners who are registered as such in terms of the *Civil Partnership Act,*[327] making it impossible for heterosexual partners to be eligible for a claim of the deceased partner's estate. Eligibility for claim in terms of the *Inheritance (Provision for Family and Dependents)* Act is not only applicable to current partners or spouses, but also makes provision for former spouses and civil partners of the deceased, provided they are not party to a subsequent marriage or partnership at the time of death.[328] In current "relationships", a further provision is prevalent in that spouses or partners must have lived together in the same household for a period of two years preceding the death of the first dying spouse or partner, to be eligible for a claim.

4 3 2 Determination of needs

At the outset, the surviving spouse or partner falling into the category discussed above, may apply to the court where no, or insufficient provision was made for him or her in terms of the deceased spouse's will or by operation of intestate succession.[329] In the determination of a claim, the *Inheritance (Provision for Family and Dependents)* Act follows the premise that where maintenance is needed by surviving spouse or partner, such

[326] *Civil Partnership Act* of 2004.
[327] S 1(1)(a) of the *Inheritance (Provision for Family and Dependents)* Act.
[328] S 1(1)(b) of the Inheritance *(Provision for Family and Dependents)* Act.
[329] S 1 of the *Inheritance (Provision for Family and Dependents)* Act.

needs must be reasonable in the circumstances. In deciding whether a claim is allowable or not, or what the quantum thereof is, the court will consider a number of factors relating to the applicant to ascertain if a need for maintenance is in fact required. The court in making its finding, will consider the applicant's financial resources, the present needs of the applicant, as well as those that are foreseeable. Other factors that will be taken into account include the age of the applicant, whether the deceased spouse was in actual fact responsible for the maintenance needs of the applicant, the duration of the marriage or union and whether the applicant had in fact made any contribution to the household. Payments to spouses or partners can take the form of a lump sum or a payment in installments and even allows for transfer of assets out of the estate to the surviving spouse or partner in lieu of the claim. In conclusion, English law also prescribes that a claim must normally be lodged within six months after the date on which representation of the estate is first taken out, but a longer period may be allowed if there is sufficient reasoning.[330]

4 3 3 Comparison between South African, Dutch and English law

Upon investigation of the two jurisdictions in question, it can be seen that, although very similar in some respects to South Africa, the rules pertaining to maintenance for surviving spouses or partners under Dutch and English law respectively is far more comprehensive and the methods and parameters utilized to quantify and deal with a claim. At the outset, both Dutch and English law are very definitive in their definitions as to who may be eligible to claim for support from the deceased estate. However, just like South Africa law, English law makes no provision for heterosexual partners to make a claim against the deceased estate, as only civil marriages and same-sex marriages enjoy such protection. Dutch law on the other hand, makes it possible that a civil marriage may be concluded, as well as for the registration of same-sex and heterosexual partners under the same Act, meaning that these partners can all make claims against the deceased partner's estate.

[330] S 4 of the *Inheritance (Provision for Family and Dependents)* Act.

Where all three jurisdictions however, share commonality, is with the determination of a claim and the factors that need to be considered when deciding whether a claim should be allowed or not. Prominent factors such as age, current and prospective means, capacity to earn, current and future financial obligations of the survivor and the duration of the marriage or relationship are all prevalent factors, but the method of payment however, differs in all respects. In English law, payments can take the form of a lump sum or installments, while in Dutch law, the surviving spouse or partner is given a usufruct over the assets or monies in the estate, thereby protecting the inheritance for the ultimate beneficiaries. In South African law there are merely guidelines as to an agreement for the creation of a trust, or for a right in assets, but such agreement can be refuted, whereas with English and Dutch law, provisions in their legislation make it obligatory for parties to enter into agreements, thereby creating consistency when dealing with a claim.

Chapter 5: Recommendations and conclusion

5 1 Introduction

As reflected in the preamble to the Maintenance of Surviving Spouses Act, the aim and purpose thereof is to provide the surviving spouse with a claim for maintenance against the estate of the first dying spouse in certain circumstances. As was seen, the Act however, states further that such a claim would only be allowed, if certain jurisdictional standards are met and these would depend on the circumstances that present themselves in each case when a claim is lodged. Despite the fact that the legislator was successful in its endeavor to accomplish its aim, there are however, still a number of practical issues that are in need of attention. In what follows, a number of recommendations will be put to the fore which could somehow aid in trying strike a balance between the stated aim and purpose of the Act, as well as at the same time offering some kind of protection for the ultimate beneficiaries in terms of the deceased spouse's will, or in terms of the law of intestate succession.

5 2 Recommendations

5 2 1 "Spouse" and "marriage"

The Maintenance of Surviving Spouses Act fails to provide for apt definitions as to what the concepts "spouse" and "marriage" denotes. In chapter 2 of this research, an analysis was done as to "who" may be eligible to lodge a claim against the estate of his or her predeceased spouse's estate. As was seen the concepts "spouse" and "marriage" have now been given a much wider meaning as compared to the strict and narrow prescripts of common law and subsequently the Marriage Act. This being said, the problem however, still persists, as the decisions of the respective cases that were discussed, provided relief for those parties specifically at that time. This in turn does not mean that other religious marriages will automatically enjoy the same protection, future cases would have to be brought before the court for

decision. To clear up the issue as to the definition of the concepts "spouse", and "marriage" as it appears in the Maintenance of Surviving Spouses Act, it is recommended that the definition of "spouse" and "marriage" be amended in the Act, so as to include "all" persons in any type of relationship to bring it in line with so-called Constitutional principles. A point of departure in this regard would be to follow suit as was done in the Pension Fund Act,[331] the Estate Duty Act [332] and the Income Tax,[333] where the concept of the word "spouse" is defined for purposes of the said Acts. In these Acts "spouses" include those in marriages in terms of the Marriage Act, the Recognition of Customary Marriages Act, the Civil Union Act, couples in permanent heterosexual relationships and couples in "religious" unions.

5 2 2 Role of the executor in the determination of a claim

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It is stated in section 2(2)(d),[334] the executor has the power to enter into an agreement with the surviving spouse, heirs and legatees to effect the maintenance claim. However, as previously stated, these provisions can only be seen to serve as guidelines, as the affected parties are under no obligation to enter into such agreement. This would mean that should any of the parties for some or other reason are not be willing be enter into the agreement, this could have the effect that there could be a delay in the finalization of the first dying spouse's estate.

It could further transpire that the parties, as what happened in the *Oshry* and *Friedrich* cases, brought applications to the High Court to enforce their views, which could prove costly for those concerned. The Maintenance of Surviving Spouses Act makes provision for the duration of the claim, until death or remarriage, but does not indicate how the claim is to be paid, either as a lump sum or in installments. In such instances, there could be any number of problems, which could include premature death should a lump sum be paid, or that that the life expectancy exceeds the amount calculated.

[331] Act 24 of 1956.
[332] Act 45 of 1955.
[333] Act 58 of 1962.
[334] See ch 3.

If the agreed payment method consists of installments, the beneficiaries would be saddled with burden of ensuring that same will be done in a timeous manner. As for the duration of the claim, death or remarriage are stipulated by the Act, but what about instances where the surviving spouse simply cohabits with another person on a permanent basis, in this instance there is no safeguard for the funds. A recommendation in this regard, first and foremost is to amend the Act, to provide for the insertion of obligatory measures to firstly safeguard the payment of the maintenance claim on the one hand and secondly to safeguard the inheritance of the ultimate heir/s or legatee/s, at the termination of the agreed period. In this regard, an obligatory creation of a trust, the duration of which will extend until death, re-marriage or co-habitation of the surviving spouse. In this way provision will be made for the payment of a regular income to the surviving spouse with a discretionary use of capital and perhaps a right of occupation to the family home which would form part of the trust assets. The surviving spouse would in all respects then be placed in the same, or in a similar position as during the marital relationship, while at the same time retaining, or protecting the capital of the trust for the ultimate beneficiaries.

5 2 3 Adjudicator

Although not part of the matter at hand, the possibility of the establishment of an adjudicator with a specific office similar to that as contained in sections 30A to 30Y of the Pension Fund Act.[335] The purpose of the adjudicator would be to preside over and make decisions regarding claims for maintenance by a surviving spouse or to deal with disputes by any of the parties being part of the administration of the deceased estate either as the executor, the surviving spouse or heirs and/or legatees. The office of the adjudicator should work on the same basis as the stipulated in the Pension Fund Act and the powers of such adjudicator being made enforceable against all parties concerned, subject to appeal to the High Court if need be.

[335] Act 24 of 1956.

The aim of the proposed adjudication procedure would of course be to obviate, or prevent to an expensive suit of the matter being taken to the high court and to deal with matters relating to maintenance claims in a less formal manner.

5 2 4 Maintenance Court

The implementation of a similar Maintenance Court as enumerated in the Maintenance Act,[336] which could provide for matters relating to maintenance claims by surviving spouses and matters incidental thereto. In terms of section 3 of the Maintenance Act, provision is made for a Maintenance court being part of the magistrate's court that can be approached by either the executor, the surviving spouse, or heirs and legatees to have their disputes or grievances heard in a more informal and less costly manner. Commensurate to the maintenance courts *per se*, provision can be made for the same type of office as a maintenance officer and maintenance investigators, especially as the claims for surviving spouse also involves intricate calculations in the same manner as related to maintenance for children and spousal maintenance in the case of divorce. The aim of the maintenance officer and investigators, both of which would be able to deal with matters pertaining to the investigation of claims in an objective manner in order to assist with an equitable solution for all concerned in a timeous and inexpensive manner.

5 3 Conclusion

The aim of this research involved an analysis as to the accessibility of maintenance claim for a surviving spouse in terms of the Maintenance of Surviving Spouses Act. As denoted in the preamble to the Act, the aim and purpose thereof, was to provide for a claim for maintenance by the surviving spouse against the estate of the first dying spouse in certain circumstances.

[336] Act 99 of 1998.

This being said, this research showed that although to a certain extent the purpose of the Act had been met, a number practical issues were highlighted, some of which have been cured by court decisions, while others still persist.

As the Maintenance of Surviving Spouses Act does not provide for definitions of what a "spouse" and "marriage" denotes, chapter 2 investigated these concepts from a common law, as well as from a constitutional law perspective. The investigation revealed that a marriage based on common law perspectives was far too narrow especially when compared to constitutional and societal principles. It was shown that the traditional meaning of concept of marriage had to be expanded and developed in terms of South African Law, particularly based on what the Constitution opines. A number of court decisions outlined the different meanings of what a "spouse" or "marriage" connotes and the qualifications thereof. Particular attention in this regard was placed on Customary, Muslim, Hindu, same-sex and heterosexual co-habitation relationships. The end result of this analysis as to "who" may eligible to claim in terms of the Act, has been expanded to include almost all intimate relationships discussed, save for heterosexual co-habitation relationships, which did not receive the required recognition as hoped for.

Chapter 3 investigated the eligibility of a claim in relation to the factors that have to be present in any given situation where a claim is lodged. This chapter focused on two prominent cases, namely, *Oshry v Feldman*,[337] and *Friedrich v Smit*,[338] which dealt with the very essence as to the eligibility of a claim. The role of the executor was also examined as to how he or she is supposed to deal with a claim. Investigation in this regard, revealed that there are still a number of practical issues that need to be dealt with. These included the fact that the executor is not really equipped to deal with a claim due to the complexity thereof, as well as how the factors for determination of a claim should be interpreted.

[337] 2010 (6) SA 19 (SCA).
[338] 2017 (4) SA 144 (SCA).

Focus in chapter 4 was placed on prescripts of Dutch and English Law respectively relating to maintenance for surviving spouses and how this aspect is dealt with. The reason for the choice of these two jurisdictions, were that the approaches followed in Dutch law and English law, are far more comprehensive, when compared to the Maintenance of Surviving Spouses Act.

As a result of the practical issues dealt with in practice, chapter 5 provided a number of recommendations that could be implemented. The first and foremost could involve an amendment to the Maintenance of Surviving Spouses Act to clear up the identified issues, which could possibly provide a more succinct solution to protect all parties concerned. Other recommendations include involving other parties to perhaps ease the financial burden, especially where any of the parties involved are not satisfied with the executor's decision as to whether to allow a claim, or to refute the claim.

Based on the outcomes of each of the provisions of the Maintenance of Surviving Spouses Act that were investigated in this research, it can be concluded that even though the legislator had promulgated the Act with the best intentions, there is still a need for work to be done in order to strike a balance, first in allowing the claim for "all" of the so-called "spouses" and "partners" and secondly and equally important, to carry out the will maker's intention of adhering and carrying out his or her wishes in terms of the will.

Bibliography

Case law

- *BOE Trust Ltd NNO* 2013 (3) SA 236 (SCA)
- *Curators, Emma Smith Educational Fund v University of KwaZulu Natal* 2013 (3) SA 236 (SCA)
- *Daniels v Campbell* 2004 (5) SA 331 (CC)
- *Du Toit v Greyling* NO (78173/2014) (GNP)
- *Fourie and Another v Minister van Buitelandse Sake and Another (Lesbian and Gay Eqality Project as Amicis Curiae)* 2003 (5) SA 301 (CC)
- *Friedrich v Smit* 2017 4 SA 144 (SCA)
- *Gory v Kolver (Starke and Others Intervening)* 2007 (4) SA 97 (CC)
- *Govender v Ragavayah* 2009 1 All SA 371 (D)
- *Hassam v Jacobs* (2008) 4 All SA 350 (C)
- *Hodges v Couubrough NO 1991* (3) SA 58 (D)
- *Ismail v Ismail* 1983 (1) SA 1006 (A)
- *Kambule v The Master* 2007 3 SA 403 (E)
- *Kroon v Kroon* 1986 All SA 423 (E)
- *Laubscher v Duplan* 2017 (2) SA 264 (CC)
- *Minister of Education v Syfrets Trust NO* 2006 (4) SA 205 (C)

- *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality and Others v Minister of Home Affairs* 2007 (4) SA 97 (CC)

- *Oshry NO v Feldman* 2016 (6) SA 19 (SCA)

- *Pommerel v Pommerel* 1990 (1) SA 110 (A)

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

- *Vather v Seedat* 1974 (3) SA 389 (N)

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

Handbooks

- Clark B, van Zyl L J, Sonnekus J, Scott T J, Schwellnus T, Schafer L I , Meintjies-Van der Walt L, Laubuschagne J M T, Kruger R, Mwambene L, Kerr A J, Joubert D J, Goolam N M I, Glover G, Driver S E H, Bekker J C and Lupton M L *Family Law Service* South Africa: Lexis Nexis 2011

- Corbett M M, Hofmeyer G and Kahn E (ed) *The Law of Succession in South Africa* 2ed Cape Town: Juta 2001

- De Waal M J and Schoeman-Malan M C *Law of Succession* 5ed Cape Town: Juta 2015

- Du Bois F (ed), Bradfield G, Himonga C, Hutchison D, Lehmann K, le Roux R, Paleker M, Pope A, van der Merwe C G and Visser D *Wille's Principles of South African Law* 9ed Cape Town: Juta 2007

- Du Toit F, Smith B and Van der Linde A *Fundamentals of South African Trust Law* South Africa: Lexis Nexis 2019

- Hahlo HR *The South Africa Law of Husband and Wife* 5ed Cape Town: Juta 1985

- Jamneck J (ed), Rautenbach C (ed), Paleker M, Van der Linde A, Wood-Bodley M *The Law of Succession in South Africa* 3rd Cape Town: Oxford University Press 2017

- Robinson J, Human S and Boshoff A *Introduction to SA Family Law* 5ed Potchefstroom: Printing Things 2012

- Sinclair J D assisted by Heaton J *The Law of Marriage* Volume 1 Cape Town: Juta 1996

- Van Heerden B, Cockrell A, Keightley R, Heaton J (ed), Clark B (ed), Sinclair J (ed) and Mosikatsana T (ed) Boberg *Law of Persons and The Family* 2ed Cape Town: Juta 1999

Journals

- Coetzee Bester B and Louw A "Domestic Partners and "The Choice Argument": *Quo Vadis*?" *PER/PELJ* 2014 (17) 6

- Smith B "Rethinking *Volks v Robinson:* The Implications of Applying a Contextualised Choice Model" to Prospective South African Domestic Partnerships Legislation" 2010 13 *PER/PELJ 238*

- Sonnekus J C "Verlengde onderhoudsaanspraak van die langslewende gade" 1990 *TSAR* 491

- Sonnekus J C "Verlengde onderhoudsaanspraak vir langslewende gade geen onbedagte meevaller vir erfgename van aanspraakmaker nie" 2010 *TSAR* 4

- Sonnekus J C "Verlengde onderhoudsaanspraak van die langslewende gade is geen vrypas tot ongegronde baattrekking nie en dus is skadevergoeding gepas" 2017 *TSAR* 891

Legislation register

- Administration of Estates Act 66 of 1965
- Civil Union Act 17 of 2006
- Constitution of the Republic of South Africa, 1996
- Domestic Partnerships Bill 2008 (GN36GG30663/14-1-2008)
- Maintenance Act 99 of 1998
- Maintenance of Surviving Spouses Act 27 of 1990
- Marriage Act 25 of 1961
- Pension Fund Act 24 of 1956
- Recognition of Customary Marriages Act 120 of 1998

Foreign Legislation Register

- *Dutch Civil Code*
- *Inheritance (Provision for Family and Dependents) Act 1975*
- *Civil Partnership Act 2004*