

woman

**know** your rights



## A SIMPLIFIED GUIDE TO MARRIAGE AND RELATIONSHIPS



WOMEN'S LEGAL CENTRE

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*Researched by* Erin Torkelson

*Written by* Sibongile Ndashe and Shehaam Johnstone

*Edited by* Jennifer Williams and Pam Sykes

*Updated by* Jennifer Williams and Hoodah Abrahams-Fayker.

*Illustrations:* Maalin

*Cover photograph:* © Fleur Suijten

*Printing:* Modern Printers



**WOMEN'S LEGAL CENTRE**



7th Floor, Constitution House,  
124 Adderley Street, Cape Town 8000  
Tel: 021 424 5660 · Fax: 021 424 5206

# CONTENTS

	Introduction	4
	How to Use This Booklet	5
<b>1</b>	Civil Marriages	6
<b>2</b>	Customary Marriages	13
<b>3</b>	Religious Marriages	17
<b>4</b>	Same Sex Marriages	22
<b>5</b>	Domestic Partnerships	23
<b>6</b>	Useful contact details	26

## INTRODUCTION

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

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

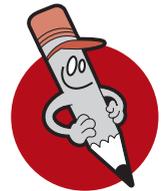
This booklet is intended to provide basic information on the different types of marriages and relationships and the law that goes with those marriages or relationships. We hope the information in this booklet will make it possible for people to assert their rights and decide what kind of relationship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

## HOW TO USE THIS BOOKLET

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



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



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



## USE THIS BOOKLET TO

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

# **CHAPTER 1:**

## **Civil Marriages**

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

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

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

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

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

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

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

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

# Marriage in Community of Property



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

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

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

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

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

## What happens if my husband becomes insolvent?

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

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

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

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

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



**Out of community of property:**

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

**Ante-nuptial contract:**

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

**Creditors:**

People that you owe money to.

**Interpleading procedures:**

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

**Attach:**

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

## Marriage out of Community of Property

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

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

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

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

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

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

# Marriage out of Community with Accrual

## What is accrual and when does it apply?

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

The accrual system in South Africa basically operates as follows:

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

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

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

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

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

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



### **Accrual:**

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

### **Proprietary:**

Involving property

**Irretrievably:**

Means the marriage cannot be saved.

**Habitual criminal:**

A person who regularly commits crime

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The family courts are based at your nearest regional court. Regional courts can now deal with disputes including divorce, maintenance, adoption and custody of children (parental rights and responsibilities).

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

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

1. Certified copy of your marriage certificate;
2. Certified copy your identity document ;
3. Certified copy of your spouse's identity document ;
4. Certified copy of the birth certificates of your children

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

Yes, the family court can decide cases concerning family law, including maintenance, parental rights and responsibilities, who will have care of the child and what contact the other parent will have.



#### **Care:**

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

#### **Contact:**

The right to spend time with the child

#### **Guardian:**

The right to take legal decisions for the child. Both parents have guardianship of a legitimate child born of the marriage.

Some decisions require both parents consent such as adoption, the removal of a child from the country, selling the immovable property of a child (such as a house).

#### **Certified copy:**

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

## Table Of Rights For Civil Marriages

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

## CHAPTER 2: Customary Marriages

### What is a customary marriage?

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

### Are customary marriages legally recognised?

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

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

Your marriage will have legal recognition and protection if it complies with the customary law and was still in existence after the implementation of the RCMA. If your marriage was before the RCMA came into effect and is polygynous, then your marriage is still governed by customary law. If you are in a monogamous customary marriage, no matter whether you married before or after the RCMA came into effect, your marriage is governed by the terms of the RCMA.



#### Implementation:

The date the law came into effect.

#### Legally valid:

Recognised and protected by the law

#### Monogamous:

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

#### Polygynous:

Where a man has more than one wife. The commonly used term is "polygamous", however this means where a spouse can have more than one spouse and in fact, the RCMA only allows a man to have more than one wife.

#### Perpetual minor:

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



## FROM THE PRESS

### Court scraps customary marriage rule – Ernest Mabuza, Legal Affairs Correspondent

The Constitutional Court has abolished the rule of African customary law which prevented women from owning immovable property in a customary marriage. The court declared that section 7 (1) and 7 (2) of the Recognition of Customary Marriage Act of 1998 were invalid. The Women's Legal Centre Trust, which was a friend of the court in the case, said a "substantial group of women" would benefit from the change.

"Mrs. Gumede and women in her position are now afforded protection which before the judgment they could not enjoy because their marriages were governed by customary law," the centre's director, Jennifer Williams, said. Deputy Chief Justice Dikgang Moseneke said the case concerned a claim of unfair discrimination on the grounds of gender and race in relation to women married under customary laws in KwaZulu Natal.

"At one level, the case underlines, the stubborn persistence of patriarchy and, conversely, the vulnerability of many women during and upon termination of customary marriage. At another level, the case poses intricate questions about the relative space occupied by pluralist legal systems under the umbrella of one supreme law, which lays down a common normative platform." Section 7 (1) of the act provides that customary marriages entered into before the commencing of the act in 2000 continue to be governed by customary law. Customary marriages entered into after the act was promulgated are marriages in community of property. Elizabeth Gumede and her husband, Amos Gumede, entered into a customary marriage in 1968 and the family acquired two homes. In January 2003, he instituted divorce proceedings. She consulted the Legal Resources Centre which brought an application to stay that divorce action, pending the discriminatory nature of the customary marriage.

Business Day, 9/12/2008



**Equitably:**  
Fairly and equally

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

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

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

Yes, in the case of polygynous marriages. This means that women who married before the RCMA came into operation in a polygynous marriage are not given equal status to their husbands, and their marriages are governed by the customary law. This means that these marriages would almost always be out of community of property and there would be no obligation on the husband to register a contract where he married more than one wife before the RCMA. The Women's Legal Centre is advocating for this to be changed in line with the Constitution.

However, the Constitutional Court (in the Gumede case) has ruled that women married in monogamous customary marriages before the implementation of the RCMA are covered by its provisions and get the same protections as if they were married after the RCMA came into effect. This means that all monogamous customary marriages are automatically in community of property and women have equal status and capacity in the law to their husbands. The court did not go so far as to include polygynous marriages.

### **Customary law marriages have always been said to be out of community of property, is that still the case?**

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

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

The RCMA does allow a man to enter into multiple marriages. The RCMA stipulates that in the event that a man wishes to enter into a polygynous marriage he has to apply to the court for permission.

In this application he must set out the property systems of all of his wives. All interested parties must be represented in the application, particularly the existing and future wives. The court must consider the circumstances of the existing spouse(s) and family members and ensure that the contract fairly divides the existing marital property. The court has the power to accept the contract, add a condition or refuse to accept the contract. The provision is intended to protect all wives, children and family members.



**Primogeniture:**

The rule that the eldest male relative must inherit the property

**Assets:**

Property of value, such as a house, cars or furniture

**What if my husband dies ? I have been told that as a woman I can't inherit unless he leaves a will?**

This is no longer true. You can inherit. In 2004 the Women's Legal Centre took a case to court on behalf of Ms Bhe's partner and her daughters. Mr Bhe had died without a will and the deceased husband's father was to inherit the house according to customary law. The High Court and later the Constitutional Court found that the customary law that only males can inherit (primogeniture) is unconstitutional.

In 2009 the State passed a law that reforms the customary law of succession in line with the findings of the Constitutional Court. This Act is called the Reform of Customary Law of Succession and Regulation of Related Matters Act No 11 of 2009. This law finally does away with the rule of primogeniture. It also provides that spouses in polygynous marriages may inherit the equivalent of a child's share of their husband's estate, unless the estate does not have sufficient money, in which case the estate is divided between the surviving spouses equally.

**How do I go about termination my customary marriage?**

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

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

### What powers do the courts have?

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

## Table Of Rights for Customary Marriages

LAW	RIGHTS GIVEN TO SPOUSES IN CIVIL MARRIAGES	RIGHTS GIVEN TO SPOUSES IN CUSTOMARY MARRIAGES
Privacy	Spouses do not have to testify against one another in criminal proceedings.	Same as civil marriage
Common Home and Other Property	Spouses are entitled to some portion of the joint home, and during the marriage can only be evicted in exceptional circumstances	Same as civil marriage. (Pre RCMA polygynous marriages: customary law will apply).
Pension schemes	Pension schemes often provide benefits to the spouses.	Same as civil marriage.
Medical schemes	Medical schemes are required to cover spouses.	Same as civil marriage.
Insurance	Insurance coverage automatically covers spouses of the insured.	Same as civil marriage.
Duty of support	Spouses have a duty to support each other.	Same as civil marriage. (Pre RCMA polygynous marriages: customary law will apply. The Supreme Court of Appeal has recognised a duty of support in polygynous marriages at least in respect of the Road Accident Fund [Gasa case]).
Children	Both parents are equal guardians of the child.	Same as civil marriage.
Immigration	Both spouses are given the same benefits under immigration law.	Same as civil marriage.
Inheritance	If a spouse dies without a will, the surviving spouse is entitled to a share in the property of the deceased.	Same as civil marriage. Polygynous marriages: each wife receives a child's share.

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

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

Religious marriages are defined as marriages solemnized according to religious rites i.e. the rituals prescribed by your belief, such as Islamic and Hindu marriages.

Religious marriages have been given some recognition by the courts which we will discuss. There is currently no law in place recognizing religious marriages.

### **Is a religious marriage recognized in S.A. Law?**

No. There is no legislation affording protection to persons married according to religious rites. However, the Constitution being the supreme law in South Africa recognizes freedom of religion, equality and dignity. Therefore the courts have given recognition in certain instances to religious marriages, specifically Islamic and Hindu marriages.

### **ISLAMIC MARRIAGES**

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

The proprietary consequences of Islamic marriages are that the estate of the husband and wife remain separate after the date of marriage. Since the law does not recognise the marriage the accrual system does not apply.

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

There is limited protection given by the courts:

In maintenance

- Spouses in an Islamic marriage may call upon a maintenance court to obtain maintenance from the other spouse. For

**De facto:**

In fact

**Intestate:**

Dying without leaving a will

**Deceased estate:**

The property of the person who died

**Polygynous:**

For the definition of polygynous, see the section on Customary marriages.

**Interim:**

Until the main case before the court is finished.

a duty of support after the termination of a marriage by divorce, the courts acknowledge the duty of support for three months after an Islamic divorce has been granted (as recognised by Islamic law) and go further to investigate the extent of the contributions made by the wife during the marriage (financial and otherwise) to establish the extent of the maintenance she is entitled to;

- The courts also allow a spouse to claim maintenance in a polygynous Islamic marriage. The court case supporting this position in law was decided in the then Transvaal High Court in *Khan v Khan* where the court held that a wife married in accordance with Muslim rites under a monogamous or polygynous marriage was entitled to maintenance during their marriage and as such it fell within the ambit of the Maintenance Act.
- In the case of *Mohamed v R Mohamed & Six Others*, the Eastern Cape High Court ordered that interim maintenance for personal maintenance, a child's maintenance and contribution towards legal costs be paid where the main action involved a matrimonial action (in this case a claim to order that Muslim marriages too be governed by the Divorce Act).
- The Cape High Court followed suit in the case of *Hoosain v Dangor*. Ms Hoosain was asking the court to apply the Divorce Act to her Islamic marriage, and the court ordered Mr Dangor to pay her interim maintenance until the court decided on the main action.

### **Is there any protection regarding the proprietary (the property) consequences of the marriage?**

Yes, but very limited.

Under the law of contract, in the *Rylands v Edros* case, the Cape High Court recognized a marriage solemnised in accordance with Islamic rites as a valid contract under the Constitution. As such, the court can be called upon to ensure that the parties to a Muslim marriage comply with the terms of the contractual agreement.

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



## FROM THE PRESS

### Muslim Widows Can Now Inherit

by Chantelle Benjamin (“Business Day,” March 12, 2004)

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

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

### Victory for Muslim wives

By Karen Maughan (“Cape Times”, July 16, 2009)

“Fatima Gabie Hassam lost everything when her husband died without a will- leaving her, as a spouse in a polygynous Muslim marriage, with no legal claim to his estate. Her husband had two wives, and the Intestate Succession Act provided for only one spouse to inherit the estate. But Hassam did not give up and embarked on what was to become a five-year court quest to ensure that all the Muslim wives in a polygynous Muslim marriage could share the estate if their husband died without a will. The Constitutional Court’s 11 judges ruled in favour of Hassam, 6:3. They ordered that that the words ‘or spouses’ be read into the Act, and that the change be made retroactive to April 27, 1994”.

### Widow’s win opens doors

By Doreen Premdev (“Tribune Herald”, November 9, 2008)

“Saloshinie Govender was widowed and stripped of her matrimonial Thali (a sacred yellow string neck chain with gold pendants, worn by married South Indian Hindu women) by her in-laws 22 months ago. They refused to acknowledge Govender’s Hindu marriage to their son Balasundran Narainsamy, or allow her to inherit from his R380 000 estate. She took the matter to court and this week made history when she changed the law for women married according to Hindu rites in South Africa”.

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

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

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

Spouses in a polygynous Islamic marriage are also protected when the husband dies. In *Gabie Hassam v Jacobs N.O. & Others*, the Constitutional Court confirmed the decision of the Cape High Court that where a deceased has more than one wife which he married according to Islamic law, the wives will be entitled to inherit in terms of the Intestate Succession Act and claim maintenance in terms of the Maintenance of Surviving Spouses Act.



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

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

**de facto:** As a matter of fact (as opposed to a matter of law)

## HINDU MARRIAGES

### What are the proprietary (property) consequences of a Hindu marriage?

Hindu marriages are regarded as being in community of property.

### Is there any legal protection for people entering into Hindu marriages?

In Maintenance - In the *Prag* case the Maintenance court ordered that Mr Prag pay spousal maintenance to Mrs Prag to whom he was married according to Hindu rites.

### Do I have any protection in law if my husband to whom I was married according to Hindu rites dies?

Yes. In the case of *Govender*, the Durban High Court extended the definition of the word 'surviving' spouse in the Intestate Succession Act (ISA) and the Maintenance of Surviving Spouses Act (MSSA) to include a wife married according to Hindu law and custom, thus she was able to inherit from her deceased husband's estate when he died without leaving a will.

## Table Of Rights for Muslim Marriages

LAW	RIGHTS GIVEN TO CIVIL MARRIAGES	RIGHTS GIVEN TO MUSLIM MARRIAGES
Privacy	Spouses are not required to testify against one another in criminal proceedings.	Same as civil marriages, religious marriages are recognised as valid marriages for the purposes of the law of evidence.
Common Home and Other Property	Spouses are entitled to some portion of the joint home and cannot be evicted from the home.	Generally, this does not apply to religious marriages. The law of contract, unjustified enrichment and universal partnership might be used to assist partners in a dispute about property.
Pension schemes	Pension schemes often provide benefits to the spouses.	Some schemes provide benefits to a nominee of the contributor, and a growing number also recognize "partners," which could include parties to religious marriages.

<b>Medical schemes</b>	Medical schemes are required to cover spouses.	Medical schemes are required to cover partners, which could include parties to religious marriages.
<b>Insurance</b>	Insurance coverage automatically covers spouses of the insured.	Partners may include each other on their insurance coverage - however, they must specifically ask for this. It does not happen automatically.
<b>Duty of support</b>	Spouses have a duty to support each other.	Courts recognise that parties to a religious marriage have a duty to support one another.
<b>Children</b>	Both parents are equal guardians of the child.	Both parents are equal guardians of the child according to legislation governing children, where religious marriages are included in its definition of marriage.
<b>Immigration</b>	Both spouses are given the same benefits under immigration law.	Parties to a religious marriage are given the same benefits under immigration law.
<b>Inheritance</b>	If a spouse dies without a will, the surviving spouse is entitled to a share in the property of the deceased.	The courts have given a spouse in a religious monogamous marriage the same rights as a spouse in a civil marriage. Where the husband dies without a will, and he has more than one wife the court recognises that all the wives will inherit equal shares according to a child's portion.
<b>Maintenance</b>	If a spouse dies, her/his will must sufficiently provide for the surviving spouse according to her/his means. If this is not the case, the surviving spouse can claim maintenance from the estate.	The courts have extended the claim of a surviving spouse for maintenance from the deceased spouse's estate to partners in monogamous and polygamous religious marriages.
<b>Occupational injury or disease</b>	Spouses are entitled to compensation	Parties to a religious marriage are entitled to compensation if they were living together as husband and wife at the time of disease, injury or death.
<b>Protection against violence</b>	Spouses are protected against domestic violence.	Parties to a religious marriage are protected against domestic violence.

## CHAPTER 4: Same Sex Marriages

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

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

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

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

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



**Heterosexual:**  
Opposite sex

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

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

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

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

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

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



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## FROM THE PRESS

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### Same-sex marriage approved in South Africa

Afrol News, 1 December 2005

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

## **CHAPTER 5:**

# **Domestic Partnership**

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

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



**Domestic partnership:**  
Commonly known as “living together” or life partners

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

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

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

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

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

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

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

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

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

If you do not enter into a contract the law does not provide any protection. Where parties fail to enter into a contract, the law will deem there to be no legal relationship that existed between the two parties. However, there are legal remedies available such as if



## FROM THE PRESS

**Nothing but the knot** – by Michelle O’Sullivan      The Mail and Guardian, 1 March 2005  
 Last Monday, the Constitutional Court handed down judgement in the case of Ethel Robinson and dealt a blow to the 2,3-million South Africans who described themselves as life partners in the most recent census. Robinson was in a monogamous life partnership for 15 years and sought to claim maintenance from her deceased partner’s estate. Justice Thembile Skweyiya, writing for the majority, ruled that it is not unfair discrimination to make a distinction between the survivors of marriage on the one hand and survivors of heterosexual life partnerships on the other in the context of maintenance claims.



### Express:

Is stated in writing or verbally

### Tacit:

Can be implied from the circumstances

you can prove the existence of a universal partnership. In terms of a universal partnership agreement the court is obliged to make an equitable distribution of the estate, in proportion to the contribution made by each partner.

### How does one define a universal partnership?

A universal partnership is an agreement, either express or tacit, where parties choose to bring their present and future assets into community of property. In other words, all of the property is owned jointly during the relationship. To have a universal partnership declared, four legal requirements must be met:

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

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

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

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

## Table Of Rights for Domestic Partnerships

LAW	RIGHTS GIVEN TO MARRIED PARTNERS	RIGHTS GIVEN TO DOMESTIC PARTNERS
Privacy	Spouses don’t have to testify against one another in criminal proceedings.	Partners may have to testify against each other in criminal proceedings

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

## USEFUL CONTACT DETAILS

Province	Regional Court	Contact Number
<b>Eastern Cape</b>	East London	043 722 6643
	Grahamstown	046 622 7303
	Graaff-Reinet	049 892 2263
	King William's Town	043 642 3548
	Port Elizabeth	041 502 7400
	Queenstown	045 839 2013
<b>Free State</b>	Humansdorp	042 291 0732
	Bethlehem	085 303 5386
	Bloemfontein	051 506 5111
	Kroonstad	056 212 6706
<b>Gauteng</b>	Welkom	057 916 2500
	Ekangala	013 934 4249/50
	Johannesburg	011 491 5000
	Kempton Park	011 975 0313
	Oberholzer	018 788 2341
	Pretoria	012 319 4001/2
	Randburg	011 789 2600
	Roodepoort	011 766 1004
	Germiston	011 873 0500/7
<b>KwaZulu-Natal</b>	Vereeniging	016 422 0071/4
	Durban	031 332 2040
	Empangeni	035 772 1711/2/3 035 923 3232
	Newcastle	034 312 1166/7/8
	Vryheid	034 981 4912
<b>Limpopo</b>	Pietermaritzburg	033 355 5100
	Port Shepstone	039 682 0136/0163
	Giyani	015 812 1069/015 812 0420/1
	Lebowakgomo	015 633 7160
	Sekhukhune	013 260 1001/2
	Tzaneen	015 307 3770/1
<b>Mpumalanga</b>	Thohoyandou	015 962 5550/2
	Eestehoek	017 883 0090
	Evander	017 632 2204/7
	KwaMahlanga	013 947 2363/6
<b>Northern Cape</b>	Middleburg	013 282 5345
	De Aar	053 631 2184/5
	Kimberley	053 833 2576
<b>North West</b>	Upington	054 337 5300
	Brits	012 252 3223
	Klerksdorp	012 700 8200
	Potchefstroom	018 293 0701
	Rustenburg	014 592 2206
	Temba	012 717 2179/3364/3327
<b>Western Cape</b>	Vryburg	053 927 3841
	Atlantis	021 572 1003/9
	Bellville	021 950 3387
	Cape Town	021 401 1503
	George	044 802 5800
	Mitchells Pliian	021 370 4200
	Oudsthoorn	044 272 6061/2
	Somerset West	021 850 7420
	Worcester	023 342 2325
Wynberg	021 799 1800	





**WOMEN'S LEGAL CENTRE**