



WOMEN'S LEGAL CENTRE

## INHERITANCE & MAINTENANCE LAW AMENDMENTS FOR WOMEN IN DOMESTIC PARTNERSHIPS

### What is a Domestic Partnership?

A Domestic Partnership is when a couple live together in a romantic relationship, similar to a marriage, without a legal wedding. Some couples create legal contracts, while others don't, due to various reasons.

### Before the Amendments

Women in Domestic Partnerships could not inherit or claim maintenance if their partner didn't have a valid Will after their passing, or if they did not have a written agreement in place.

These new amendments were driven by a woman in a Domestic Partnership whose case was brought before the Constitutional Court.

### Jane Bwanya v The Master of the High Court

Jane Bwanya's case exposed a major injustice. After her partner's death, she was denied inheritance and support, facing eviction. Her case, representing millions of South Africans in Domestic Partnerships, reached the Constitutional Court, which found the Intestate Succession Act and Maintenance of Surviving Spouses Act unconstitutional for not recognising partners in Domestic Partnerships with maintenance duties.

### The Amendments:

#### The Intestate Succession Act (ISSA):

The Intestate Succession Act is a set of rules that determine what happens to a person's property when they pass away without leaving a valid Will. It outlines the steps to follow in such situations.

#### What are the Amendments to the Intestate Succession Act?

In December 2021 the Constitutional Court declared that women in Domestic Partnerships were being discriminated against because they were not recognised as spouses for the purposes of inheriting under the ISSA.

The Act now recognise partners in Domestic Partnerships as spouses for inheritance purposes, provided they have undertaken reciprocal duties of support during their relationship. This means that when a partner passes away without a valid Will, their surviving partner will have a rightful claim to inherit from the deceased partner's estate.

The executor or Master's representative has specific responsibilities in handling the deceased person's estate:

- If the deceased is survived by a spouse (or partner in a Domestic Partnership with mutual support duties) but has no descendants, that spouse (or partner) gets the whole estate.\*
- If the deceased has both a spouse (or partner with mutual support duties) and descendants:
- The spouse (or partner) will receive a share like that of a child, or as set by the Minister of Justice in the Gazette, whichever is more.

*\* This only applies once the deceased's debt has been paid.*

## The Maintenance of Surviving Spouses Act

The Maintenance of Surviving Spouse's Act makes sure that if a spouse isn't provided for in a valid Will, they still get support. It helps provide maintenance so they don't face financial problems.

### What are the amendments to the MSSA?

The Courts changed the meaning of 'spouse' in the MSSA. Now, it also means the surviving partner in a Domestic Partnership, where both partners agreed to support each other, and the surviving partner didn't get a fair share of the deceased partner's estate in the Will to ensure they don't face financial problems.

- "Spouse" for the purposes of this Act shall include a person in a Domestic Partnership in which the partners undertook reciprocal duties of support.
- "Marriage" for the purposes of this Act shall include a Domestic Partnership in which the partners undertook reciprocal duties of support.

## Understanding Your Rights In a Domestic Partnership

If you're a woman in a Domestic Partnership, you might have questions about your rights to inheritance and maintenance after your partner's death. This guide is here to help answer some of those questions. If you have more questions or face challenges, don't hesitate to seek advice from a qualified legal professional. They can provide the support you need.

You can also contact our Legal Advice Unit on 021 424 5660 or email us at [info@wlce.co.za](mailto:info@wlce.co.za)

## Is my Domestic Partnership legally recognised in South African law?

### The answer to this question is Yes and No

Yes: Courts do acknowledge that you may have some rights and benefits like inheriting or claiming maintenance if your partner dies.

No: Domestic Partnerships aren't legally recognised in South Africa because there is no legislative framework that recognises and regulates Domestic Partnerships in the same way as marriages or civil unions.

So, if the partnership ends due to an irretrievable breakdown, there's no automatic right to share assets or get maintenance. But, if you have a written agreement, you might secure rights to a division of a joint estate or accrual of assets.

## Does it matter why I am in a Domestic Partnership as opposed to a marriage (Civil/Customary/Religious) or Civil Union?

It does not matter what type of relationship you have, because you have the right to choose the type of relationship you want to be in. The Courts have recognised the diversity of the type of families in South Africa, and people living in them should have access to equal rights recognition, protection, and enjoyment.

The decision on whether a woman marries or not is often based on patriarchal stereotypes and beliefs in our society. Men tend to have unequal power in relationships, and so they more often than not are the decision makers who initiate or propose marriage. Men also play a leading role in the negotiation of customary and religious marriage contracts between families, and this impacts and influences how women navigate their own romantic relationships and decisions about marriage. Our Courts have recognised that this inequality in society creates a gender imbalance and without a legislative framework to recognise women's rights in domestic partnerships they are vulnerable to discrimination.

## What am I entitled to if or when my partner dies and we were in a Domestic Partnership?

If your partner in Domestic Partnership passes away, you have rights under two important laws.

### The Intestate Succession Act

This law deals with what happens when someone dies without a valid Will. It now recognises someone in a Domestic Partnership as a spouse for inheritance purposes. Meaning, you may inherit their estate\*, especially if you don't have children together.

#### Here's how it works:

- If the person who died has a partner in a Domestic Partnership, and they don't have any children together, the surviving partner gets everything that belonged to the person who passed away.
- If the person who died has a partner in a Domestic Partnership and they do have children together, the surviving partner still gets a share of their things, but it might not be everything. The exact share depends on the rules set by the Minister of Justice.

So, these changes make sure that partners in Domestic Partnerships are treated fairly and can inherit from each other's estates if one of them passes away without a Will.

*\* This only applies once the deceased debt has been paid.*

### The Maintenance of Surviving Spouses Act

The Maintenance of Surviving Spouse's Act, is a set of rules about taking care of a husband or wife after their spouse has passed away. These rules make sure that the surviving spouse doesn't end up struggling with money and can continue to live the way they were used to when their spouse was alive.

When we talk about maintenance, we mean all the things needed for daily life, like food, clothes, a place to live, and even nice things like vacations. Without the support of the deceased spouse, the one left behind could face financial difficulties or have to change how they live.

But there's a catch. These rules apply only if the deceased person had enough money in their estate (their belongings and money) to support the surviving spouse. If there isn't enough money in the estate, the surviving spouse may not benefit from these rules.

Now, the good news is that the MSSA has been changed. It now includes not only husbands and wives but also partners in Domestic Partnerships. So, whether you were in a marriage or a Domestic Partnership, if you both promised to take care of each other, these rules apply to you.

## What factors must be considered whether I can benefit under the ISSA and or the MSSA?

### Duration of the Partnership:

There's no fixed amount of time that tells us how committed a couple is. Sometimes, people think that living together for five or seven years means they're in a common-law marriage, but there's no official rule like that.

Every couple is unique. Some may show strong commitment and shared responsibility in a short time, while others may take longer. So, we need to look at all the factors that show their commitment, not just the time they've been together.

### Family and Friends' Views:

The opinions of close friends and family to understand how a couple's relationship was can be asked. What these people thought about the commitment, how the couple interacted, and what they contributed can show what the couple intended and how devoted they were to each other.

But there's a thing to consider. Sometimes, family members may want to get something from the deceased person's belongings, like children or parents. So, they might not always tell the truth about the relationship. The person in charge of handling the deceased person's belongings, called the executor or Master's representative, needs to be careful because self-interest might influence them to give a false account of the relationship.

### **Shared Household:**

Even if you live apart sometimes, you can still have a shared home.

If a couple in a Domestic Partnership promises to take care of each other, we assume they live together and share responsibilities in the same home. However, in South Africa, we have many different types of families. Sometimes, especially male partners might work in a different area while their partner lives somewhere else.

In such cases, it's important to explain how they still consider their home shared, even if they don't live together all the time. Just because one partner lives somewhere else for work doesn't mean they don't have a shared home and life together.

### **Contribution to the household:**

Contributions to the relationship don't have to be just financial.

In the past, our laws mainly focused on how much money each person put into their shared home to show they were in a Domestic Partnership. But our laws have changed. Now, we understand that contributing to a relationship isn't just about money.

The courts recognise that women often do a lot of unpaid work at home, like taking care of the family. This work is crucial for keeping the family healthy and the relationship strong. While men often do well in their careers outside the home, it's because they get support from women at home. All of these things show that both partners are committed to taking care of each other, not just financially.

### **Financial Support and Benefits:**

Sharing financial responsibilities and benefits show commitment.

It's important to see how much one partner helps the other financially and if they've planned for things like medical care and retirement together.

When one partner financially supports the other, it shows they're committed. For example, in Domestic Partnerships, the partner who's better off financially might put the other on their medical aid or make them a beneficiary in important policies like life insurance. These actions show that the couple cares for each other.

But sometimes, it's not possible for both partners to do these things because it can be expensive. If one partner couldn't provide in this way, it doesn't mean they didn't care or weren't committed.

### **Written Agreements and Wills:**

Legal agreements and Wills can prove your commitment.

Confirmation if the couple wrote anything down about their relationship or if they made a Will that includes each other.

Sometimes, when couples have legal advice, they write down what their relationship means to them. This written agreement can show their commitment to each other. But not having such an agreement doesn't mean they weren't committed. Not everyone can get legal help or negotiate good terms for such an agreement.

The same goes for Wills. If one partner made a Will that benefits the other, it's proof of their commitment. But making a Will can be costly, and not everyone can afford it. So, we shouldn't judge a relationship based on whether they had a Will or not. These criteria should be used to make sure the partner gets the recognition and rights they deserve, not to disadvantage them.

### **Children:**

Having or not having children together doesn't define your commitment.

In South Africa, we have many different cultures and types of families. Some couples in Domestic Partnerships decide to have children or bring children into their relationship. Having kids can be a way of showing their commitment to each other, but not having children doesn't mean they weren't committed to taking care of each other.

So, even if a couple in a Domestic Partnership doesn't have kids together, we can still consider it a strong and committed partnership. Taking care of children, whether they are biologically related or not, can show that the couple wanted to create a family and be together for the long term. This commitment to children can be a sign of a permanent partnership.

### **Ceremonies and Celebrations:**

Celebrations can be evidence of your commitment, but not having them doesn't mean you're not committed.

Sometimes, couples want to celebrate their love and commitment in ways that are important to their culture or religion. These celebrations can take different forms, like exchanging promises or having a special ceremony. These events are not the same as legal marriages or civil unions because they aren't performed by marriage officials recognised by the law.

However, these celebrations are a way for couples to publicly show their commitment to each other. If a couple has had such a ceremony, it can be proof that they are in a Domestic Partnership. But it's also important to remember that not all couples choose to have these celebrations, and that doesn't mean they aren't in a committed relationship.

### **Q What happens if I don't meet all the criteria?**

You don't have to meet all the criteria to claim your rights.

These criteria are like a guide for the person in charge of handling the deceased person's belongings, called the executor or the Master's representative. The final decision is made by the Master, who oversees everything.

You don't have to meet every single criteria because they're not strict rules. They're more like things that help understand your Domestic Partnership. They're not a test to prove your relationship exists. Because there's no clear law for Domestic Partnerships, it can be challenging for the surviving partner to show they were in a real relationship and deserve the benefits under the Intestate Succession Act (ISSA) or Maintenance of Surviving Spouses Act (MSSA). Remember, every relationship is different, and people show their love and commitment in their own ways.



## Common terms that we use in this guide and which you may hear when seeking recognition of your rights

### **“Domestic Partnership”**

Refers to a couple living together in a relationship which is like or mirrors the characteristics of a marriage, and where they have undertaken reciprocal duties of support towards each other. Various other terms are used in society the most common being life partnership, cohabitation, living together, de facto marriage and common-law marriage.

### **“Beneficiary”**

Refers to a person who derives an advantage or benefit of some kind. In this context it refers to a person who can receive a benefit from a deceased estate.

### **“Deceased estate”**

Is created when a person dies and leaves property (moveable and or immovable) behind.

“executor” is a person authorised by the Master of the High Court to act on behalf of and to administer the deceased estate.

### **“Master of the High Court”**

Has oversight over and ensures that the deceased estate is administered in terms of the law.

“intestate succession” refers to the process in terms of which a deceased estate will be dealt with where the deceased person died without leaving a will. The process that will be followed is prescribed by the Intestate Succession Act.

### **“Testate Succession”**

Refers to the process in terms of which a deceased estate will be dealt with where the deceased person died leaving a will that sets out their wishes in terms of who should benefit from their deceased estate. The process that will be followed is prescribed by the Testate Succession Act.

### **“Gross value of assets”**

Refers to the total fair market value of an individual’s assets unencumbered before liabilities.

### **“Master’s representative”**

Is a person appointed by the Master of the High Court to represent and administer a deceased estate where the estate’s value is less than R250 000.00 or where the deceased estate does not have high value or entails complex decisions to be made in terms of the estate.

### **“Letter of executorship”**

Is issued by the Master of the High Court and authorises the executor to execute and administer the deceased estate.

### **“Letters of authority”**

Is issued by the Master of the High Court and authorises the Master’s representatives to administer the deceased estate.

### **“Winding-up of an estate”**

Is the process undertaken by the executor or Master’s representative in administering the deceased estate.

### **“Reporting of an estate”**

The law requires that the relatives of a deceased person inform the Master of the High Court of the death. This process is called reporting the estate and requires that specific forms are completed. Reporting the estate is an important process in the administration of estates. The Chief Master’s Directive 2 of 2015 sets out the documentation required when reporting a deceased estate.