CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/04

RICHARD GORDON VOLKS NO — Appellant

versus

ETHEL ROBINSON — First Respondent

WOMEN'S LEGAL CENTRE TRUST — Second Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Third Respondent

THE MASTER OF THE HIGH COURT — Fourth Respondent

Together with

CENTRE FOR APPLIED LEGAL STUDIES — Amicus Curiae

Heard on : 20 May 2004

Decided on : 21 February 2005

JUDGMENT

SKWEYIYA J:

Introduction

[1] This appeal and confirmatory proceedings concern the interpretation and constitutionality of section 2(1), read with section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 (the Act) which, in substance, confers on surviving spouses

the right to claim maintenance from the estates of their deceased spouses if they are not able to support themselves. The first respondent (Mrs Robinson) contends that the survivor of a stable permanent relationship between two persons of the opposite sex who had not been married to each other during their lifetime, but nevertheless lived a life akin to that of husband and wife, should be afforded the same protection that is afforded to the survivor of a marriage under the provisions of section 2(1) of the Act.

[2] The central question for consideration in this matter is whether the protection which the Act affords to a "survivor"[1] should be withheld from survivors of permanent life partnerships. The High Court (Cape Provincial Division) found that the exclusion of the surviving partner of a permanent life partnership from the ambit of the Act was unconstitutional.[2] The present proceedings follow from that order.

Factual background

[3] Mrs Robinson was in a permanent life partnership with the late Mr Shandling, an attorney and senior partner at CK Friedlander Shandling Volks (the law firm), from 1985 until the latter's death in 2001. They were never married and no children were born of their relationship. During the lifetime of the deceased, they had jointly occupied a flat situated in Cape Town on a continuous basis from early 1989 until the

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[1] Section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 (the Act) defines "survivor" as "the surviving spouse in a marriage dissolved by death."

[2] *Robinson and Another v Volks NO and Others* 2004 (6) SA 288 (C) at 299J; 2004 (6) BCLR 671 (C) at 682I.

deceased's death. She remained in occupation of the flat until the end of December 2002.

[4] The deceased had previously been married to Edith Freedman (Mrs Shandling), in 1950. Three children were born of their marriage, two sons, Martin and Adrian, and a daughter, Lauren. Mrs Shandling passed away on 27 January 1981 due to lung cancer. The couple's children, now majors, have established families of their own in the United States of America.

[5] The description by Mrs Robinson of their relationship is, in broad terms, accepted by the appellant (Mr Volks). She states that to a large extent the deceased had supported her financially. He gave her R5000 per month in order to cover household necessities and would deposit money into her account whenever she needed it. He also provided her with petrol money from the law firm's account and paid for her car maintenance. She was accepted as a dependant on his medical aid scheme from January 2000. During the relationship she worked intermittently as a freelance journalist and artist. This employment brought in some small income which she used on general living expenses, gifts for the deceased and personal expenses. She also worked on a voluntary basis at Fine Music Radio as a newsreader, programme compiler and presenter.

[6] Once a year, the deceased would travel to the United States to visit his three major children and grandchildren and on one occasion she accompanied him.

Whenever there were social functions at the law firm or at the radio station they would accompany each other. They were accepted as a couple and had many mutual friends. The deceased suffered from bi-polar disorder/manic depression, and over the years she had nursed him through illness and taken him to hospital.

[7] In terms of the deceased's will, Mr Volks, a partner in the law firm, was appointed as the executor of the deceased estate. The balance in the estate for distribution to Mrs Robinson, his three children, his domestic worker, and three staff members of the law firm, was R413 665.37. The bequest to Mrs Robinson constituted a Toyota motor vehicle, the contents of the flat which they occupied in Cape Town, other than those items that were chosen by and reserved for his three children, and a sum of R100 000. In terms of the will, Mrs Robinson was entitled to remain in the house for a period not exceeding nine months.

[8] In April 2002 Mrs Robinson sought legal advice from the Women's Legal Centre (the Centre) about her rights to claim maintenance from the deceased estate. After consulting with Mr Volks in his capacity as the executor, the Centre advised her that the residue in the estate was minimal and that she should not pursue her claim. In June 2003 she received a copy of the Final Liquidation and Distribution Account, which reflected a residue of R248 533.87. In accordance with the deceased's will, the residue would devolve upon his three children.

[9] During August 2003 the Centre wrote letters to Mr Volks and to the fourth respondent, the Master of the High Court (the Master), advising them of their client's claim. The appellant's attorneys rejected the claim on the basis that Mrs Robinson was not a "spouse" for the purposes of the Act.[3]

[10] After this response, Mrs Robinson launched a two-part application in the High Court. Part A sought an urgent interdict preventing Mr Volks from winding up and distributing the assets in the estate, pending the determination of the constitutional challenge to the Act, which relief was sought in Part B of the application. The application for the interdict was not opposed and was granted by the High Court.

[11] The application relating to the constitutional challenge was set down for a later date subject to the filing of an amended notice of motion, further papers and heads of argument. The Women's Legal Centre Trust (the Trust) filed an application to intervene in this application. That application was not opposed and the Trust was admitted as the second applicant in the proceedings. Both Mrs Robinson and the Trust relied upon the provisions of section 38 of the Constitution for standing. They

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[3] The letter of refusal stated:

> "*prima facie* it would appear that the deceased and your client considered their position during the lifetime of the deceased and elected not to enter into a marriage in accordance with the laws of South Africa. That election, included implicitly, if not expressly, the choice not to have the automatic consequences of the laws of marriage apply to their relationship. The provisions contained in the Last Will of the deceased dated 24th December 1999 are consistent with that election."

alleged that they were acting in their own interests; on behalf of partners in permanent life partnerships; and in the public interest.[4]

The contentions of the parties in the High Court

[12] In an amended notice of motion, Mrs Robinson and the Trust sought an order declaring that she was the "survivor" of the late Mr Shandling for the purposes of the Act, and therefore entitled to lodge a claim for maintenance under the Act. In the event that it was found that she did not qualify as a "survivor" for the purposes of the Act by virtue of not being "the surviving spouse in a marriage dissolved by death", they sought an order declaring that the exclusion of the survivor of permanent life partnerships from the provisions of the Act was unconstitutional. They contended that this exclusion violated the provisions of sections 9(3)[5] and 10[6] of the Constitution, in that it discriminated unfairly on the ground of marital status, and infringed her right to dignity. In this regard they submitted that the definition of the words "survivor", "spouse" and "marriage" in the Act should include a reference to survivors of permanent life partnerships.

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[4] Section 38 of the Constitution confers standing and provides as follows:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are ─
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

[5] Section 9 of the Constitution is set out in para 47 below.

[6] Section 10 reads as follows:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

[13] In relation to the declaration of invalidity sought, Mr Volks argued that the reading-in of words to the Act was unacceptable. He argued that the entire structure of the Act was premised on the concept of marriage and protects surviving spouses of such a marriage. Thus reading-in, in the form sought, did not deal properly with these provisions, nor did they fit in with the structure of the Act.

[14] Mr Volks argued that in the event that the court found that the Act was inconsistent with the Constitution and invalid, it would not be just and equitable for an order to apply to permanent life partnerships in respect of which the partner had already died. He argued for an order which would only have prospective effect. He argued that a retrospective order would not sufficiently protect the freedom and dignity of the deceased. He also argued that the relief sought by Mrs Robinson and the Trust may affect other legislation like the Administration of Estates Act.[7]

[15] He argued further that Mrs Robinson chose to live with Mr Shandling without entering into a marriage although there was no legal or other impediment to marrying. There was therefore no reason in law or in principle why the laws of marriage should be imposed upon the deceased, his estate, and his heirs. He argued that it would constitute an infringement of the deceased's freedom and dignity to have the consequences of marriage imposed in circumstances where there was a clear choice not to enter into a marriage relationship. As evidence of this choice on the part of the

[7] Act 66 of 1965.

deceased, he referred to a statement that Mr Shandling made to him that "if he were ever single again he would not marry". Mr Volks also relied on the fact that he referred to Mrs Robinson as "my friend" in his will, whereas he referred to his deceased wife, Mrs Shandling, as "my wife".

[16] Mr Volks also contended that Mr Shandling, in terms of his will, had made a choice as to how his assets would be disposed of. He did this with an understanding that the laws of marriage would not apply to his estate. His freedom and dignity would be violated if his choice as to how to dispose of his assets were to be overridden by a court permitting a claim for maintenance against his estate. Indeed his right not to be arbitrarily deprived of property in terms of section 25(1) of the Constitution would be infringed.

[17] In short, he argued that the deceased's freedom and dignity would be violated if his fundamental life choices, not to marry and to dispose of his property as he wanted, were to be overridden by a court permitting a maintenance claim against his estate. He submitted that different considerations may have applied if the deceased had died intestate, but that this was not the case. For these reasons, he urged that even if the Act were thought to involve discrimination, the discrimination was not unfair. Alternatively, the discrimination, if unfair, would be justifiable under section 36(1) of the Constitution.

[18] In response, Mrs Robinson submitted that for all intents and purposes they had lived their lives as a married couple, and that she was at all times prepared to marry Mr Shandling. In any event, she went on to state that the fact that they were not married is not a material consideration which a court should have regard to in determining whether she was entitled to maintenance under the Act. In determining this question she argued for the court to consider the nature of their relationship, and cited the following criteria:

> "a) our commitment to a shared household;
> b) the financial and other dependence between us;
> c) the duration of our relationship;
> d) the roles we played in our relationship in relation to each other."

[19] In reply to the argument on choice in relation to property disposition, she argued that if they were married and he had disinherited her or had left insufficient means for her maintenance, she would have been entitled to claim maintenance under the Act. She also contended that the Act was intended to provide for vulnerable widows or persons in her position where testators did not properly provide for their dependants.

The decision of the High Court

[20] The High Court noted that there are significant differences between a marriage and a permanent life partnership. In this regard the court stated:

> "Apart from the profound religious significance attached to the institution of marriage, there are important definitional differences. For example, upon the

> conclusion of a marriage ceremony, the relationship between the two parties has immediate legal significance. In the case of a domestic life partnership, the determination of the nature of the relationship can only take place after a lengthy period of time, only after the lapse of which period, the criteria enunciated above by both Goldblatt [2003 (120) *SALJ* 610 at 625] and L'Heureux-Dubé J [*Nova Scotia (Attorney General) v Walsh* 2002 SCC 83 at paras 126-36] can be shown to exist. In this case, the enquiry requires the benefit of evidence which illustrates that the relationship is of a permanent nature, at which stage, it can be concluded that the parties are involved in a domestic life partnership."[8] (references inserted)

[21] Based on the nature of the relationship between Mrs Robinson and the late Mr Shandling, the High Court concluded that it was clear

> "that, well before Mr Shandling's death, a life partnership existed between the two and that they regarded themselves as being involved in a permanent and intimate life partnership."[9]

[22] Adopting the equality test formulated in *Harksen v Lane NO and Others*,[10] the High Court found that the Act differentiated between married spouses and unmarried cohabitants on the listed ground of marital status and therefore unfair discrimination was presumed. It held that there were no justificatory grounds for the unfair discrimination, and concluded that Mrs Robinson's right to equality had been unfairly eroded.

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[8] Above n 2 SALR at 298E-G; BCLR at 681F-H.

[9] Id SALR at 299A; BCLR at 682B.

[10] 1998 (1) SA 300 (CC) at para 54; 1997 (11) BCLR 1489 (CC) at para 53.

[23] The High Court stated that it was trite that one of the core commitments of our constitutional society was the recognition of the dignity of difference, which accords respect to the existence of domestic partnerships and those who live in them. The court stated that:

> "If there were clear evidence that parties expressly, by choice, decided to eschew any possible financial benefits which flowed from a marriage and, for this reason (or notwithstanding this position), chose to live within the context of a domestic life partnership, there may be an argument, . . . that a surviving partner such as [Mrs Robinson] could not successfully launch a constitutional challenge to the Act."[11]

The court concluded that, in this case

> "there is little beyond the speculation of [Mr Volks] that a conscious choice was made by [Mr Shandling] and [Mrs Robinson] to live in terms of a relationship in which none of the benefits of marriage now sought were to apply."[12]

[24] Relying on certain factual information in an article by Goldblatt[13] to the effect that for a range of reasons domestic partnerships were a significant part of South African family life, Davis J stated:

> "To ignore the arrangement and impose a particular religious view on their world is to undermine the dignity of difference and to render the guarantee of equality somewhat illusory insofar as a significant percentage of the population is concerned."[14]

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[11] Above n 2 SALR at 299E-F; BCLR at 682E-F.

[12] Id SALR at 299F-G.

[13] Goldblatt "Regulating Domestic Partnerships — A Necessary Step in the Development of South African Family Law" (2003) 120 *SA Law Journal* 610.

[14] Above n 2 SALR at 299I; BCLR at 682H.

He therefore held that the breach of both the rights to equality and dignity could not be justified.

[25] The High Court made an order in the following terms:

> "1. It is declared that: The omission from the definition of 'survivor' in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the words 'and includes the surviving partner of a life partnership' at the end of the existing definition is unconstitutional and invalid.
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> 2. The definition of 'survivor' in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as if it included the following words after the words 'dissolved by death': 'and includes the surviving partner of a life partnership'.
>
> 3. The omission from the definition in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the following, at the end of the existing definitions, is unconstitutional and invalid:
> ' "Spouse" for the purposes of this Act shall include a person in a permanent life partnership';
> ' "Marriage" for the purposes of this Act shall include a permanent life partnership.'
>
> 4. Section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as though it included the following at the end of the existing definition:
> ' "Spouse" for the purposes of this Act shall include a person in a permanent life partnership';
> ' "Marriage" for the purposes of this Act shall include a permanent life partnership.'
>
> 5. The order in paras 1, 2, 3 and 4 above shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has finally been wound up by the date of this order."[15]

[15] Above n 2 SALR at 302E-I; BCLR at 684G-5B.

Proceedings before this Court

[26] At the hearing counsel for Mr Volks informed the Court that they had decided, after consultation with him, to withdraw the appeal and opposition to the confirmation proceeding in so far as this related to the equality challenge. In other words, Mr Volks conceded the correctness of the unconstitutionality of the provision in issue, as found by the High Court. It is unfortunate that the Court was not informed of this before the date of hearing. It is also regrettable that we were not able to hear full argument from any party supporting the constitutionality of the provision. It would also seem that the heirs have not been informed of this decision.

[27] However it is incumbent upon this Court to fully consider the question of constitutionality, despite the abandonment of the appeal.

[28] Mrs Robinson and the Trust, in their heads of argument, sought confirmation of the order in its entirety. However, in oral argument counsel indicated that they were of the view that if words were to be read-in, they would require that the Act be extended to cover partners only where there was a reciprocal duty of support present, not dissimilar from the reading-in remedy ordered by this Court in *Satchwell*.[16]

[29] The third respondent, the Minister of Justice and Constitutional Development (the Minister), and the Master had issued a notice of intention to abide the decision of the High Court. Yet, in this Court they submitted heads of argument and made oral

[16] *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).

submissions challenging the confirmation of the remedy given in the High Court. They argued for judicial restraint in light of the current law reform process being explored in this area by the South African Law Reform Commission (the Commission). They also argued that the order should not be retrospective or, if it were to be, that it should be limited so as to alleviate what may amount to an insurmountable administrative burden on the Master, given that it is the Master's office which is tasked in most instances with the administration, winding up and distribution of deceased estates.

[30] The Centre for Applied Legal Studies (CALS) argued in favour of confirmation. Much of their argument was directed at the vulnerability of women in cohabitation relationships. They also argued for a remedy which would extend the Act to cover polygynous cohabitation relationships, where for instance the male partner was still married during the duration of his cohabitation with another.

Further evidence

[31] CALS seeks to persuade us to accept certain additional evidence aimed largely at demonstrating the vulnerability of women in existing relationships between unmarried cohabitants, and of the fact that few women have the choice about whether they should marry. The admission of additional evidence is regulated by the provisions of rule 31 of the rules of this Court.[17] Subsection 1 provides as follows:

[17] Government Gazette 25643 GN R 1603, 31 October 2003.

> "(1) Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts -
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> (a) are common cause or otherwise incontrovertible; or
>
> (b) are of an official, scientific, technical or statistical nature capable of easy verification."

[32] In the case of *In Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others,*[18] the Court considered the predecessor to rule 31[19] and held:

> "That Rule permits a duly admitted amicus 'to canvass factual material which is relevant to the determination of the issues before the Court and which do not specifically appear on the record'. However, this is subject to the condition that such facts 'are common cause or otherwise incontrovertible' or 'are of an official, scientific, technical or statistical nature, capable of easy verification'. This Rule has no application where the facts sought to be canvassed are disputed. A dispute as to the facts may and, if genuine, usually will demonstrate that they are not 'incontrovertible' or 'capable of easy verification'. Where this is so, the material will be inadmissible."[20] (footnote omitted)

[33] The whole of the report tendered by the amicus cannot be considered to consist merely of evidence of a statistical or incontrovertible nature, or which is common cause. It is apparent that the conclusions and solutions offered are not

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[18] 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC).

[19] Rule 30 of the old rules in Government Gazette 6199 GN R 757, 29 May 1998.

[20] Above n 18 at para 8.

incontrovertible.[21] Furthermore, Mr Volks does not accept that the evidence sought to be introduced is necessarily incontrovertible or uncontroversial. Indeed the report in its own words notes:

> "As is evident from our methodology, our findings are *not representative* but simply indicate trends which confirm our *general assumptions about cohabitation*."[22] (my emphasis)

In the executive summary the study was defined as "qualitative primary research amongst poor 'African' and 'Coloured' communities".[23]

[34] Moreover, the entire study consisted of interviews with only 68 people in eight sites. This non-representative sampling, which was not quantitative but qualitative and was conducted in only eight poor communities, cannot be said to be statistical or scientific evidence capable of easy verification, nor can it be said to be incontrovertible. A more representative study might well lead to different conclusions.

[35] The evidence is not directly relevant to the issue before us. That issue is whether the protection afforded to survivors of marriage under section 2(1) of the Act

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[21] South African Law Reform Commission Discussion Paper 104, Project 118: Domestic Partnerships at viii, where the Commission suggests the concept of registering cohabitation as a means to recognising them, a solution which is not advocated in the CALS Report.

[22] Goldblatt et al "Cohabitation and Gender in the South African Context — implications for law reform: A research report prepared by the Gender Research Project of the Centre for Applied Legal Studies, University of the Witwatersrand", November 2001 at 24 at para 2.2.

[23] Id executive summary at ii.

should be extended to the survivors of permanent life partnerships. The admission of the evidence would impermissibly broaden the case before us. It cannot be admitted.

The history and purpose of the Maintenance of Surviving Spouses Act 27 of 1990

[36] This Act has its own unique history which is relevant to its goal or object. In *Glazer v Glazer, NO*[24] the Appellate Division refused to extend the principle applied in *Carelse v Estate De Vries*,[25] that a father's estate was liable to support his children, to cases of a spouse requiring support to enable her to claim maintenance from her deceased husband's estate.[26]

[37] The Act emanates from the recommendations of the Commission's report: "Review of the Law of Succession: The introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse" (Project 22), submitted in August 1987. The Commission was of the view that the institution of a legitimate portion would not be the appropriate solution to the problem, and recommended instead that a claim for maintenance be given by operation of the law. It is regrettable that it took as many as three years before the recommendations of the report were given effect to.

[24] 1963 (4) SA 694 (A).

[25] (1906) 23 SC 532.

[26] Above n 24 at 706H-707B.

[38] In terms of section 2(1) of the Act a surviving spouse will, in so far as he is not able to provide therefor from his own means and earnings, have a claim against the deceased spouse's estate "for the provision of his reasonable maintenance needs until his death or remarriage." "Own means" of the surviving spouse includes

> "any money or property or other financial benefit accruing to the survivor in terms of the matrimonial property law or the law of succession or otherwise at the death of the deceased spouse".[27]

The claim by the surviving spouse will be dealt with in accordance with the Administration of Estates Act.[28]

[39] The purpose of the provision is plain. The challenged law is intended to provide for the reasonable maintenance needs of parties to a marriage that is dissolved by the death of one of them. The aim is to extend an invariable consequence of marriage beyond the death of one of the parties. The legislation is intended to deal with the perceived unfairness arising from the fact that maintenance obligations of parties to a marriage cease upon death. The challenged provision is aimed at eliminating this perceived unfairness and no more. The obligation to maintain that exists during marriage passes to the estate. The provision does not confer a benefit on the parties in the sense of a benefit that either of them would acquire from the state or a third party on the death of the other. It seeks to regulate the consequences of marriage and speaks predominantly to those who wish to be married. It says to them:

[27] Section 1 of the Act.

[28] Above n 7.

"If you get married your obligation to maintain each other is no longer limited until one of you dies. From now on, the estate of that partner who has the misfortune to predecease the survivor will continue to have maintenance obligations."

Interpretation

[40] Before evaluating the constitutional challenge, it is necessary to interpret the relevant provisions of the Act in the light of its history. Section 2(1) of the Act provides:

> "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 his death or *remarriage* in so far as he is not able to provide therefor from his own means and earnings." (my emphasis)

Mrs Robinson and the Trust argued both in the High Court and in this Court that the Act could be interpreted so as to include heterosexual cohabitants. However, for the reasons considered below, I agree with the conclusion of the High Court that the Act is not reasonably capable of being so interpreted.

[41] It is patent from the definition in the Act that, "survivor" means "the surviving spouse in a marriage dissolved by death." It would seem that the only possible meaning for "marriage" when viewed in the context of the Act is one recognised either by the law or by a religion.[29] This is evident both from the use of the words "spouse" and "marriage" dissolved by death.

[29] See in general *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC).

[42] Furthermore, in *Satchwell*[30] this Court was very definitive in its interpretation of the term "surviving spouse" in the Judges Remuneration and Conditions of Employment Act,[31] and stated:

> "There is no definition of the word 'spouse' in the provisions under attack. In the circumstances the ordinary wording of the provisions must be taken to refer to a party to a marriage that is recognised as valid in law and not beyond that. . . . The context in which 'spouse' is used in the impugned provisions does not suggest a wider meaning, nor do I know of one. Accordingly, a number of relationships are excluded, such as same-sex partnerships and *permanent life partnerships between unmarried heterosexual cohabitants.*"[32] (my emphasis)

[43] In addition, section 2(1) refers to the provision of maintenance until "death or remarriage". This would be illogical if the phrase "surviving spouse" included survivors of permanent life partnerships, who generally may not have been previously married and could therefore not get remarried.

[44] As noted by this Court in the *Hyundai*[33] case:

> "On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and

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[30] Above n 16.

[31] Act 88 of 1989.

[32] Above n 16 at para 9.

[33] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC).

> precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."[34] (footnotes omitted)

[45] I find that an interpretation of the Act that would include permanent life partnerships would be "unduly strained" and manifestly inconsistent with the context and structure of the text. The Act is incapable of being interpreted so as to include permanent life partners.

Equality challenge

[46] The basis of the High Court's finding of unconstitutionality is that the Act excludes permanent life partners from its protection and thereby violates the anti-discrimination provision in section 9(3) of the Constitution.

[47] Section 9 provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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[34] Id at para 24.

(3) 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, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[48] In the *Harksen*[35] case this Court laid out the general approach to equality analysis and said:

"(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of [section] 8(1).[36] Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a

[35] Above n 10.

[36] The equivalent of section 9(1) of the 1996 Constitution.

> specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
>
> If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of [section] 8(2).[37]
>
> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)."[38]

[49] The question for determination in this case is whether the exclusion of survivors of permanent life partnerships from the protection of the Act constitutes unfair discrimination. The Act draws a distinction between married people and unmarried people by including only the former. We are not concerned with the exclusion of survivors of gay and lesbian relationships, nor are we concerned with survivors of polygynous relationships.

[50] Although it is arguable whether the distinction or differentiation amounts to discrimination, I am prepared to accept that it amounts to discrimination based on marital status. That being the case, the discrimination is presumed to be unfair in terms of section 9(5) of the Constitution. The question however is whether it is indeed unfair discrimination.

[37] The equivalent of section 9(3) of the 1996 Constitution.

[38] The equivalent of section 36 of the 1996 Constitution.

[51] In determining whether discrimination is unfair one must consider the differences between the two groups. Although there is no right to marry and to found a family contained in Chapter 2 of the Constitution marriage as an institution is recognised therein. This is clear from the provisions of section 15(3)(a)(i) of the Constitution.[39] The constitutional recognition of marriage is an important starting point for determining the question presented in this case.

[52] Marriage and family are important social institutions in our society. Marriage has a central and special place, and forms one of the important bases for family life in our society.[40] In this regard O'Regan J notes in *Dawood*[41] that:

> "Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that

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[39] Section 15 guarantees the right to freedom of religion, belief and opinion and provides:

> "(1) Everyone has the right to freedom of conscience, religion, thought, belief, and opinion.
> (2) Religious observances may be conducted at state or state-aided institutions, provided that:
> (a) those observances follow rules made by the appropriate public authorities;
> (b) they are conducted on an equitable basis; and
> (c) attendance at them is free and voluntary.
> (3) (a) This section does not prevent legislation recognising ─
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

[40] See *Daniels v Daniels; Mackay v Mackay* 1958 (1) SA 513 AD at 532E, where Hoexter JA referred to marriage as "the most important unit of our social life, the family." See also in *Belfort v Belfort* 1961 (1) SA 257 AD at 259H, where the same judge states that marriage "is the very foundation of the most important unit of our social life, the family."

[41] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.

The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends."[42] (footnotes omitted)

[53] Marriage is also an internationally recognised social institution.[43]

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[42] Id at paras 30-1.

[43] The concept of marriage as a civil right has been advanced by some American courts in a variety of circumstances, for example, *Skinner v. Oklahoma* 316 US 535, 541 (1942); *Perez v. Lippold* 198 P.2d 17, 20-1 (1948). See also *Loving v. Virginia* 388 US 1 (1967), where Chief Justice Warren speaking for the majority of the Supreme Court included language describing marriage as one of the basic civil rights of man.

See further Noonan, who in "The Family and the Supreme Court" (1973) 23 *Catholic University Law Review* 255 at 273 comments as follows on the *Loving v. Virginia* case:

> "The vital personal right recognized by *Loving v. Virginia* is not the right to a piece of paper issued by a city clerk. It is not the right to exchange magical words before an agent authorized by the state. It is the right to be immune to the legal disabilities of the unmarried and to acquire the legal benefits accorded to the married. Lawful marriage in the society's hierarchy of values recognized by *Boddie v. Connecticut* and in the host of laws yet unchallenged – the tax law, the common law of property, the law of evidence – is a constellation of these immunities and privileges. To say that legal immunities and legal benefits may not depend upon marriage is to deny the vital right. To say that Equal Protection requires the equal treatment of the married and the unmarried in all respects is to deny the hierarchy of values of our society."

In addition, Article 23(2) of the International Covenant on Civil and Political Rights provides that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognised"; and Article 18 of the African [Banjul] Charter on Human and Peoples' Rights provides that "[t]he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."

[54] From this recognition, it follows that the law may distinguish between married people and unmarried people. Indeed, this Court in *Fraser*[44] noted:

> "In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with."[45]

The law may in appropriate circumstances accord benefits to married people which it does not accord to unmarried people.

[55] Mrs Robinson never married the late Mr Shandling. There is a fundamental difference between her position and spouses or survivors who are predeceased by their husbands. Her relationship with Mr Shandling is one in which each was free to continue or not, and from which each was free to withdraw at will, without obligation and without legal or other formalities. There are a wide range of legal privileges and obligations that are triggered by the contract of marriage. In a marriage the spouses' rights are largely fixed by law and not by agreement, unlike in the case of parties who cohabit without being married.

[56] The distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely

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[44] *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC).

[45] Id at para 26.

attached to marriage. Whilst there is a reciprocal duty of support between married persons, no duty of support arises by operation of law in the case of unmarried cohabitants. The maintenance benefit in section 2(1) of the Act falls within the scope of the maintenance support obligation attached to marriage. The Act applies to persons in respect of whom the deceased person (spouse) would have remained legally liable for maintenance, by operation of law, had he or she not died.

[57] It must be borne in mind that the legislature, by enacting the law, in fact qualified the right to freedom of testation. It said that freedom of testation would be limited to the extent that where marriage obliged the parties to it to maintain each other, freedom of testation ought not to result in the termination of the obligation upon death. The question we have to answer is whether it was unfair for the legislature not to qualify freedom of testation further, by creating a posthumous duty to maintain on cohabitants.

[58] In his judgment Sachs J envisages two categories of people within this broad class of unmarried cohabitants against whom the disputed law is unfairly discriminatory.[46] The first category is the people who by written instrument or by necessary implication agree to live together, to maintain each other and to give each other support of every kind. It is contended that for the law not to oblige survivors of relationships in this category to be maintained entails unfair discrimination against the survivor simply because the survivor does not have the piece of paper which is the

[46] Dissent of Sachs J at paras 213-4; 218.

marriage certificate.[47] That is an over-simplification. Marriage is not merely a piece of paper. Couples who choose to marry enter the agreement fully cognisant of the legal obligations which arise by operation of law upon the conclusion of the marriage. These obligations arise as soon as the marriage is concluded, without the need for any further agreement. They include obligations that extend beyond the termination of marriage and even after death. To the extent that any obligations arise between cohabitants during the subsistence of their relationship, these arise by agreement and only to the extent of that agreement. The Constitution does not require the imposition of an obligation on the estate of a deceased person, in circumstances where the law attaches no such obligation during the deceased's lifetime, and there is no intention on the part of the deceased to undertake such an obligation.

[59] The second category referred to by Sachs J is the relationship in which the deceased male partner refused to marry the woman who cared for him, put everything into the relationship and gave her heart and soul to it, bringing up a number of children born of the relationship between them in the process.[48] I have sympathy for surviving partners who fall within this category. The conduct of the male partner is unconscionable in these cases. There is a strong argument that partners ought to be obliged to maintain each other during their lifetime in certain circumstances.

[47] Id at para 220.

[48] Id at para 219.

[60] I conclude that it is not unfair to make a distinction between survivors of a marriage on the one hand, and survivors of a heterosexual cohabitation relationship on the other. In the context of the provision for maintenance of the survivor of a marriage by the estate of the deceased, it is entirely appropriate not to impose a duty upon the estate where none arose by operation of law during the lifetime of the deceased. Such an imposition would be incongruous, unfair, irrational and untenable.

The right to dignity

[61] It was also contended that the failure to make provision for the people in the class to which Mrs Robinson belongs offends the dignity of members of that class. Section 10 of the Constitution provides:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

[62] I do not agree that the right to dignity has been infringed. Mrs Robinson is not being told that her dignity is worth less than that of someone who is married. She is simply told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance. It is that people in a marriage are obliged to maintain each other by operation of law and without further agreement or formalities. People in the class of relationships to which she belongs are not in that position. In the circumstances, it is not appropriate that an obligation that did not exist before death be posthumously imposed.

Vulnerability and economic dependence

[63] Structural dependence of women in marriage and in relationships of heterosexual unmarried couples is a reality in our country and in other countries.[49] Many women become economically dependent on men and are left destitute and suffer hardships on the death of their male partners.

[64] Much of the argument and many of the passages of the judgment of Sachs J express concern for the plight of vulnerable women in cohabitation relationships. This concern arises because women remain generally less powerful in these relationships. They often wish to be married, but the nature of the power relations within the relationship makes a translation of that wish into reality difficult. This is because the more powerful participants in the relationship would not agree to be bound by marriage. The consequences are that women are taken advantage of and the essential contributions by women to a joint household through labour and emotional support is not compensated for.

[49] Freeman and Lyon *Cohabitation without Marriage* (Gower Publishing Company Limited, Hants, England 1997) at 19-20, describe the position of women in England in the following terms:

> "The position of women in society today is closely related to their role within the family. An understanding of woman's oppression accordingly requires a description and analysis of the position of women in today's privatised family. As Mary McIntosh rightly has observed, 'ultimately the very construction of men and women as separate and opposed categories takes place within, and in terms of, the family'. Women are expected to be dependent on men. Their role is geared to the household. They are responsible for child care, as well as for the care of the aged and handicapped. Their domestic labour is seen as non-productive, not real work. Women, particularly married women, have to be housewives: if they do not carry out the service roles depicted here they are 'bad' housewives, but housewives nevertheless. Furthermore, as Kate Millett noted, 'sex role is sex rank'. 'As long as woman's place is defined as separate, a male-dominated society will define her place as inferior'." (footnotes omitted)

[65] I agree that the women in this category suffer considerably. But it is not the under-inclusiveness of section 2(1) which is the cause of their misery. The plight of a woman who is the survivor in a cohabitation relationship is the result of the absence of any law that places rights and obligations on people who are partners within relationships of this kind during their lifetimes. I accept that laws aimed at regulating these relationships in order to ensure that a vulnerable partner within the relationship is not unfairly taken advantage of are appropriate.

[66] In the case of the very poor and the illiterate the effects of vulnerability are more pronounced. The vulnerability of this group of women is, in my view, part of a broader societal reality that must be corrected through the empowerment of women and social policies by the legislature. It is a widespread problem that needs more than just implementation of what, in their case, would be no more than palliative measures. It needs more than the extension of benefits under section 2(1) to survivors who are predeceased by their partners. Unfortunately the reality is that maintenance claims in a poverty situation are unlikely to alleviate vulnerability in any meaningful way.

[67] Both dissenting judgments make it plain that there are many ways in which these relationships can be regulated. It is not for us to decide how this should be done. In any event, this case is not concerned with the provision that should be made to ensure that partners in relationships other than marriage treat each other fairly during their lifetime. That does not mean, however, that fairness in the case of people who

are married will be the same as fairness between parties to a permanent life partnership. It is up to the legislature to make provision for this.

[68] As I have already said, it is not unfair not to impose a duty upon the estate of a deceased where no duty of that kind arose by operation of law during the lifetime of that person. I have a genuine concern for vulnerable women who cannot marry despite the fact that they wish to and who become the victims of cohabitation relationships. I do not think however that their cause is truly assisted by an extension of section 2(1) of the Act or that vulnerable women would be unfairly discriminated against if this were not done. The answer lies in legal provisions that will make a real difference to vulnerable women at a time when both partners to the relationship are still alive. Once provision is made for this, the legal context in which section 2(1) falls to be evaluated will change drastically.

Costs

[69] Neither Mr Volks nor Mrs Robinson and the Trust sought costs in this Court. However, Mrs Robinson and the Trust argued that the Minister and the Master, who had originally abided the decision of the High Court, but who at a very late stage sought to tender evidence and argument in this Court, should be ordered to pay the costs of the appellant on a punitive scale. They argued that the effect of their late intervention would have caused additional costs to Mr Volks which would inevitably be drawn from the estate. However, Mr Volks abides the decision of this Court in regard to this latter issue and does not seek a costs order against the Minister and the

Master. There can be no doubt that it is regrettable that they did not intervene in the proceedings earlier. However, no postponement was occasioned by their late intervention, and generally it is helpful to the Court for the state's attitude to constitutional challenges to legislation to be before it. Although the desirability of having that information before the Court cannot excuse non-compliance with its rules, I am of the view that in this case it would be inappropriate to make the costs order sought by Mrs Robinson and the Trust against the Minister and the Master. In the circumstances, I conclude that no order should be made as to costs in this matter.

Order

[70] I make the following order:

(a) The order of the High Court declaring section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 inconsistent with the Constitution is not confirmed.

(b) The appeal is upheld.

Chaskalson CJ, Langa DCJ, Moseneke J, Ngcobo J, Van der Westhuizen J and Yacoob J concur in the judgment of Skweyiya J.

NGCOBO J:

[71] Section 2(1) read with section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990 (the Act), confers on surviving spouses the right to claim maintenance from the estates of their deceased spouses if they are unable to support themselves. The question presented in this case is whether this right should also be conferred upon survivors of permanent life partnerships between two persons of the opposite sex who were not married to each other but nevertheless lived a life that was akin to that of husband and wife. The High Court (Cape of Good Hope Division) took the view that it should. It therefore concluded that the exclusion of survivors of such partnerships from the protection of the Act is unconstitutional. The present proceedings are a sequel.

[72] Mrs Robinson, the first respondent, is a survivor of a permanent life partnership. Her deceased partner is Mr Shandling, who was a senior partner at a Cape Town law firm. Mrs Robinson took the view that survivors of such a relationship are entitled to the protection afforded to surviving spouses by the Act. She lodged a claim for maintenance under the Act against the estate of the deceased. The executor of the estate of the deceased, the appellant, rejected the claim, taking the view that such survivors do not fall within the ambit of the protection afforded by the Act. The rejection of the claim prompted, amongst other things, a constitutional challenge directed at the provisions of the Act.

[73] The High Court found that the provisions of the Act are incapable of being construed in a manner that would bring survivors of permanent life partnerships within the ambit of the Act. The problem, the High Court appears to have found, lay in the definition of the word "survivor" in section 1 of the Act, which did not include persons involved in permanent life partnerships. This exclusion, the court found, unfairly discriminated against survivors of permanent life partnerships on the basis of marital status. It therefore concluded that section 2(1) read with the definition of "survivor" in section 1 of the Act is unconstitutional in that it contravenes sections 9 and 10 of the Constitution. It is this conclusion that is now in issue before this Court.

[74] Section 9 of the Constitution provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) 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, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

And section 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

[75] That the Act differentiates between survivors of marriages and survivors of permanent life partnerships is patent. The provisions of the Act are aimed at providing maintenance and support for survivors of marriages. The legitimacy of this governmental purpose cannot be gainsaid. Nor can it be doubted that the differentiation that the Act makes is rationally connected to that purpose. The next question is whether the differentiation between survivors of marriages and survivors of permanent life partnerships constitutes unfair discrimination.

[76] For the purposes of this judgment, I am prepared to accept that the differentiation involved here constitutes discrimination. The differentiation is on the ground of marital status, a ground listed in subsection 9(3) of the Constitution. That being the case, the discrimination is presumed to be unfair under subsection 9(5). The ultimate question for determination therefore is whether the provisions of section 2(1) read with section 1 of the Act do in fact discriminate unfairly against survivors of permanent life partnerships.

[77] The proper approach to the equality analysis is that set out in the *President of the Republic of South Africa and Another v Hugo*[1] and *Harksen v Lane NO and Others*[2] cases.

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[1] 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at paras 32-50.

[78] The nature of unfairness contemplated by the provisions of section 9 of the Constitution has been considered by this Court, albeit in the context of section 8 of the interim Constitution, the predecessor to section 9. In the *Hugo* case, this Court held that:

> "The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."[3]

[79] Dignity is an underlying consideration in the determination of unfairness. Thus in the *Harksen* case, this Court held that "[t]he prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner."[4] While legislation may make distinctions, those "distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity"[5] cannot be tolerated. In the final analysis, it is the impact of discrimination on the survivors of permanent life

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[2] 1998 (1) SA 300 (CC) at paras 41-69; 1997 (11) BCLR 1489 (CC) at paras 40-68. See also *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 24.

[3] Above n 1 at para 41.

[4] Above n 2 at para 51 of the SALR and para 50 of the BCLR.

[5] *Egan v Canada* (1995) 29 CRR (2d) 79 at 105, cited with approval by this Court in the *Hugo* case above n 1 at para 41.

partnerships that is the determining factor regarding the unfairness of the discrimination in this case.[6]

[80] The starting point in determining the fairness or otherwise of the discrimination involved in this case is the Constitution itself. Although our Constitution contains no express provision protecting the institution of marriage, it nevertheless recognises the right freely to marry and to raise a family. In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*, this Court commented as follows on the absence of an express provision protecting the right to family life or the right of spouses to cohabit:

> "The omission of such a right from the Constitution was challenged during the first certification proceedings on the basis that such a right constituted a 'universally accepted fundamental right' which in terms of Constitutional Principle II had to be entrenched in the Constitution. The Court observed from its survey of international instruments that States are obliged in terms of international human rights law to protect the rights of persons freely to marry and raise a family. However, it also observed that these obligations are achieved in a great variety of ways in different human rights instruments.
>
> . . .
>
> The Court therefore concluded that the new constitutional text, although it contained no express clause protecting the right to family life, nevertheless met the obligations imposed by international human rights law to protect the rights of persons freely to marry and to raise a family."[7] (footnotes omitted)

[6] Above n 4.

[7] 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 28. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 97.

[81] There can be no doubt that our Constitution recognises the institution of marriage. This much is apparent from section 15(3)(a)(i) of the Constitution which in substance makes provision for the recognition of "marriages concluded under any tradition, or a system of religious, personal or family law." This Court too has recognised the importance of marriage as an institution. One need only refer to the *Dawood* case, where this Court said the following concerning the institution of marriage:

> "Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.
>
> The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends."[8] (footnotes omitted)

[8] *Dawood* id at paras 30-1.

[82] The constitutional recognition of the right freely to marry and the institution of marriage is consistent with the obligations imposed on our country by international and regional human rights instruments which impose obligations upon states to respect and protect marriage. The African [Banjul] Charter on Human and Peoples' Rights, 1981[9] recognises the importance of marriage and the family. Article 18(1) provides that the "family shall be the natural unit and basis of society." The relevant part of article 18 provides that:

> "1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.
> 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community."[10]

[83] Under article 23(4) of the International Covenant on Civil and Political Rights, 1966 (ICCPR),[11] States Parties are required to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution." Article 23 of the ICCPR provides that:

> "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

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[9] Adopted on 27 June 1981 by the Eighteenth Assembly of the Heads of State and Government of the Organization of African Unity and entered into force on 21 October 1986.

[10] The importance of the family in the context of the African Charter is also apparent from the duties which individuals have under the Charter. These duties appear, for example, in article 27(1) which provides that "[e]very individual shall have duties towards his family and society . . . ."; and article 29(1) which provides that "[t]he individual shall also have the duty [t]o preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need".

[11] Adopted by General Assembly resolution 2200A (XX1) of 16 December 1966 and entered into force on 23 March 1976.

> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.
> 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

[84] So too does article 16 of the Universal Declaration of Human Rights, 1948[12] provide that:

> "(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
> (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
> (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

[85] These regional and international instruments underscore the importance of marriage as an institution and the right freely to marry. They underscore the duty of states like ours, which are signatories to these instruments, to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage *and at its dissolution*."[13] Therefore, both the Constitution and international instruments impose an obligation on our country to protect the institution of marriage.

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[12] Adopted and proclaimed by General Assembly resolution 217A (III) of 10 December 1948.

[13] Article 23(4) of the ICCPR. The emphasis is mine.

[86] It seems to me to follow from this recognition of the institution of marriage that the law may, in appropriate circumstances, distinguish between married people and unmarried people. This much was recognised by this Court in *Fraser v Children's Court, Pretoria North, and Others*,[14] where the Court observed:

> "In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with."[15]

[87] Once it is accepted that marriage is a constitutionally recognised institution in our constitutional democracy, it follows that the law may legitimately afford protection to marriage. And in appropriate circumstances the law may afford protection to married people which it does not accord to unmarried people. This seems to me to be the logical consequence of the recognition of the institution of marriage. But there are other considerations that are relevant to the determination of the fairness or otherwise of the discrimination involved in this case.

[88] One of the factors that is relevant to the determination of unfairness is the purpose sought to be achieved by the impugned provisions. The purpose of the provisions of the Act is manifestly not directed at impairing the dignity of the survivors of permanent life partnerships. It is primarily directed at ensuring that surviving spouses who are in need of maintenance and who are unable to support

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[14] 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC).

[15] Id at para 26.

themselves, do get maintenance. One of the invariable consequences of marriage is a reciprocal duty of support. During the subsistence of the marriage, the deceased spouse is under a duty to support and maintain the surviving spouse. What the provisions of the Act merely do is to ensure that this duty continues after the death of one of the spouses. It does this by transferring this duty to the estate of a deceased spouse.

[89] It is not without significance that indigenous law, which is part of our law, also protects widows. Under indigenous law, the duty to maintain and support the widow survives the death of the husband. Thus upon the death of a husband, the duty to maintain and support the widow falls upon *indlalifa*. This duty remains with *indlalifa* regardless of whether the deceased husband left enough assets from which to maintain and support the widow. Recently, I had occasion to observe that:

> "The perpetuation and preservation of the family unit and succession to the position and status of the deceased therefore lie at the heart of succession in indigenous law. Like his predecessor, *indlalifa* becomes the nominal owner of the family property, and is required to administer it on behalf of and for the benefit of the family. *Indlalifa* acquires the duty to maintain and support the widow and minor children. In dealing with family property, *indlalifa* has to consult the widow who had the right to restrain him from dissipating family assets. When there are insufficient assets to maintain the family, *indlalifa* had to use his own resources to provide maintenance."[16] (footnotes omitted)

[16] *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) BCLR 1 (CC) at para 172.

[90] It is therefore plain that the impact of the provisions of the Act on surviving spouses is to protect their right to receive maintenance and support from the deceased spouse by transferring the duty to support and maintain onto the estate of a deceased spouse. It is true that surviving partners of permanent life partnerships are not afforded this protection. But, although this may constitute a disadvantage, it does not take away the right of a surviving partner of a permanent life partnership from receiving a sum of money from the estate of a deceased partner. Indeed, the provisions of the Act do not prevent partners in a permanent life partnership from leaving sums of money to each other in their respective wills, which can be used for maintenance. We know for example that the deceased in this case left Mrs Robinson a sum of money in his will.

[91] There is a further consideration that is equally relevant. The law places no legal impediment to heterosexual couples involved in permanent life partnerships from getting married. All that the law does is to put in place a legal regime that regulates the rights and obligations of those heterosexual couples who have chosen marriage as their preferred institution to govern their intimate relationship. Their entitlement to protection under the Act, therefore, depends on their decision whether to marry or not. The decision to enter into a marriage relationship and to sustain such a relationship signifies a willingness to accept the moral and legal obligations, in particular, the reciprocal duty of support placed upon spouses and other invariable consequences of a marriage relationship. This would include the acceptance that the duty to support survives the death of one of the spouses.

[92] The Act does not say who may enter into a marriage relationship. The Act simply attaches certain legal consequences to people who choose marriage as their contract. There is a choice at the entry level. The law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify their acceptance of those consequences by entering into a marriage relationship. Those who do not wish such consequences to flow from their relationship remain free to enter into some other form of relationship and decide what consequences should flow from their relationships.

[93] The other consideration is that marriage is a matter of choice. Marriage is a manifestation of that choice and more importantly, the acceptance of the consequences of a marriage. It is more than a piece of paper. As this Court observed in the *Dawood* case:

> "The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends."[17]

[94] People involved in a relationship may choose not to marry for a whole variety of reasons, including the fact that they do not wish the legal consequences of a

[17] Above n 7 at para 31.

marriage to follow from their relationship. It is also true that they may not marry because one of the parties does not want to get married. Should the law then step in and impose the legal consequences of marriage in these circumstances? To do so in my view would undermine the right freely to marry and the nature of the agreement inherent in a marriage. Indeed it would amount to the imposition of the will of one party upon the other. This is equally unacceptable.

[95] Another consideration that is relevant is the difficulty of establishing the existence of a permanent life partnership. The point at which such partnerships come into existence is not determinable in advance. In addition, the consequences of such partnerships are determined by agreement between the parties. Unless these have been expressly agreed upon, they have to be inferred from the conduct of the parties. What happens at the dissolution of such partnerships is far from clear. All of this points to the need to regulate permanent life partnerships. This does not mean that a law designed to regulate marriages is unconstitutional simply because it does not regulate permanent life partnerships.

[96] The provisions of the Act may have denied the surviving partners of permanent life partnerships the protection it affords to surviving spouses, but it cannot be said that it fundamentally impairs their rights of dignity or sense of equal worth. The impact of the discrimination upon the surviving partners is, therefore, in all the circumstances not unfair. It follows that the provisions of the Act are not inconsistent

with sections 9 and 10 of the Constitution. In the event, the order of invalidity made by the High Court cannot be confirmed.

[97] For these reasons I concur in the order proposed in the judgment of Skweyiya J.

Chaskalson CJ, Langa DCJ, Moseneke J, Van der Westhuizen J and Yacoob J concur in the judgment of Ngcobo J.

MOKGORO AND O'REGAN JJ:

[98] We have had the opportunity of reading the judgments in this matter prepared by Skweyiya J and Sachs J. We are unable to agree with the order proposed by Skweyiya J. We agree with the conclusion reached by Sachs J but for different reasons which we set out in this judgment.

[99] The crisp constitutional issue we have to decide is whether section 2(1) of the Maintenance of Surviving Spouses Act, 27 of 1990 (the Act) read with the definition of "survivor" in section 1 of that Act constitutes unfair discrimination and is inconsistent with the Constitution as found by the Cape High Court (the High Court).[1] Section 2(1) provides that:

[1] *Robinson and Another v Volks NO and Others* 2004 (6) SA 288 (C); 2004 (6) BCLR 671 (C).

> "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 his death or remarriage in so far as he is not able to provide therefor from his own means and earnings."

The word "survivor" is defined in section 1 of the Act as "the surviving spouse in a marriage dissolved by death". The High Court found that this narrow definition of "survivor" rendered the provision discriminatory to the extent that it did not afford a maintenance claim to the surviving partner of a permanent life partnership. The High Court accordingly made an order reading in the following words to the definition of survivor in section 1 – "and includes the surviving partner of a life partnership" as well as two further orders reading in definitions of "spouse" and "marriage".[2] We must decide whether to confirm that order.

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[2] The order made by the High Court read as follows:

> "1. It is declared that: the omission from the definition of 'survivor' in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the words 'and includes the surviving partner of a life partnership' at the end of the existing definition is unconstitutional and invalid.
> 2. The definition of 'survivor' in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990, is to be read as if it included the following words after the words 'dissolved by death';
> 'and includes the surviving partner of a life partnership'.
> 3. The omission from the definition in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the following, at the end of the existing definitions, is unconstitutional and invalid:
> > '"Spouse" for the purposes of this Act shall include a person in a permanent life partnership';
> > '"Marriage" for the purposes of this Act shall include a permanent life partnership'.
>
> 4. Section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as though it included the following at the end of the existing definition;
> > '"Spouse" for the purposes of this Act shall include a person in a permanent life partnership';
> > '"Marriage" for the purposes of this Act shall include a permanent life partnership'.
>
> 5. The order in paragraphs 1, 2, 3 and 4 above shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has finally been wound up by the date of this order."

[100] The facts of the case have been set out in the judgments of both Skweyiya J and Sachs J. To recap in brief, Mrs Robinson and Mr Shandling (the deceased), who had both been previously married, formed a relationship in which they lived together from 1985 until his death in November 2001. The relationship thus lasted sixteen years. They did not marry although there was no legal impediment to marriage. For the last twelve years of Mr Shandling's life, they lived in a flat owned by a Shandling family trust. Their relationship was monogamous and Mrs Robinson characterised the relationship as a "permanent life or domestic partnership". The applicant in this Court, Mr Volks, the executor of Mr Shandling's deceased estate (the executor) did not dispute the characterisation of the relationship as a "permanent life partnership".

[101] In his will, Mr Shandling referred to Mrs Robinson as his "friend". He also mentioned his former wife whom he referred to as "my wife Edith Rose". He bequeathed certain of his assets, totalling approximately one third of his estate, to Mrs Robinson. The residue of his estate was left to his three children in different proportions. In addition to the bequests made in her favour, Mrs Robinson applied to the executor for her to be treated as a surviving spouse for the purposes of section 2(1) of the Act, which would entitle her to maintenance. That application was refused by the executor on the grounds that she did not fall within the terms of section 2(1) as she had not been married to Mr Shandling.

[102] Mr Shandling was a senior partner in a firm of attorneys in Cape Town while Mrs Robinson worked intermittently as a freelance journalist and artist. Mrs

Robinson averred that Mr Shandling supported her financially during the subsistence of their relationship and paid all household expenses. Mrs Robinson was also added as a dependant to Mr Shandling's medical aid from 2000.

[103] Mrs Robinson states that Mr Shandling had been diagnosed as suffering from bi-polar disorder before their relationship commenced and that she nursed him through the mood swings that are characteristic of this disorder. She also nursed him in his final illness. It is quite clear from the evidence given by Mrs Robinson, and not disputed by the executor, that Mr Shandling and Mrs Robinson lived together for sixteen years, supporting one another both financially and emotionally and that both considered the relationship to be a permanent one. The High Court found on the facts that Mr Shandling and Mrs Robinson had entered into a permanent and intimate life partnership.

[104] In deciding whether this finding is correct, we consider the following factors to be determinative in this case: the length of the period of cohabitation which was sixteen years, the fact that Mr Shandling paid Mrs Robinson an allowance to cover household expenses and was generally responsible for the payment of all the costs of running the household, the fact that Mr Shandling had declared Mrs Robinson to be his dependant for the purposes of medical aid, the undisputed close and intimate relationship between them, and the fact that Mrs Robinson nursed Mr Shandling through bouts of ill-health. In our view, these facts make it plain that both Mr Shandling and Mrs Robinson considered themselves to constitute a permanent life

partnership in which they undertook duties of mutual support and care for one another. It is also clear, however, that they chose not to marry. We must assume that it was Mr Shandling who chose not to marry as Mrs Robinson says that she was at all times willing to be married. We cannot ascertain Mr Shandling's reasons for not marrying from the affidavits before us. In our view, however, the fact that they did not marry does not mean that they had not established a permanent life partnership.

[105] Section 9(3) of our Constitution prohibits discrimination on the grounds of marital status. It provides:

> "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, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[106] The institution of marriage is an important social institution which has extensive legal consequences under the two legal regimes which regulate marriage in South Africa, the common law and African customary law. The social importance of marriage has been recognised by this Court in several cases. In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*,[3] for example, this Court held:

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[3] 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

> "The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends."[4]

The celebration of a marriage thus confers extensive legal duties and rights upon the parties to the marriage as a matter of law. As a matter of social relations, it often results in the founding of a family which provides essential human companionship, mutual support and security to the members of that family. However, not every family is founded on a marriage recognised as such in law. Yet members of such families often play the same roles as in families which are founded on marriage and provide companionship, support and security to one another.

[107] The law has tended to privilege those families which are founded on marriages recognised by the common law. Historically, marriages solemnised according to the principles of African customary law were not afforded recognition equal to the recognition afforded to common law marriages,[5] though this has begun to change.[6]

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[4] Id at para 31. See also *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) at paras 13 and 22; *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC) at para 19.

[5] Marriages in terms of African customary law were referred to as "black customary unions" in section 35 of the Black Administration Act, 38 of 1927 and were not recognised as legal marriages. Accordingly, a widow of a customary marriage was held not to have a claim in delict for the loss of support caused by the death of her husband. See *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 (2) SA 467 (A). The position was different in customary law, see *Vakubi Ngqongqozi and Another v Noselem Nyalambisa and Others* 4 NAC 32 (1919). See the comment by Dlamini "Claim By Widow of Customary Union for Loss of Support" (1984) 101 *SA Law Journal* 34.

Similarly, marriages solemnised in accordance with the principles of Islam or Hinduism were also not recognised as lawful marriages[7] though this too is now altering.[8] The prohibition of discrimination on the ground of marital status was adopted in the light of our history in which only certain marriages were recognised as deserving of legal regulation and protection. It is thus a constitutional prescript that families that are established outside of civilly recognised marriages should not be subjected to unfair discrimination.

[108] Where relationships which are socially and functionally similar to marriage are not regulated in the same way as marriage, discrimination on the grounds of marital status will arise. In this case, we have concluded that the cohabitation relationship of Mrs Robinson and Mr Shandling was a relationship that constituted a permanent life partnership in which the parties had undertaken mutually to support one another, both financially and otherwise. We concluded, therefore, that their relationship was socially and functionally similar to marriage. To the extent that the law regulates its consequences differently from that of marriage, the law will be prima facie discriminatory. The question that then arises is whether that discrimination is unfair. In each case where it is shown that a relationship that is socially and functionally similar to marriage is treated differently from marriage, a careful contextual analysis will be necessary to determine whether the discrimination is indeed unfair.

[6] See the Recognition of African Customary Marriages Act, 120 of 1998.

[7] These marriages were historically not recognised as valid marriages because they were potentially polygynous. See *Ismail v Ismail* 1983 (1) SA 1006 (A).

[8] See, for example, *Ryland v Edros* 1997 (2) SA 690 (C); 1997 (1) BCLR 77 (C); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA).

[109] It will be helpful to start by considering the legal rules governing marriage. Before we do so, however, it is important to note that the rules governing marriage both under common law and under African customary law have been the subject of intense debate in the last few decades. The focus of that debate has been a realisation that many of the rules of marriage in both systems were discriminatory on the grounds of gender and sex. Some of the rules were expressly and obviously discriminatory, such as the rule of common law which provided that a woman married in community of property had limited contractual capacity and that her husband, the bearer of the marital power, was entitled to manage their common estate on his own without referring to her at all.[9] Or the rule of customary law which provided that women may ordinarily not inherit property.[10]

[110] Other rules regulating marriage were discriminatory against women, not expressly, but in effect. In particular these rules often failed to acknowledge the division of labour within the household, in terms of which women bore primary and often sole responsibility for the maintenance of the household and caring for children and elderly members of the family. The responsibilities so often borne by women across all South African communities, whether wealthy or poor, and regardless of colour, meant that women were less likely to be able to participate in the labour

[9] For a discussion of the rules regulating marital power before its abolition, see Hahlo *The South African Law of Husband and Wife* 5 ed (Juta, 1985) at 194; see also the discussion in Van Heerden et al *Boberg's Law of Persons and the Family* 2 ed (Juta, 1999) at 161ff.

[10] But see *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality Intervening); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) BCLR 1 (CC).

market as successfully as men. (Indeed practices in the labour market as well were often discriminatory, further hampering women's ability to participate.) The effect of the unequal division of labour in the household, and discriminatory practices in the labour market, meant that at the termination of a marriage, whether by death or divorce, women were often more materially vulnerable than men. This was caused by the fact that during the marriage women were often less able than men to accumulate property, and were also less able to compete in the labour market.

[111] The Legislature has sought to remedy this inequality over the last twenty years with a range of legislative enactments governing the regulation of matrimonial property both during the subsistence of the marriage and upon its termination,[11] as well as provisions extending the duty of support that arises on marriage to after the death of one of the spouses (the provision in question in this case),[12] and seeking to improve the procedures whereby the duty of support may be enforced.[13] This brief account of recent developments in the law of marriage makes it plain that marriage itself is an institution which is legally evolving. That evolution reflects and responds to changes in the broader community. The discussion of the rights of marriage that follows is based largely, but not exclusively, on the current common law rules regulating marriage.

[11] See the Matrimonial Property Act, 88 of 1984; Marriage and Matrimonial Property Law Amendment Act, 3 of 1988; General Law Fourth Amendment Act, 132 of 1993.

[12] See the discussion in Hahlo "Widow's Claim to Maintenance out of Deceased Husband's Estate" (1962) 79 *SA Law Journal* 361. In 1969, there was an abortive attempt to enact a remedial provision, the Family Maintenance Bill. See also Hahlo "The Sad Demise of the Family Maintenance Bill 1969" (1971) 88 *SA Law Journal* 201.

[13] See generally the Maintenance Act, 99 of 1998; See also *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC).

[112] Marriage, as presently constructed in common law,[14] constitutes a contract between a man and a woman in which the parties undertake to live together,[15] and to support one another.[16] Marriage is voluntarily undertaken by the parties, but it must be undertaken in a public and formal way and once concluded it must be registered. Formalities for the celebration of a marriage are set out in the Marriage Act.[17] A marriage must be conducted by a marriage officer,[18] to whom objections may be directed. If objections to the marriage are lodged, the marriage officer must satisfy herself or himself that there are no legal obstacles to the marriage.[19] Those wishing to get married must produce copies of their identity documents, or alternatively make affidavits in the prescribed form.[20] Marriages must take place in a church or other religious building, or in a public office or home, and the doors must be open.[21] Both parties must be present[22] as well as at least two competent witnesses.[23] A particular

[14] See, however, the recent judgment of the SCA in *Fourie and Another v Minister of Home Affairs and Another (Lesbian and Gay Equality Project Intervening)* SCA 232/2003, 30 November 2004, as yet unreported in which a majority of the court issued a declarator to the effect that "marriage is the union of two persons to the exclusion of all others for life." This was decided shortly before judgment was handed down in this matter.

[15] The duty to live together forms part of the *consortium omnis vitae* "which obliges spouses to live together, afford each other reasonable marital privileges, and be faithful to each other" (Van Heerden et al above n 9 at 172).

[16] Voet 25.3.8; *Jodaiken v Jodaiken* 1978 (1) SA 784 (W) at 788H.

[17] Act 25 of 1961.

[18] Section 11(1) of the Marriage Act. Sections 2-9 of the Act govern the appointment of marriage officers. All magistrates are marriage officers *ex officio* (see section 2(1) of the Marriage Act).

[19] Section 23 of the Marriage Act.

[20] Section 12 of the Marriage Act.

[21] Section 29(2) of the Marriage Act.

[22] Sections 29(2) and (4) of the Marriage Act.

[23] Section 29A(1) of the Marriage Act.

formula for the ceremony is provided in the Marriage Act,[24] but other formulae, such as religious rites, may be approved by the Minister.[25] Once the marriage has been solemnised, both spouses, at least two competent witnesses, and the marriage officer must sign the marriage register.[26] A copy of the register must then be transmitted to the Department of Home Affairs to be officially recorded.[27] These formalities make certain that it is known to the broader community precisely who gets married and when they get married. Certainty is important for the broader community in the light of the wide range of legal implications that marriage creates, as we shall now describe.

[113] One of the most important invariable consequences of marriage is the reciprocal duty of support. It is an integral part of the marriage contract and has immense value not only to the partners themselves but to their families and also to the broader community. The duty of support gives rise to the special rule that spouses, even those married out of community of property, can bind one another to third parties in relation to the provision of household necessaries which include food, clothing, medical and dental services.[28] The law sees the spouses as life partners and jointly and severally responsible for the maintenance of their common home. This obligation may not be excluded by antenuptial contract.

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[24] See section 30(1) of the Marriage Act.

[25] Id

[26] See section 29A(1) of the Marriage Act.

[27] See section 29A(2) of the Marriage Act.

[28] See the general discussion in Sinclair *The Law of Marriage* Volume 1 (Juta, 1996) at 442-452; and Van Heerden et al above n 9 at 235ff.

[114] Another invariable legal consequence of the marriage is the right of both parties to occupy the joint matrimonial home. This obligation is clearly based on the premise that spouses will live together. The party who owns the home may not exclude or evict the other party from the home. Limited exceptions to this rule have been created under the Domestic Violence Act.[29]

[115] The way in which the marriage affects the property regime of the parties to the marriage is variable at common law. The ordinary common law regime is one of community of property including profit and loss in terms of which the parties to a marriage share one joint estate which they manage jointly. Historically, of course, our common law provided that the power to manage the estate ("the marital power") vested in the husband. This rule was altered by statutory intervention in 1984.[30] Major transactions affecting the joint estate must now be carried out with the concurrence of both parties.[31]

[116] Marriage also produces certain invariable consequences in relation to children. Children born during a marriage are presumed to be children of the father. Both

[29] Act 116 of 1998. See in particular subsections 7(1)(c) and (d). Note also that the Domestic Violence Act provides remedies to cohabiting partners. Section 1 of the Act defines "domestic relationship" to include people who "(whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other" (section (b) of the definition).

[30] See section 11 of the Matrimonial Property Act, 88 of 1984. The abolition of the marital power was only extended to marriages between African people in 1988 – see the Marriage and Matrimonial Property Amendment Act, 3 of 1988. Both these statutes only abolished the marital power prospectively. In 1993 the General Law Fourth Amendment Act, 132 of 1993 abolished the marital power in all marriages which had been solemnised before the 1984 and 1988 Matrimonial Property Acts had come into force. See also the full discussion in Sinclair above n 28 at 126-130.

[31] See subsections 15(2) and 15(3) of the Matrimonial Property Act, 88 of 1984. Joint estates must now be administered in terms of chapter III of the Act.

parents have an ineluctable duty to support their children (and children have a reciprocal duty to support their parents). The duty to support children arises whether the children are born of parents who are married or not.

[117] Because of the social importance of marriage in our community, the law also attaches a range of other consequences to marriage – for example, insolvency law provides that where one spouse is sequestrated, the estate of the other spouse also vests in the Master in certain circumstances,[32] the law of evidence creates certain rules relating to evidence by spouses against or for one another,[33] and the law of delict recognises damages claims based on the duty of support.[34] The rules that govern marriage have developed over a long period of time. More recently, as pointed out in the judgment of Sachs J, Acts of Parliament which attach benefits to marriage, also confer them upon cohabitants who are not married, variously referred to in legislation as "life partners", "partners" and "cohabitants".[35]

[32] See, for example, section 21(1) of the Insolvency Act, 24 of 1936, and the consideration of that provision by this Court in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC). Interestingly, section 21(13) provides that the word "spouse" in section 21 is to be read to include "a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another".

[33] Section 195 of the Criminal Procedure Act, 51 of 1977 provides, subject to certain exceptions, that the spouse of an accused is a competent, but not compellable, witness for the prosecution. Section 196 provides that the spouse of an accused is a competent witness for the defence, but may not be compelled to give evidence by a co-accused of the accused spouse. Interestingly, section 195(2) of the Criminal Procedure Act provides that for the purposes of evidence in criminal proceedings "marriages" include customary law marriages and marriages concluded under any system of religious law, but not cohabitation.

[34] The aquilian action entitles a spouse whose spouse has been killed or injured by the wrongful act of a third party to recover damages for the patrimonial loss suffered. A claim for loss of the non-material aspects of *consortium* does not lie. See *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Marine and Trade Insurance Co Ltd v Mariamah and Another* 1978 (3) SA 480 (A).

[35] See paras 175-176 of the judgment of Sachs J.

[118] From the above, it is clear that marriage is an institution of great legal significance. This significance arises both from the important social role that marriage plays in our society and from its public and formal character which make it a reliable criterion for the conferral of obligations and rights. We are unable to agree with Skweyiya J to the extent that he suggests that in determining whether discrimination on the grounds of marital status is unfair or not, one can take the view that it is not unfair to discriminate between relationships to which the law attaches the obligations of support and cohabitation and those relationships to which the law does not attach such consequences. In our view, this approach defeats the important constitutional purpose played by the prohibition on discrimination on the grounds of marital status. For if it does not constitute unfair discrimination to regulate marriage differently from other relationships in which the same legal obligations are not imposed upon the partners to that relationship by the law, marriage will inevitably remain privileged. We do not consider this would serve the constitutional purpose of section 9(3), and its prohibition of unfair discrimination on the grounds of marital status.

[119] It has become apparent that more and more people in South Africa live together without being married.[36] In the 2001 Census, 2.3 million people described themselves as "living together like married partners" although they were not married. This constitutes approximately 8% of the adult population. However, although cohabitating partners have received some piecemeal attention by Parliament over the

[36] Sinclair above n 28 at 270 records that the number of people living together as cohabitants had grown from 463 000 in 1970 to 1,2 million people in 1991.

last ten years,[37] no comprehensive legislative regulation of the consequences of cohabitation has yet taken place. The South African Law Reform Commission, however, has been engaged in researching the matter and has prepared a comprehensive discussion paper on it.[38]

[120] Of course, the circumstances of cohabitants can vary significantly. Some may be living together with no intention of permanence at all, others may be living together because there is a legal or religious bar to their marriage, others may be living together on the firm and joint understanding that they do not wish their relationship to attract legal consequences, and still others may be living together with the firm and shared intention of being permanent life partners. Moreover, one cohabiting relationship may change its joint character and purpose so that partners who may originally not intend to be living together as permanent life partners may over time alter that intention and intend to live together as permanent life partners.

[121] Often cohabitation will be a long-term arrangement between two people. Because such relationships are similar to marriage, and because they will be based on many of the same social practices that underpin marriage, many of the gender inequalities that are attendant upon marriage, and described above,[39] will also be attendant upon these relationships. It is quite likely that after a long period of

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[37] See the examples given in the judgment of Sachs J at paras 175-176.

[38] See South African Law Reform Commission Discussion Paper, Paper 104, Project 118, "Domestic Partnerships".

[39] See paras 109-111.

cohabitation, in which the parties have lived together, and even raised children jointly, the person in the relationship, often, but not necessarily the woman, who has been responsible for the maintenance of the household and caring for children will be more vulnerable in relation to material and financial matters than the other partner. The termination of the cohabitation relationship whether by death or separation will often prejudice that person in the absence of any equitable regulation of the property affairs of the partners upon termination.

[122] Some cohabitation relationships, such as that between Mrs Robinson and Mr Shandling, play a role very similar to marriage in our society. However, because they are not formally celebrated in a manner that is capable of easy proof or ascertainment, attaching legal consequences automatically to such relationships may be less practicable. To resolve this problem some societies have provided for the registration of cohabitation relationships in a manner similar to marriage.[40]

[123] There are thus differences between marriage and cohabitation even where cohabitation plays a similar social function to marriage. These differences mean that the mere fact that the law regulates marriage relationships differently from cohabitation relationships does not mean that the law, to the extent that it discriminates on the grounds of marital status, will constitute *unfair* discrimination. To determine whether the law does constitute unfair discrimination requires us to

[40] See, for example, the Netherlands Act of 16 July 1997, Staatsblad 1997, 324 and Act of 17 December 1997, Staatsblad 1998, 600, as cited in the Discussion Paper above n 38. See also the discussion in the South African Law Reform Commission Discussion Paper above n 38 at 72-80; the Law Commission in the United Kingdom has made a similar proposal for the United Kingdom which has not yet been adopted, see the South African Law Reform Commission Discussion Paper at 90-91.

follow the approach to unfairness established by this Court in a series of cases.[41] Three things need to be considered: (a) the position of complainants in society and whether they have previously suffered from patterns of disadvantage; (b) the nature of the provision and the purpose sought to be achieved by it; and (c) the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity or has caused them some other harm of a comparably serious nature.

[124] Although discrimination against cohabiting partners has not been equal to the discrimination relating to race and gender, cohabiting partners have been excluded from legal recognition as we have described above. Moreover, cohabiting partners have been and still are the subject of stigma and disapproval in our community, though this stigma is on the wane in some sectors of our society. A further important factor in this case is that the group of cohabiting partners under consideration are those who, upon the death of their partner, are unable to provide for their own reasonable maintenance needs from their own resources. We are, by definition therefore, concerned with survivors of a cohabitation relationship in financial need. We conclude for these reasons that the cohabiting partners under consideration in this case are a vulnerable group. We turn now to consider the circumstances of cohabiting partners under our law at present.

[41] See, for example, *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at paras 41-43; *Harksen* above n 32 at paras 51-54 of the SALR and paras 50-53 of the BCLR.

[125] At present our law makes no express provision for the regulation of the affairs of cohabiting partners upon termination of their relationship. In several other jurisdictions, the law of implied or constructive trusts has been used to re-allocate property rights between partners at the termination of a cohabitation relationship to achieve equity.[42] This remedy is not available in our law, given the different legal basis of the law of trusts in South African law.[43] However, the common law rules governing universal partnership may in some circumstances assist the partners at termination. A universal partnership is a contract in which the parties agree to put in common all their property, both that which they presently own and that which they are to acquire in the future.[44] In *Ally v Dinath*,[45] the court held that a universal partnership like other contracts could be tacitly concluded. Establishing that a contract has been concluded tacitly is of course not straightforward.[46]

[42] See the discussion in Sinclair above n 28 at 274-277; see also Neave "Living Together – The Legal Effects of the Sexual Division of Labour in Four Common Law Countries" (1991) 17 *Monash University Law Review* 14 at 17.

[43] See Cameron et al *Honoré's South African Law of Trusts* 5 ed (Juta, 2002) at 110.

[44] There are in fact two types of universal partnership known in our law, the *societas universorum bonorum* and the *universorum quae ex quaestu veniunt.* See *Isaacs v Isaacs* 1949 (1) SA 952 (C) at 955. The former is an agreement in terms of which the parties agree to pool all their existing and future property, and the latter is an agreement in which the parties agree to pool all property they receive during the term of the partnership. We are referring to the *societas universorum bonorum* in the text.

[45] 1984 (2) SA 451 (T) at 454F-455A.

[46] There is some doubt as to the precise test to be met in establishing the existence of a tacit contract. See the approach set out in *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A) at 292B, but see the comments in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 164G-165H and also *Mühlmann v Mühlmann* 1984 (3) SA 102 (A). Not much turns on this uncertainty for our purposes.

[126] Another legal remedy that may be available to assist a cohabiting partner on the termination of the relationship arises from the law governing unjustified enrichment.[47] One partner may be able to show that the other partner has been enriched during the existence of the relationship by tangible improvements made to the property of the one partner by the other.[48] It might even be that the enrichment action could be developed to accommodate other forms of contributions made by partners to one another during the subsistence of their relationship. However, the law has not yet developed in this direction. The scope of the law of unjustified enrichment need not be further considered.

[127] Accordingly, at present, there are only a few common law rules which may have the potential to regulate the rights of parties upon the termination of a cohabitation relationship, no matter how longstanding that relationship. These remedies do not as presently recognised provide a comprehensive, certain and coherent set of principles to protect cohabitants. Moreover, there are no express statutory provisions at all to regulate the affairs of cohabitants upon termination of their relationship by the death of one party. Accordingly, at termination by the death of one of the parties, the surviving partner is left without effective legal recourse, unless she or he can formulate a claim based on the principles of the common law described above. This situation arises, despite the fact that it is clear that the

[47] See the discussion in Sinclair above n 28 at 277-78.

[48] In *Nortje v Pool NO* 1966 (3) SA 96 (A) it was held that where tangible improvements which increase the market value of the property are made by one person to the property of another, a claim in unjustified enrichment will lie. The same case held that there was no general claim for unjustified enrichment in our law. See, however, *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A) where the court held that *Nortje's* case does not necessarily exclude the further extension of liability for unjustified enrichment.

relationship of cohabitation was one in which the parties had undertaken mutual duties of support and one in which patterns of vulnerability and dependence had been established, such that the death of one party may put the other in great difficulty.

[128] The determination whether the discrimination caused by section 2(1) affects cohabiting partners unfairly needs to be understood in the context of the fact that there are no comprehensive, certain or clear legal remedies that can ameliorate the circumstances of the surviving cohabitant upon termination of the relationship by the death of one of the cohabitants. The absence of any other legal remedy coupled with the discriminatory impact of section 2(1) will mean that often surviving cohabiting partners will be left vulnerable and unprotected upon the termination of their cohabitation arrangements by the death of their partner, even where their relationship had subsisted for a long period of time.

[129] Upon termination of a marriage by death, on the other hand, there are a range of rules which govern the rights of the parties. When one spouse dies intestate, the other spouse is entitled to inherit the entire estate if the deceased spouse is not survived by any descendants.[49] If the deceased spouse is survived by a descendant, then the spouse is entitled to inherit either a child's portion of that spouse's estate[50] or a minimum amount established by the Minister for Justice and Constitutional

[49] See section 1(1)(a) of the Intestate Succession Act, 81 of 1987.

[50] A child's portion is calculated by producing a number calculated by identifying the number of descendants and adding one to it to represent the spouse. The cash value of the estate is then divided by that number.

Development from time to time.[51] The amount is currently set at R125 000.[52] Of course, the provisions of the Intestate Succession Act apply only if the deceased spouse does not make a will.

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[51] See section 1 of the Intestate Succession Act which provides:

> "(1) If after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and—
>
> (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;
>
> (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
>
> (c) is survived by a spouse as well as a descendant—
>
> (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and
>
> (ii) such descendant shall inherit the residue (if any) of the intestate estate;
>
> (d) is not survived by a spouse or descendant, but is survived—
>
> (i) by both his parents, his parents shall inherit the intestate estate in equal shares; or
>
> (ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate; or
>
> (e) is not survived by a spouse or descendant or parent, but is survived—
>
> (i) by—
>
> (aa) descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of his deceased father who are related to the deceased through him only; or
>
> (bb) descendants of his deceased parents who are related to the deceased through both such parents; or
>
> (cc) any of the descendants mentioned in subparagraph (aa), as well as by any of the descendants mentioned in subparagraph (bb),
>
> the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate; or
>
> (ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate;
>
> (f) is not survived by a spouse, descendant, parent, or a descendant of a parent, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares."

[52] The amount was published in *Government Gazette* 11188 GN 483, 18 March 1988.

[130] In addition to the provisions regulating succession, section 2(1) of the Act provides that a spouse in financial need may claim maintenance from the estate of his or her deceased spouse until his or her death or remarriage. As both Sachs J and Skweyiya J note in their judgments, this provision was enacted in 1990 to amend the situation then prevailing under the common law. At that time, the common law held that the duty of support between spouses did not survive the death of one spouse. Accordingly, a spouse had no claim against the estate of his or her deceased spouse, even when in dire financial need, and if the estate would have been able to provide maintenance.[53]

[131] There is a significant difference, therefore, between the way in which the law regulates the rights of spouses who survive a marriage, and the manner in which it regulates the rights of partners who survive a cohabitation relationship. There can be no doubt that there is a range of ways in which the rights of partners surviving cohabitation relationships could be regulated. There are many different examples to be found in other legal systems.[54] In particular, the Legislature may be minded to regulate different forms of cohabitation differently. For example, it may conclude that registered cohabitation relationships will be more comprehensively regulated than other forms of cohabitation. The various possibilities are canvassed extensively in the Law Reform Commission report referred to earlier.[55] It is unnecessary and premature

[53] *Glazer v Glazer NO* 1963 (4) SA 694 (A) at 707B-D.

[54] See, for example, the Canadian Maintenance and Custody Act, RS, 1989, c 160; see also the New South Wales Property (Relationships) Act of 1984; see also the law in the Netherlands, above n 40; see also section 160 of the Tanzanian Law of Marriage Act 1971 as cited in Sinclair above n 28 at 297n108.

[55] Above n 38.

in our view to consider the full range of forms of regulation that may be considered by the Legislature and to consider their constitutionality for as yet there is no statutory regulation.

[132] From the foregoing it becomes plain that cohabiting partners are a vulnerable group, and that in the absence of any other forms of legal regulation, the fact that they are excluded from the provisions of section 2(1) can have a grave impact on the interests of cohabiting partners. That impact will be particularly grave where the partnership is a permanent life partnership in which partners have undertaken reciprocal duties of support, where the surviving partner is in need, and there has been no equitable distribution to the surviving partner from the estate of the deceased partner. It is our conclusion that, in the absence of any regulation in such circumstances, the effect of limiting the scope of section 2(1) to married spouses only will constitute unfair discrimination within the meaning of section 9(3) of the Constitution.

[133] Were there some regulation to provide equitable protection to cohabitants who have been in relationships which can be said to perform a similar social function to marriage, the provisions of section 2(1) may not have constituted unfair discrimination. Given however that there is no regulation to ensure some equitable protection for cohabitants, particularly those who have been in long-term relationships where patterns of dependence have been established, the failure of section 2(1) to apply to such relationships constitutes, in our view, unfair discrimination.

[134] It should be emphasised that this conclusion does not mean that the Legislature is required to regulate cohabitation relationships in the same way that it regulates marriage. In particular, the Legislature need not extend the provisions of section 2(1) to all cohabitation relationships. As indicated earlier, marriage is a particular form of relationship, concluded formally and publicly with specified and clear consequences. Many people who choose to cohabit may do so specifically to avoid those consequences. In our view, the Legislature is entitled to take this into account when it regulates cohabitation relationships. However, cohabitation relationships that endure for a long time can produce patterns of dependence and vulnerability which in the light of the substantial and increasing number of people in cohabitation relationships cannot be ignored by the Legislature without offending the constitutional prohibition on unfair discrimination on the grounds of marital status.

[135] The unfairness of the discrimination in this case lies not primarily in the fact that cohabiting partners are not afforded equivalent rights to marriage as stipulated in section 2(1) of the Act, but in the fact that neither section 2(1) nor any other legal rule regulates the rights of surviving partners to cohabitation relationships which were socially and functionally similar to marriage, when those relationships are terminated by death and where that surviving partner is in financial need. In our view, given that section 2(1) of the Act and other legal provisions extensively regulate the rights of spouses in the event of the termination of a marriage by death, but there are no statutory provisions at all regulating the rights of cohabitants upon the termination of

their relationships by death, the law discriminates against surviving partners of cohabitation relationships who are in financial need.

[136] We have concluded that the discrimination is unfair. The next question that arises is whether that unfair discrimination can be said to be reasonable and justifiable within the contemplation of section 36 of the Constitution.[56] The purpose of the legislation is to alter the common law rules governing marriage to protect the surviving spouse from penury upon the death of the other spouse. In our view, this is an important purpose. However, that purpose can be achieved without excluding surviving partners of cohabitation relationships in which duties of support had been mutually undertaken, whether tacitly or expressly, and where those surviving partners are in financial need, from similar protection. It is not clear why marriage only need be protected. The need to provide protection to such surviving partners is all the more acute in the light of the prevailing common law principle that provides that such partners would not be able to enter into legally enforceable contractual obligations to support one another after the termination of their partnership by the death of one of them. The law prohibits contracts between individuals which seek to regulate their

[56] Section 36(1) reads as follows:

> "Limitation of rights.—(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is 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 purpose of the limitation;
> (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."

affairs or relationships posthumously.[57] To the extent that the purpose of providing legal protection to a surviving spouse but not to a surviving cohabitant might be to preserve the religious attributes of marriage, this cannot be an acceptable purpose in terms of our Constitution. While marriage plays an important role in our society, and most religions cherish it, the Constitution does not permit rights to be limited solely to advance a particular religious perspective. We conclude therefore that the unfair discrimination is not justifiable within the terms of section 36.

Remedy

[137] It is necessary to consider the appropriate remedy. Section 172(1)(a) of the Constitution requires a court when deciding a constitutional matter to declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency.[58] Section 172(1)(b) also permits a court to make an order that is just and equitable. The difficulty we face in this case is that, for the reasons given earlier in this judgment, the discrimination we have found may be cured by the Legislature in

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[57] *Pacta successoria*, as they are called, are prohibited in terms of our common law. There is no uniform view on whether such contracts are merely unenforceable (see *Salzer v Salzer* 1919 EDL 221; *Van Jaarsveld v Van Jaarsveld's Estate* 1938 TPD 343) or contrary to public policy and therefore invalid (*Nieuwenhuis v Schoeman's Estate* 1927 EDC 266). For a general discussion see the discussion in Christie *The Law of Contract in South Africa* 4 ed (Butterworths, 2001) at 415-6. It is not necessary to engage in this debate here and it is sufficient, for the purposes of this case, simply to highlight that such contracts are not enforceable in South African law.

[58] Section 172(1) of the Constitution reads as follows:

> "When deciding a constitutional matter within its power, a court—
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including—
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

a variety of ways and that those ways need not be identical to the manner in which marriages are currently regulated. To cure the unfairness of the discrimination identified in this case the Legislature should make provision to ensure that on the termination of a longstanding cohabitation relationship by death, an equitable arrangement is reached in relation to the financial position of the survivor so that the dependence or vulnerability of the survivor which has arisen through the relationship of cohabitation is appropriately redressed. This equitable arrangement could be achieved, either by an equitable distribution of the property of the cohabitants,[59] or by rules relating to maintenance. The Legislature is in the best position to determine the precise nature of that regulation. We accordingly consider that the order of constitutional invalidity should be suspended to give the Legislature an opportunity to cure the constitutional defect.

[138] All this may be so, yet section 172(1) nevertheless obliges us to capture the scope of the unconstitutionality as precisely as we can. It may be that if the context were to change, what would constitute "unfair discrimination" may also change. We are, however, constitutionally obliged to formulate an order of invalidity as precisely as we can in the light of the circumstances that currently obtain. If the Legislature were not to take steps to cure the defect within the time stipulated and also not seek an extension of the suspension of the order, the order of invalidity would come into

[59] See section 2(g) of the Canadian Matrimonial Property Act, RS 1989 and the discussion thereof in *Nova Scotia (Attorney General) v Walsh* [2002] 4 SCR 325 (SCC).

effect. It is important for this reason too that the scope of the unconstitutionality be as carefully drawn as possible.

[139] In the light of the reasoning on the merits above, we consider that the unconstitutionality in section 2(1) lies in the definition given to "spouse" in section 1 of the Act. In our view, were that definition to be read to include "and includes the surviving partner of a permanent heterosexual life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate", the unconstitutionality would be cured. It should be emphasised that, were this order to come into operation, a partner would only be able to claim maintenance in the circumstances contemplated by section 2(1). The surviving partner would have to show that he or she was not able to provide for his or her reasonable maintenance needs from his or her own means and earnings.

[140] It should be noted that this definition limits the scope of the relief to a narrow class of cohabitation relationships only – those that are permanent heterosexual life partnerships in which the parties have undertaken reciprocal duties of support.[60] It was argued by the respondents and the amicus in this Court that basing the relief only on parties who have expressly or tacitly undertaken duties of support, which was also

[60] This case is concerned with heterosexual cohabitation relationships only. It does not concern gay and lesbian life partnerships. The result of a constitutional challenge to section 2(1) of the Act on the basis of unfair discrimination on the ground of sexual orientation may be different to the challenge launched in this case.

the approach adopted by this Court in *Satchwell*'s case,[61] was not correct because family law should not be governed by contractual principles and the common law should instead be developed to give rise to an automatic legal duty of support between the parties to permanent life partnerships. The difficulty with this submission is that the development of the common law as proposed by the amicus was not relief sought in this litigation. The relief sought in this case was a declaration of constitutional invalidity in respect of section 2(1) of the Act. Developing the common law as proposed by the amicus is quite different relief which it would be inappropriate to grant on appeal, in circumstances where it is has not been considered by any other court. Accordingly, the submission made by the amicus must fail.

[141] In our view, the proposed order identifies the relationships which perform most closely a similar social function to marriage and the relief should not extend beyond them, though of course it is open to the Legislature to regulate other cohabitation relationships. Moreover, we limit the relief to circumstances in which a partner in such a relationship has not been afforded any equitable distribution from his or her partner's estate. We do this because we consider that even where a life partnership performs a similar social function to marriage, it is not constitutionally necessary for the Legislature to regulate that partnership in the same way as it regulates a marriage. The key issue for the Constitution is to ensure that some provision is made equitably to regulate the circumstances of a cohabiting partner upon the death of the other

[61] Above n 4.

partner. In the circumstances of this matter, it is prudent to leave the Legislature as free as constitutionally possible to determine the appropriate form of regulation.

[142] In this case, as it happens, Mrs Robinson was provided for in Mr Shandling's will. That will recognised her contribution to the partnership and her potential financial vulnerability upon the death of Mr Shandling by leaving to her approximately one third of his estate. In our view, this constitutes an adequate equitable division of the property of Mr Shandling, such as not to entitle Mrs Robinson to any further relief within the terms of the order we propose. In these circumstances, we do not consider it appropriate to make an order for interim relief. In our view, this is an area which should best be regulated by the Legislature and it would be difficult and perhaps inadvisable to seek to provide an interim regime pending the Legislature's intervention.

[143] We would therefore agree with Sachs J, though for different reasons, that the applicants have established that section 2(1) of the Act is unfairly discriminatory in that neither it nor any other provision of the law regulates the rights of surviving partners of cohabitation relationships. We would put the Legislature on terms to resolve this. Given the complexity of the task, we consider that two years is an appropriate period to give the Legislature to cure the defect in the current legislation.

[144] Neither the applicant nor the respondents sought costs against one another. The respondents did seek costs against the Minister for Justice and Constitutional

Development on an attorney and client basis in the light of the fact that she abided the outcome of the litigation in the High Court and then sought to lodge evidence in this Court and oppose the relief. Given that this judgment is not supported by a majority of the members of this Court who heard the matter, it is not necessary for us to consider whether it would be appropriate to award costs on the basis sought by the respondents.

[145] We have had an opportunity, since writing this judgment, to read the judgment prepared by Ngcobo J. We cannot agree with it. In our view, the approach he adopts privileges marriage relationships in a manner that cannot be consistent with the express constitutional prohibition of unfair discrimination on the grounds of marital status. For these reasons, we propose the following order, which confirms in substance the order of the High Court, but subjects the order to a period of two years' suspension.

The Order

1. It is declared that the omission from the definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990 of the words "and includes the surviving partner of a permanent heterosexual life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate" at the end of the existing definition is unconstitutional and invalid.

2. The definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990, is to be read as if it included the following words after the words "dissolved by death" –

> "and includes the surviving partner of a permanent heterosexual life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate."

3. The omission from the definition in section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990 of the following, at the end of the existing definitions, is unconstitutional and invalid –

> "Spouse" for the purposes of this Act shall include a person in a permanent heterosexual life partnership;
>
> "Marriage" for the purposes of this Act shall include a permanent heterosexual life partnership.

4. Section 1 of the Maintenance of Surviving Spouses Act, 27 of 1990 is to be read as though it included the following at the end of the existing definition –

> "Spouse" for the purposes of this Act shall include a person in a permanent heterosexual life partnership;

> "Marriage" for the purposes of this Act shall include a permanent heterosexual life partnership.

5. The orders contained in paragraphs 1, 2, 3 and 4 are suspended for a period of 2 years from the date of this order to enable the Legislature to take steps to cure the constitutional defects identified in this judgment.

6. Any party may approach this Court, on notice to all other parties, for an extension of the period of suspension provided for in paragraph 5 of this order before the period of suspension elapses.

7. Should the Legislature choose not to enact legislation as contemplated in paragraph 5, the order of invalidity that shall come into operation two years after the date of this order shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has finally been wound up by the date upon which the order of invalidity comes into effect.

SACHS J:

Introduction

[146] This case raises complex social and legal questions about the interaction between freedom of choice and equality in intimate relationships.

[147] The problem does not lie in defining the technical legal question to be answered: does the fact that the Constitution prohibits unfair discrimination on the ground of marital status, mean that the exclusion of the survivor of a committed, permanent and intimate life partner from the benefits of the Maintenance of Surviving Spouses Act[1] (the Act) amounts to unfair discrimination against her?

[148] Similarly, it is not difficult to illustrate the practical issues involved: to take a not unusual situation, should a person who has shared her home and life with her deceased partner, borne and raised children with him, cared for him in health and in sickness, and dedicated her life to support the family they created together, be treated as a legal stranger to his estate, with no claim for subsistence because they were never married? Should marriage be the exclusive touchstone of a survivor's legal entitlement as against the rights of legatees and heirs?

[149] The source of the complexity appears to lie elsewhere. In my view this is one of those cases in which however forceful the reasoned text might be, it is the largely unstated subtext which will be determinative of the outcome. The formal legal issue

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[1] Act 27 of 1990. Section 2(1) of the Act provides:

> "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 his death or remarriage in so far as he is not able to provide therefor from his own means and earnings."

Section 9(3) of the Constitution provides that:

> "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, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." [My emphasis].

before us is embedded in an elusive, evolving and resilient matrix made up of varied historical, social, moral and cultural ingredients. At times these emerge and enter explicitly into the legal discourse. More often they exercise a subterranean influence, all the more powerful for being submerged in deep and largely unarticulated philosophical positions.

[150] Thus the judgment of Skweyiya J, which has majority support, holds that the issue is whether it amounts to unfair discrimination to impose a duty upon the deceased estate to maintain a surviving spouse on the one hand, and not, on the other to impose that duty upon the deceased estate where the deceased bore no such duty by operation of law during his or her lifetime to maintain the partner in a heterosexual partnership. The answer, the judgment decides, is that such discrimination is not unfair.

[151] I find myself in disagreement with the judgment both as to the approach utilised and to the conclusion reached, and totally so. This is not because I would challenge the legal logic used, which appears to be impeccable within the framework adopted. It is because I would locate the issue in a completely different legal landscape. I do not accept that it is appropriate to examine the entitlements of the surviving cohabitant in the context of what the common law would provide during the lifetime of the parties. To do so is to employ a process of definitional reasoning which presupposes and eliminates the very issue which needs to be determined, namely, whether for the limited socially remedial purposes intended to be served by the Act, unmarried

survivors could have a legally cognisable interest which founds a constitutional right to equal benefit of the law.

[152] In my view, the question of the fairness of excluding such survivors from such benefits falls to be assessed not in the narrow confines of the rules established by matrimonial law, but rather within the broader and more situation-sensitive framework of the principles of family law, principles that are evolving rapidly in our new constitutional era. By its very nature, the quality of fairness, like that of mercy and justice, is not strained. The enquiry as to what is fair in our new constitutional democracy accordingly does not pass easily through the eye of the needle of black-letter law. Judicial dispassion does not exclude judicial compassion; the question of fairness must be rigorously dealt with, but in a people-centred and not a rule-centred way.

[153] The issues raised are novel. A wide range of jurisprudential perspectives are implicated. Because I differ fundamentally with the majority with regard to the point of departure and the context of the enquiry I have found it necessary to set out my views at some length. The first part of this judgment seeks to delineate and establish the jurisprudential setting in which I believe the issues should be located. The second part sets out my reasons for holding that the Act does in fact discriminate unfairly against survivors of committed life partnerships.

PART ONE

ESTABLISHING THE LEGAL LANDSCAPE

(i) The philosophical context: freedom of choice and equality

[154] Respect for human autonomy undoubtedly implies that the law must honour the choices that people make, including the decision whether or not to marry. A central argument advanced in the appellant's written submissions, and, I believe, the philosophical premise underlying the majority judgment (as well as the basis for the judgment of Ngcobo J, which I have had the opportunity to read), is as follows: By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage, a person cannot complain if she is denied the legal benefits she would have had if she had married. Having chosen cohabitation rather than marriage, she must bear the consequences. Just as the choice to marry is one of life's defining moments, so, it is contended, the choice not to marry must be a determinative feature of one's life. These are powerful considerations.

[155] Sinclair[2] indicates her respect for such an argument, which implies that freedom of choice demands that cohabitation be preserved as an alternative to marriage and not simply become a different type of marriage. She goes on, however, to negate this contention. On the premise that two people set up a home together, live in a stable, permanent, affective relationship that emulates marriage, and intend to deal fairly with one another, the law's objective, she states, should be to achieve equity between the parties.[3] This, she adds, should be accomplished both during the currency of the

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[2] Sinclair *The Law of Marriage*: *Based on H.R. Hahlo: The South African Law of Husband and Wife* vol 1 (Juta, 1996) at 292.

[3] Id at 297-8.

partnership and after the death of one of the partners. She cites Rhode who points out that a balance must be struck

> "between liberty and equality in intimate associations, between flexibility and certainty in legal rules, and between tolerance for diversity and encouragement of stability in family life . . . . The tradeoff between liberty and equality becomes less stark if liberty is defined not as freedom to do what we want when we want, but rather as freedom to form relationships of mutual trust and commitment, relationships that presuppose some obligations of honesty and fair dealing. Flexibility and certainty are more readily reconciled if we do not demand a single framework for all intimate associations, but rather search for legal guidelines that will distinguish casual from committed relationships. In the absence of explicit agreements, criteria such as the duration of the relationship, the degree of the parties' financial interdependence, and, most importantly, the presence of children, could help provide some consistency across cases."[4]

[156] In my view this balanced, flexible and nuanced approach accords well with the multi-faceted character of our new constitutional order. Respecting autonomy means giving legal credence not only to a decision to marry but to choices that people make about alternative lifestyles. Such choices may be freely undertaken, either expressly or tacitly. Alternatively, they might be imposed by the unwillingness of one of the parties to marry the other. Yet if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not be astute to penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them.

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[4] Rhode *Justice and Gender* 139 quoted in Sinclair (above n 2) at 298n109.

[157] It is instructive to look at the manner in which the Canadian Supreme Court has grappled with the relevance of choice in relation to cohabitation. In *Miron*[5] the majority[6] found that, while in theory the individual is free to choose to marry or not to marry, in practice the reality may be otherwise. It noted further that since the object of the legislation in question was to sustain families when one of their members was injured in an accident, this should be the focus of the issue, rather than what the marital status of the claimant was.[7] The court stated that:

> "If the issue had been viewed as a matter of defining who should receive benefits on a basis that is relevant to the goal or functional values underlying the legislation, rather than marriage equivalence, alternatives substantially less invasive of *Charter* rights might have been found."[8]

Accordingly, the exclusion of unmarried partners from an accident benefit which was available to married partners, violated the Charter. In the result, the definition of 'spouse' had to be read so as to include cohabiting partners. Writing as part of the majority in that case L'Heureux-Dubé J challenged the assumption that most unmarried persons living in a relationship of some interdependence and duration are indeed exercising a 'free choice'.

> "This silent and oft-forgotten group constitutes couples in which one person wishes to be in a relationship of publicly acknowledged permanence and interdependence and the other does not . . . . It is small consolation, indeed, to be told that one has been

[5] *Miron v Trudel* [1995] 2 SCR 418.

[6] Of five against four.

[7] Above n 5 at 420-1.

[8] Id at 421.

> denied equal protection under the *Charter* by virtue of the fact that one's partner had a choice."[9]

[158] By way of contrast, in the more recent case of *Walsh*[10] the court decided[11] that merely choosing to cohabit was insufficiently indicative of an intention by cohabitants to share and contribute to each other's assets and liabilities,[12] and therefore the exclusion of cohabiting partners from sharing in the division of matrimonial property by the Nova Scotia Matrimonial Property Act did not violate the Charter.

[159] The judgment of Bastarache J emphasises how context-related the significance of choice will be. Because of its relevance to the matter before us I quote extensively from it:

> "This Court has recognized both the historical disadvantage suffered by unmarried cohabiting couples as well as the recent social acceptance of this family form. As McLachlin J noted in *Miron* . . .
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>> 'There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits. In recent years, the disadvantage experienced by persons living in illegitimate relationships has greatly diminished. Those living together out of wedlock no longer are made to carry the scarlet letter.

[9] Id at 471-2.

[10] *Nova Scotia (Attorney General) v Walsh* [2002] 4 SCR 325.

[11] By a majority of eight to one.

[12] Above n 10 at para 54.

> Nevertheless, the historical disadvantage associated with this group cannot be denied.'

Since *Miron,* . . . significant legislative change has taken place at both the federal and provincial levels. Numerous statutes that confer benefits on married persons have been amended so as to include within their ambit unmarried cohabitants. Nevertheless, social prejudices directed at unmarried partners may still linger, despite these significant reforms. In light of those social prejudices, this Court recognized in *Miron,* that one's ability to access insurance benefits was not reducible to simply a matter of choice. L'Heureux-Dubé J., in her concurring judgment, reasoned as follows, at para.102:

> 'To recapitulate, the decision of whether or not to marry is most definitely capable of being a very fundamental and personal choice. The importance actually ascribed to the decision to marry or, alternatively, not to marry, depends entirely on the individuals concerned. For a significant number of persons in so-called "non-traditional" relationships, however, I dare say that notions of "choice" may be illusory. It is inappropriate, in my respectful view, to condense the forces underlying the adoption of one type of family unit over another into a simple dichotomy between "choice" or "no choice". Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons — all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law.' [Emphasis in original.]

Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount. The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious and financial considerations by the individual. While it remains true that unmarried spouses have suffered from historical disadvantage and stereotyping, it simultaneously cannot be ignored that many persons in circumstances similar to those of the parties, that is, opposite sex individuals in conjugal relationships of some permanence, have chosen to avoid the institution of marriage and the legal consequences that flow from it.

> To ignore [the] differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected and legitimated by the state. Examination of the context in which the discrimination claim arises . . . involves a consideration of the relationship between the grounds and the claimant's characteristics or circumstances."[13] [Reference omitted.]

[160] The point is made even more explicitly in *Walsh* by Gonthier J, who draws a sharp distinction between re-arrangement of property relations, on the one hand, and providing spousal support, on the other. Referring to the Maintenance and Custody Act which provides for maintenance, and is dependent on the need of the applicants and their capacity to provide for themselves and each other, he states that:

> "It is true that in *M.v.H.*, [1999] 2 S.C.R. 3, at para. 177, I recognized that there is 'a growing political recognition that cohabiting opposite-sex couples should be subject to the spousal support regime that applies to married couples because they have come to fill a similar social role.' However, I want to underline the fundamental difference between spousal support, based on the needs of the applicant, and the division of matrimonial assets. While spousal support is based on need and dependency, the division of matrimonial assets distributes assets acquired during marriage without regard to need.
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> . . . .
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> The division of matrimonial assets and spousal support have different objectives. One aims to divide assets according to a property regime chosen by the parties, either directly by contract or indirectly by the fact of marriage, while the other seeks to fulfil a social objective: meeting the needs of spouses and their children."[14]

[13] Id at paras 41-4.

[14] Id at paras 203-4. It is not necessary to consider whether in South African circumstances, where welfare provisions are extremely limited, employment opportunities restricted and the common law has as of yet taken only tentative steps to encompass the equivalent of the notion of a constructive or resulting trust as the basis for

[161] It is relevant that the distinction drawn by Gonthier J was not based on whether payment of a benefit to an unmarried cohabitant was to be made by the state or to come out of the deceased's estate, and thereby possibly affect the entitlement of heirs. It focused on the special importance to be attributed to need and spousal support after a life-long conjugal relationship with the deceased has come to an end. As a result, on his approach claims for spousal support could legitimately compete with inheritance rights. No general marriage equivalence is required to establish the specific right to spousal support. What matters is the functional value of the legislation based on acknowledgment of a similar social role to that served by marriage.

[162] The jurisprudential importance of context in deciding whether a distinction between married and unmarried persons can fairly be made, has also been underlined by this Court. In *Fraser,*[15] which dealt with a provision that excluded unmarried fathers from the category of persons whose consent had to be sought for adoption, Mohamed DP stated:

> "In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the

granting a share of the family home to the survivor, and the doctrine of unjustified enrichment has not been developed to provide appropriate relief, the decision in *Walsh* is consistent with our law. See also Goldblatt who contends that the existing matrimonial property regimes should serve only as a guide to courts, which should be given a broad discretion to redistribute property on the basis of equity, taking into account the various material and non-material contributions of the parties, the form of the partnership and any other factor which the legislature or the courts consider to be useful. In the case of intestate and testate succession, a domestic partner should be entitled to his/her share of the partnership estate. In the case of intestate succession, the deceased's partner should also be entitled to a spouse's share of the deceased estate. Goldblatt "Regulating domestic partnerships — A necessary step in the development of South African family law" (2003) 120 *SA Law Journal* 610 at 625.

[15] *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC).

> protection of the institution of marriage is a legitimate area for the law to concern itself with. *But in the context of an adoption statute where the real concern of the law is whether an order for the adoption of the child is justified, a right to veto the adoption based on the marital status of the parent could lead to very unfair anomalies.*
>
> . . . .
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> *It is . . . evident that not all unmarried fathers are indifferent to the welfare of their children and that in modern society stable relationships between unmarried parents are no longer exceptional*."[16] [My emphasis.]

By analogy, I believe that a de-contextualised approach to the status of unmarried survivors of intimate life partnerships inevitably leads to very unfair anomalies. The survivor of an empty shell marriage will have a claim while the survivor of a caring and committed life partnership that produced a real family, would be left destitute.

(ii)The socio-legal context: patriarchy and poverty

[163] In *Fraser* this Court stressed the need for a nuanced and balanced consideration of our society in which the demographic picture will often be quite different from that on which 'first world' western societies are premised. As Mohamed DP pointed out:

> "The socio-economic and historical factors which give rise to gender inequality in South Africa are not always the same as those in many of the 'first-world' countries described."[17] [Footnote omitted.]

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[16] Id at paras 26 and 43.

[17] Above n 15 at para 44.

This Court has on numerous occasions stressed the importance of recognising patterns of systematic disadvantage in our society when endeavouring to achieve substantive and not just formal equality.[18] The need to take account of this context is as important in the area of gender as it is in connection with race,[19] and it is frequently more difficult to do so because of its hidden nature. For all the subtle masks that racism may don, it can usually be exposed more easily than sexism and patriarchy, which are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible. The constitutional quest for the achievement of substantive equality therefore requires that patterns of gender inequality reinforced by the law be not viewed simply as part of an unfortunate yet legally neutral background. They are intrinsic, not extraneous, to the interpretive enquiry.

[164] It should be remembered that many of the permanent life partnerships dissolved by death today would have been established in past decades, when conditions were even harsher than they are now, and people had far less choice concerning their life circumstances. Thus, in respect of most of the significant transactions potentially affecting present-day claims for maintenance, the social reality would have been that in a considerable number of families the man would have regarded himself as the head of the household with the right to take all major decisions concerning the family. It would have been he who effectively decided whether he and his partner should

[18] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC); *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

[19] See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) and *Hugo* id.

register their relationship in terms of the law. If she refused to do what he wanted, he could have been the one to threaten violence or expulsion, with little chance of the law intervening.[20] Because he would in many cases have been the party to go out to work while she stayed at home to look after the children and attend to his needs, it would have been he who accumulated assets, and he who had the proprietary right to determine how they were to be disposed of after his death.

[165] It should be remembered too that the migrant labour system had a profoundly negative effect on family life. An essential ingredient of segregation and apartheid, it involved the deliberate and targeted destruction of settled and sustainable African family life in rural areas so as to provide a flow of cheap labour to the mines and the towns.[21] The chaotic, unstable and oppressive legal universe in which the majority of the population were as a consequence compelled by law and policy to live had a severe impact on the way many families were constituted and functioned. Repeal of the racist laws which sustained the system, and entry into the new constitutional era, opened the way to fuller lives for those whose dignity had been assailed, and gave them renewed opportunity to take responsibility for their lives. Yet it did not in itself correct the imbalances inside the family or eliminate the desperate poverty that is still so prevalent.

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[20] See *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC).

[21] See Sachs *Protecting Human Rights in a New South Africa* (Oxford University Press, 1990) chapter 6 at 64-78.

[166] Sinclair states that because there is exiguous welfare to protect the victims of breakdown of intimate relationships, neither public law nor private law, on its own, is adequate, and a combination of responses from both is called for.[22] Dealing specifically with the failure of the state to provide protection for the vulnerable parties in cohabiting families, she concludes:

> "[T]here are no easy solutions to the problem of poverty. Both intervention to regulate and refraining from doing so manifest choices made by the state about the plight of its people. Not intervening, in the context of cohabitation, manifests a choice to allow substantial suffering to continue unalleviated. Far from a liberal, enlightened stance, this choice would permit the strong to remain strong and the weak and vulnerable to be removed from the consciousness of the law in the name of respect for individual autonomy."[23] [Footnote omitted.]

(iii) The historical and jurisprudential context: from matrimonial law to family law

[167] In a case like the present it is vital to draw a distinction between matrimonial law and family law. The difference between the two is helpfully analysed in a Discussion Paper recently issued on the question of domestic partnerships by the South African Law Reform Commission[24] (the SALRC Paper). The SALRC Paper points out that many of the features of marriage which are assumed to have been present from time immemorial are actually of more recent origin. What is clear,

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[22] Above n 2 at 301.

[23] Id at 302.

[24] South African Law Reform Commission 'Domestic Partnerships' Discussion Paper 104 Project 118. (The closing date for comments was 1 December 2003). At the hearing of this matter much attention was paid to whether a report of a survey done by the Gender Research Project of the Centre for Applied Legal Studies on Cohabitation and Gender in the South African Context – Implications for Law Reform, November 2001 should be admitted. I agree with the view that it is generally inappropriate to admit such evidence at a late stage in the proceedings. I accordingly find it unnecessary to go beyond the SALRC Paper as a dependable and public source for relevant factual information.

however, is that marriage in its many forms has enjoyed a uniquely privileged status, while domestic partnerships have been virtually unrecognised.[25] The SALRC Paper observes that opposite-sex partners were a largely invisible group as far as the legal system was concerned: any acknowledgment of their existence tended to be characterised by scathing references to their attempts to 'masquerade as husband and wife'. They were excluded from the rights and obligations which attached automatically to marriage, and it was not even clear whether any agreements which they entered into in order to create parallel rights and obligations, were legally enforceable.[26]

[168] The SALRC Paper notes that over the years, however, there has been an increasing focus on the rights of opposite and same-sex partners, and domestic partnerships have come to be perceived as functionally if not formally similar to marriage. It observes that the increased recognition of intimate relationships outside of marriage started in South African law with the imposition of support obligations created in domestic partnership agreements and continued with the use of principles of unjust enrichment to provide property rights and to extend statutorily defined benefits similar to partnerships.[27]

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[25] Id at 3 para 1.2.2.

[26] Id at 3 para 1.2.3.

[27] Id at 4 para 1.2.6.

[169] The SALRC Paper comments that initially the extension was rather grudging and seemed primarily designed to 'pass the buck' from the welfare authorities to the family,[28] and goes on to state:

> "Given South Africa's conservative and Calvinistic background, it is not surprising that acceptance of domestic partnerships occurred at a slower and more reluctant rate than in countries like Canada, Sweden, England and the United States of America. There is, however, mounting dissatisfaction with the failure of the law to adapt to changing patterns of domestic partnership."[29] [Footnote omitted.]
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> . . . .
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> "[L]aw and social policy reforms should aim to provide for both cohabiting couples in general as well as . . . new family types. This must be done whilst acknowledging gender inequality and serious levels of violence against women."[30] [Footnote omitted.]

[170] The SALRC Paper concludes that legal regulation is needed since the existing law contains inadequate mechanisms to address disputes arising from cohabitation relationships. The significant numbers involved mean that the Napoleonic adage that "cohabitants ignore the law and the law ignores them" is no longer acceptable.[31]

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[28] Id

[29] Id at 5 para 1.2.8. The SALRC Paper also notes at 17 para 2.1.8-10 that South African statistics also demonstrate the rising trend in domestic partnerships. Even conservative statistics indicate that a very large number of people live in domestic partnerships in South Africa. Statistical data show that only about 40% of Africans and Coloured women are married. In the 1996 Census the figures for people living together in the different population groups were as follows: African: 1 056 992; Coloured: 132 180; Indian/Asian: 7119; White: 84 027; Unspecified: 8181. Even allowing for imprecision, the Paper states, we must recognise that there are large numbers of people in dependence-producing relationships who are ignored by the law.

[30] Above n 24 at 26 para 2.2.34.

[31] Id at 17 para 2.1.10. A similar point is made in a report by the Law Commission of Canada which calls for recognition and support for all close personal adult relationships. Entitled "*Beyond Conjugality*", it states that:

> "[M]arriages still constitute a predominant choice for opposite-sex conjugal unions. Nevertheless, opposite-sex cohabitation – whether as an alternative to marriage, as a prelude to marriage or as a sequel to marriage – is a growing phenomenon that now has widespread social acceptance.

Where a domestic partnership has created responsibilities for, and expectations of, the parties, the law should play a role in enforcing the responsibilities and realising the expectations of the parties that are in conflict.[32]

[171] Academic opinion also strongly favours recognition by the law of domestic partnerships.[33] Thus Goldblatt states that families need to be understood in terms of the functions that they perform rather than in terms of traditional categories. If we move away from defining relationships in terms of marriage, we can look at the actual functions that they perform in society.[34] She contends that the purpose of family law is to protect vulnerable members of families and to ensure fairness between the parties in family disputes. Women and children are vulnerable groups in our society and often become poorer when families break down. The lack of legal protection afforded to domestic partnerships increases the vulnerability of these groups living within such arrangements. She concludes that a domestic partnership is but one amongst many

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> . . .
> The state cannot create healthy relationships; it can only seek to foster the conditions in which close personal relationships that are reasonably equal, mutually committed, respectful and safe can flourish.
> . . .
> There are many instances where the law imposes rights and responsibilities on the basis of a particular kind of relationship, rather than examining the nature of that relationship. In other words, rights and responsibilities are imposed on the basis of the status rather than the function of a relationship." See http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp [Last visited 25 January 2005]. Executive Summary, 21 December 2001.

[32] Goldblatt above n 14 at 617.

[33] Incomplete research I have done indicates the last writer to oppose recognition of cohabitation was Hahlo in 1985. See Hahlo 'Cohabitation, Concubinage and the Common Law Marriage' in Kahn (ed) *Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner* (Juta, 1983) at 262-3. See too Hahlo *The South African Law of Husband and Wife* 5 ed (Juta, 1985) at 35-42.

[34] Above n 14 at 616-7.

different types of family and should be included within the definition of family for the purposes of family law.[35]

[172] The new way of looking at family law represents an emphatic shift from what the SALRC Paper refers to as a definitional approach to conjugal rights and responsibilities, towards a functional one. (I believe that it is this shift that lies at the centre of my divergence from the majority judgment). According to the definitional argument, only those who comply with the current definition of marriage are entitled to the rights and obligations attached to marriage, and only a legally valid marriage can create a family worthy of legal protection.[36] The SALRC Paper offers its own reply. Against this argument, it states, one may put what has been referred to as the functional response, which emanates from the argument that marriage changes over time and that the time has come for marriage to be redefined.[37]

[173] The SALRC Paper goes on to say that supporters of the functional argument advocate the definition of marriage according to the function that it serves and argue that other relationships can also fulfil the functions that are traditionally conceived to be attributes of marriage only.[38] Such an approach looks beyond biology and the legal requirement of marriage by considering the way in which a group of people function. As a result it has been said that

[35] Id at 610-11.

[36] Above n 24 at 164 para 7.1.17.

[37] Id at 165 para 7.1.18.

[38] Id

> "[w]hen supporters of the definitional argument assume that couples who have made a public commitment by way of marriage are the only ones who have a legal responsibility to each other, and would be more likely to provide a child with stability and security, they are under a wrong impression. . . . [E]ven married relationships are not guaranteed for life and do end with inevitable accompanying negative consequences."[39]

It is also submitted that it is an

> "unjustified generalisation to contend that unmarried couples . . . are not committed to their relationships . . . . Therefore, to regard marriage as a guarantee that the family created thereby would have certain characteristics is a misrepresentation [as these] characteristics could also be present in other relationships."[40]

[174] The SALRC Paper suggests that conditions in South Africa today require a shift from a purely definitional approach to marriage to a functional approach to the family

> "[b]ecause the exclusive nature of the common-law definition of marriage does not reflect social reality, [and it has thus] become necessary under certain legislation to adopt a functional approach to defining family status, with the result that couples who do not fit the traditional family model may be deemed spouse of one another." [41]

According to the SALRC Paper, the South African courts (and the legislator) should determine whether or not to extend common law and other legal protections to family members on this basis. It asserts furthermore that such an approach will lead to

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[39] Id at 174 paras 7.1.51-7.1.52.

[40] Id at 174 paras 7.1.52-7.1.53.

[41] Id at 177 para 7.1.63.

greater fairness, will bring law in line with reality and is more likely to harmonise the law with the values underlying the Constitution.[42]

(iv) The legislative context

[175] Recent legislation has given extensive, if ad hoc, recognition to conjugal relationships outside of marriage. The acknowledgment of domestic partnerships can be traced in the pre-constitutional era to the Insolvency Act of 1936. It is noteworthy that the Constitution itself accepted this type of family unit by providing that a detained person, including a sentenced prisoner, has the right to communicate with, and be visited by, that person's spouse or partner.[43] Since 1994 a flurry of statutes has recognised domestic partnerships. These include the Medical Schemes Act of 1998, the Prevention of Domestic Violence Act of 1998, the Housing Act of 1997, the Compensation for Occupational Injuries and Diseases Act of 1997 and the Basic Conditions of Employment Act of 1997.[44]

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[42] Id at 178 para 7.1.64.

[43] Section 35(2)(f)(i).

[44] The following is an incomplete overview of the statutes indicating the legislator's acknowledgment of domestic partnerships:

The Insolvency Act 24 of 1936. Section 21(13) provides that the word "spouse" not only means wife or husband in the legal sense, but includes wife or husband by virtue of marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another.

The Independent Media Commission Act 148 of 1993. Section 6(1)(f) prohibits a person from being appointed or remaining a commissioner if such a person or his or her spouse, partner or associate holds an office in or with or is employed by any person or company, organization or other body, which has a direct or indirect financial interest in the telecommunications, broadcasting, or printed media industry.

The Pensions Fund Act 24 of 1956. Although section 1 (as amended by section 6 of the Pensions Fund Amendment Act 22 of 1996) does not expressly define a domestic life partner as a "dependant" in relation to a member, it does make provision for persons who are factually (but not legally) dependent on the member for maintenance. It may as a result be inferred that a person whose life partner was a member of the fund may be included as a dependant for the purpose of the Act.

The Special Pensions Act 69 of 1996. The definition of "spouse" in section 31(2)(iii) of the Act refers to "the partner . . . in a marriage relationship" which latter relationship is defined to include "a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years".

The Constitution of the Republic of South Africa. Section 35(2)(f)(i), dealing with the rights of arrested, detained and accused persons, provides that such person has the right to communicate with and to be visited by his or her spouse or partner.

The Lotteries Act 57 of 1997. Section 3(7)(a)(ii), states (inter alia) that a person shall not be appointed or remain a board member if such person through his spouse or life partner (inter alia) has or obtains a direct or indirect financial interest in any lottery or gambling or associated activity. Section 3(8) states that a member of the board or his or her spouse or life partner, may not for a period of 12 months after the termination of membership of the board take up employment or receive any benefit from persons making certain applications in terms of this Act.

Compensation for Occupational Injuries and Diseases Amendment Act 130 of 1993. Section 1 states that a "dependant of an employee" includes, if there is no widow or widower, "a person with whom the employee was at the time of the employee's death living as husband and wife".

Basic Conditions of Employment Act 75 of 1997. Section 27(2)(c)(i) provides that an employer must provide an employee, at the request of the latter, three days paid leave, which the employee is entitled to take in the event of the death of the employee's spouse or life partner.

The Housing Act 107 of 1997. Section 8(6)(e)(ii)(aa) (prior to its repeal) provided that a "spouse" included a person with whom the member lived as if they were married or with whom the member habitually cohabited.

The South African Civil Aviation Authority Act 40 of 1998. Section 9(4) states that if a member of the Board, or his or her immediate family member, life partner or business associate, has any direct or indirect financial interest in any matter to be dealt with at any meeting of the Board, that member must then (inter alia) disclose the interest, not attend board meetings during consideration of the matter and may not take part as a member of the Board in the consideration of the matter. Section 11(5)(b) states that the Chief Executive Officer or his or her spouse, immediate family member, life partner or business associate, may not hold any direct or indirect financial interest in any civil aviation activity or the civil aviation industry without approval or unless such approval is open to public inspection.

The Employment Equity Act 55 of 1998. Section 1 which defines "family responsibility" includes "responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support".

The Domestic Violence Act 116 of 1998. In section 1 a "domestic relationship" is defined as a relationship between a complainant and a respondent who are of the same or opposite sex and who live/lived together in a relationship in the nature of marriage, although they are not married to each other.

The Medical Schemes Act 131 of 1998. Section 24(2)(e) states that the Council shall not register a medical scheme unless it is satisfied that the medical scheme will not unfairly discriminate directly or indirectly against any person on arbitrary grounds which include marital status.

The Road Traffic Management Act 20 of 1999. Section 10(2) also states that where a member of the board or (inter alia) his or her life partner has any direct or indirect financial interest in any matter to be dealt with at a meeting of the board then that member should comply with all the provisions under that section and section 15 (9) states that a chief executive officer or (inter alia) his or her life partner, may not hold any direct or indirect financial interest in any road traffic activity without approval or unless such approval is open to public inspection.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Section 1 refers to "family responsibility" in relation to a complainant's spouse, partner, dependant, child or other members of his or her family in respect of whom the member is liable for care and support.

[176] Of special importance are the Employment Equity Act of 1998 (the Employment Act) and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (the Equality Act). These were adopted by Parliament to give legislative expression to the need to achieve equality in South Africa. Covering as they do a wide range of activities and situations, they represent particularly strong legislative acknowledgment of the status of domestic partnerships. Thus, the Employment Act provides in section 1 that the definition of "family responsibility" includes "responsibility of the employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support."

[177] Similarly the Equality Act provides in its definition section that "family responsibility" means "responsibility in relation to a complainant's spouse, partner, dependant, child or other members of his or her family in respect of whom the member is liable for care and support." The Act goes on to state that "'marital status' includes the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same or the opposite sex, involving a commitment to reciprocal support in a relationship." A key element of this definition is the acknowledgment of a relationship involving a commitment to reciprocal support. Though one does not use legislation to interpret the Constitution, the

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The Estate Duty Act 45 of 1955 as amended by section 3 of the Taxation Laws Amendment Act 5 of 2001. Section 1 provides that a 'spouse' in relation to any deceased person, includes a person who at the time of the death of such deceased person was the partner of such person in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent.

existence of express legislative purposes aimed at extending the ameliorative reach of the law, must be a factor to be considered in terms of evolving notions as to what is fair and unfair.

[178] The fact that many if not all statutes adopted in recent times dealing with the rights of conjugal partners expressly include non-married partners within their ambit, is indicative of a new legislative approach consistent with new values, and as the SALRC Paper suggests, with the spirit, purport and object of the Constitution. As was said in *Daniels*:[45]

> "The fact that many statutes adopted in recent times dealing with married persons expressly include parties to Muslim unions under their provisions is indicative of a new approach consistent with constitutional values. The existence of such provisions in other statutes does not imply that their absence in the Acts before us has special significance. The Intestate Succession Act and the Maintenance of Surviving Spouses Act were both last amended before the era of constitutional democracy arrived. The fact that the new democratic Parliament has not as yet included Muslim marriages expressly within the purview of the protection granted by the Acts, accordingly, cannot be interpreted so as to exclude them contrary to the spirit, purport and objects of the Constitution."[46]

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[45] *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC).

[46] Id at para 27. [The statutes] include (See *Daniels* id) [Civil Proceedings Evidence Act 25 of 1965 (s 10A recognises religious marriages for the purposes of the law of evidence); Criminal Procedure Act 51 of 1977 (s 195(2) recognises religious marriages for the purposes of the compellability of spouses as witnesses in criminal proceedings); Pension Funds Act 24 of 1956 (s 1(b)(ii): definition of "dependant"); Special Pensions Act 69 of 1996 (s 31(b)(ii): definition of "dependant"); Government Employees Pension Law Proclamation 21 of 1996 (s 1(b)(ii): definition of "dependant" and Schedule 1 item 1.19, definition of "spouse"); Demobilisation Act 99 of 1996 (section 1(vi)(c): definition of "dependant"); Value-Added Tax Act 89 of 1991 (Notes 6 and 7 to item 406.00 of Schedule 1 recognise religious marriages for the purposes of tax exemptions in respect of goods imported into South Africa); Transfer Duty Act 40 of 1949 (s 9(1)(f) read with the definition of "spouse" in section 1 exempts from transfer duty property inherited by the surviving spouse in a religious marriage); and Estate Duty Act 45 of 1955 (s 4(q) read with the definition of "spouse" in section 1 exempts from estate duty property accruing to the surviving spouse in a religious marriage).

[179] The increased legislative recognition being given to cohabitation suggests that cohabitation has achieved a particular status of its own. This status gives it something of a marriage-like character, without equating it for all purposes to marriage. Unlike marriage, the legal response to cohabitation is not dictated by general laws. In practice it will depend upon the qualitative and quantitative nature of the cohabitation and the particular legal purpose for which it is being claimed, or denied, that a couple is cohabiting. A distinction will usually be drawn, for example, between short-term and long-term cohabitation, between the casual affair and the stable relationship, between relationships which have resulted in the birth of children and those which have not, and between couples who live together and couples who do not. Marriage law in this respect is different: you are either married with all the legal consequences that follow, or you are not. Your life circumstances are irrelevant. The consequences are to that extent invariable. By way of contrast, Parry[47] observes it is not perhaps surprising that the legal response to relationships outside marriage has been as variable as the relationships themselves.[48]

[180] Finally, government policy is clearly committed towards dealing with families in functional rather than definitional terms. Thus the Department of Population and Welfare Development defines family as follows:

> "Family: Individuals who either by contract or agreement choose to live together intimately and function as a unit in a social and economic system. The family is the

[47] Parry *The Law Relating to Cohabitation* 3 ed (Sweet and Maxwell, 1993). He was referring to the law in England, but in this respect the South African situation has not been much different.

[48] Id at 3.

> primary social unit which ideally provides care, nurturing and socialisation for its members. It seeks to provide them with physical, economic, emotional, social, cultural and spiritual security."[49]

Conclusion

[181] The SALRC Paper, the thrust of legislation and academic opinion all point in the same direction. It is towards establishing a new legal landscape consistent with the values of diversity, tolerance of difference and the concern for human dignity expressed in the Constitution. The emphasis shifts from locating conjugal rights and responsibilities exclusively within the tight framework of formalised marriages, towards embracing a wider canvass of rights and responsibilities so as to include all marriage-like, intimate and permanent family relationships. The problem at the heart of this case is that although the law has advanced rapidly in granting recognition to cohabitants in relation to public life and in respect of third parties, it has done little, if anything, to regulate relationships amongst themselves.

[182] One further introductory point needs to be made. At the hearing of the present matter none of the parties argued in principle against granting recognition to maintenance claims by cohabitant survivors. The intervention by the state was limited to seeking to ensure that the remedy does not have the effect of pre-empting comprehensive and thought-through legislative reform in the area.

PART TWO

[49] The Department of Population of Welfare Development, Draft White Paper (1996) 156, as quoted in Du Plessis and Pete *Constitutional Democracy in South Africa 1994 - 2004* (Butterworths, 2004) at 72.

FRAMING AND RESOLVING THE LEGAL QUESTION

(i) The origin and purpose of the Act

[183] It is in the above context that I turn to the question of whether the exclusion of non-married members of intimate life partnerships from the benefits of the Act constitutes unfair discrimination against them. It is convenient to begin the enquiry by examining the circumstances in which the Act was passed. Its genesis explains its object, which was to overcome a perceived source of injustice stemming from limitations of the common law.

[184] The decision of the Appellate Division in *Glazer v Glazer N.O.*[50] established that under the common law (as interpreted in 1963) no duty to support a disinherited surviving spouse rested on the deceased spouse's estate. In the course of his judgment, Steyn CJ said:

> "It is one thing to hold a divorced guilty husband liable for the maintenance of an innocent wife. To grant a needy widow a share in her husband's deceased estate or maintenance out of the assets in his estate, merely because she is indigent and without regard to other circumstances which may have influenced him in deliberately making no provision for her, is a somewhat different matter. The recognition of the obligation in the one case would not tend to prove the existence of a right in the other case."[51]

Pleas were long made for legislative intervention to overcome the harsh effects of implacably subordinating a widow's rights to her deceased husband's freedom of

[50] 1963 (4) SA 694 (A).

[51] Id at 705.

testation. They finally bore fruit in the form of the Act. The Act emanated from the recommendations of the South African Law Commission[52] to the effect that the institution of a legitimate portion[53] would not be the appropriate solution to the problem, and that a claim for maintenance should be given to the surviving spouse by operation of law. Rejecting the notion that the testator would not have disinherited the widow without good reason and that considerations of morality should play a role, the Commission stressed that the only consideration should be that of need.[54]

[185] It is convenient to set out once again the provisions of section 2(1) of the Act. They read:

> "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 his death or remarriage in so far as he is not able to provide therefor from his own means and earnings."

In terms of section 1 of the Act "survivor" is defined as "the surviving spouse in a marriage dissolved by death."

[52] South African Law Commission Report, "Review of the Law of Succession: The Introduction of a Legitimate Portion or the Granting of a Right to Maintenance to the Surviving Spouse" Project 22 (August 1987).

[53] That is, a portion of the estate secured for the widow or other defined members of the family that cannot be disposed of by will.

[54] Above n 52 at 34. See also Keyser "Law of Persons and Family Law" in 1990 *Annual Survey of South African Law*.

[186] In *Daniels* this Court recently observed that although linguistically gender-neutral, in substantive terms the Act[55] benefited mainly widows rather than widowers. The Court went on to say:

> "The value of non-sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-backed social practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women. The reality has been and still in large measure continues to be that in our patriarchal culture men find it easier than women to receive income and acquire property."[56] [Footnotes omitted.]

The Court stressed that the Act be seen as a measure intended primarily to rescue widows from possible penury. I would add that the survivor's need for maintenance is particularly acute if she finds herself penniless at a time of emotional bereavement accompanied by a dramatic change in life circumstances. To the extent, then, that the widow has a claim against the estate at least for her basic needs to be satisfied, the choice by the deceased not to provide for her by will (or simply the consequences of his failure to make a will) is to be overridden or disregarded.

(ii) The nature of the constitutional enquiry

[187] It is against this particular legal background, and within the broad legal landscape delineated in Part One of this judgment, that the question in this matter must be asked: given the manifest remedial purposes of the Act and the constitutional requirement of ensuring equal protection and benefit of the law, must the Act's ambit

[55] Together with the Intestate Succession Act 81 of 1987.

[56] Above n 45 at para 22.

be extended to cover survivors of permanent life partnerships that have not been consecrated by marriage?

[188] In what the SALRC Paper referred to as the Calvinistic and conservative atmosphere of the pre-constitutional era, the answer to this question would have been simple. People living in extra-marital unions would have been condemned at worst as living in sin, and at best as being irresponsible. They would have been disentitled from claiming any benefit whatsoever under the law. Today, however, we are not bound by the original intent of the legislators. We are living in an open and democratic society in which pluralism and diversity are acknowledged,[57] different forms of family life are tolerated by society and recognised by the law, and the right to equality is listed before any other right in our Constitution.

[189] Section 9(1) of the Constitution states that:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

This provision is given further texture by section 9(3) which provides:

> "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, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

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[57] See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

Section 9(5) goes on to say that:

> "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

The Constitution accordingly declares that everyone has the right to equal protection and benefit of the law, and expressly forbids unfair discrimination on the ground of marital status. So the legal issue before us is whether the non-inclusion of unmarried cohabitants under the Act violates their constitutional right not to be discriminated against on the ground of marital status.

[190] The restriction of the benefit to married survivors only, clearly differentiates them from unmarried survivors who share with them the status of bereavement and need after the death of their intimate life partner. All that distinguishes them is their marital status: the one group was married, and the other was not. This Court has held that once there is differentiation on one of the listed grounds, there is discrimination.[58] The only issue remaining, then, is whether the discrimination is fair.

(iii) The framework of the enquiry

[191] In considering the fairness of the Act it becomes vital to decide what the framework of the enquiry should be. In my view, the very nature of the equality enquiry requires a framework of reference that goes beyond the classificatory

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[58] See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 35, where the argument (by myself) that at least some degree of prejudice or disadvantage had to be shown in order to establish discrimination, was rejected by the majority of the Court, which held that once there is differentiation on one of the listed grounds, discrimination is to be presumed.

landscape established by the impugned measure itself. As Wilson J pointed out in the Canadian case of *R v Turpin*:

> "[I]t is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also the larger social, political and legal context . . . . A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged."[59]

The larger socio-legal context has already been described. I will now examine the larger constitutional and legal context. In particular, I will give the reasons why I believe that the context for the analysis should be that of family law, and not just that of matrimonial law.

[192] The point of identifying differentiation on the grounds of marital status is to save from unfair treatment those families that cannot invoke the protections provided by matrimonial law. By implication, the enquiry must shift from the relatively precise, circumscribed and rule-governed terrain of matrimonial law to the wider and evolving fields of family law. It is important to note that the present case does not involve any attack on the rules and principles of matrimonial law. Indeed, the challenge is not to any malevolence in the Act, but to the limits of its beneficence.

[193] Supporting the need for enlarging the scope of family law, Goldblatt underlines in a helpful analysis that families need to be understood on the basis of the functions

[59] *R v Turpin* (1989) 39 CRR 306 at 335-6. See *Harksen* above n 18 at para 123.

that they perform, rather than in terms of traditional categories. If we move away from defining relationships in terms of marriage, we can look at the actual functions that they perform in society.[60] The question asked is: where a domestic partnership has created responsibilities for, and expectations of, the parties, should the law play a role in enforcing the responsibilities and realising the expectations of the parties that are in conflict?[61]

[194] Goldblatt states further that the purpose of family law is to protect vulnerable members of families and to ensure fairness between the parties in family disputes. Women and children are vulnerable groups in our society and often become poorer when families break down.[62] A domestic partnership is but one amongst many different types of family and should be included within the definition of family for the purpose of family law. These relationships produce a sense of responsibility and commitment and create dependence between the parties. It also implies that the partners intend the relationship to be stable and enduring.[63]

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[60] Above n 14 at 616-7.

[61] Id at 617. Goldblatt adds that the notion of separation of public and private spheres is advanced to justify non-intervention on the basis that the realm of the family should be seen as private (at 616). It is argued that the law should not intervene in this private sphere save to protect freedom as to whether to marry or not, with the consequences that follow, and freedom of testation. (It was this approach that underlay the reasoning of Steyn CJ in *Glazer* (above n 50*).* Goldblatt argues, however, that such a libertarian ideology should not be allowed to perpetuate inequality by giving the powerful the opportunity to remain outside the law's reach with regard to domestic relationships. She contends, correctly in my view, that the lack of legal protection afforded to domestic partnerships increases the vulnerability of the groups living within such arrangements (at 611).

[62] Above n 14 at 610-11.

[63] Id at 611.

[195] Goldblatt notes that more than a million South Africans are in non-marital relationships with their intimate partners. These 'domestic partnerships' play a crucial role in meeting the financial, emotional, reproductive and other needs of their members. There are many reasons why people, often across race and class divides, cohabit without marrying. One of the main reasons for the prevalence of such relationships in South Africa is the extent of migrancy in our country.[64] She observes that many men marry in the rural areas and form domestic partnerships in the urban areas which are often lengthy and committed.[65]

[196] The issue in the present matter, then, is not whether it is fair for the state to single out married partners for claims of maintenance, as opposed, say, to siblings or parents or life-long friends of the deceased. Nor is it to decide whether widows are entitled to special consideration not accorded to other persons who might be alone, elderly and in need. It is, first, to examine the specific purpose that the Act is intended to serve in the context of the overall objectives of family law. Then it is to determine whether in substantive terms the committed life partner of the deceased bears the same relationship to the deceased in every respect as a married partner, save for not having gone through the formalities of marriage. Finally, it is to decide if such person in such circumstances can fairly be excluded from that benefit.

(iv) Marital status as a ground of unfair discrimination

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[64] Id at 610.

[65] Id

[197] In considering the question of fairness I do not believe that a mechanical application of the presumption of unfairness provided by section 9(5) of the Constitution takes the matter very far. Rather, analysis should begin with identification of the specific kinds of marginalisation and exclusion which led to the identification of marital status as a constitutionally outlawed ground of unfair discrimination.

[198] These would include the directly discriminatory practices of the past, such as penalising women for being married (e.g. women teachers and civil servants who automatically lost their employment on marriage on the basis that they could not hold down a job and look after their husbands and children at the same time); or penalising women for not being married (e.g. for bringing disgrace on an institution, neighbourhood, building or workplace by having a child 'out of wedlock'); or treating married women as losing the autonomy they formerly had as single women, because from marriage onwards they required their husband's consent for various legal transactions. Alternatively, certain posts, such as ambassadorships, were as a matter of practice reserved for married people only. In addition, there were indirect forms of disadvantage affecting people not living as a married couple. Thus single parents, widows and widowers could be denied housing, or suffer from tax or social security disadvantages or be refused mortgages because they did not fit the format of the married and male-headed-couple household.

[199] Two points need to be noted. First, it is women rather than men who in general suffered disadvantage because of their status of being married or not married. Any investigation of unfairness resulting from marital status would accordingly have to take account of the manner in which patriarchy resulted in elements of structured advantage and disadvantage being associated with the status of being and not being married.

[200] The second is that by the time the Constitution was adopted, legal disabilities associated with being married had been eliminated from the common law. Nevertheless, marital status was expressly identified in section 9(3) as one of the grounds of potential discrimination. This would seem to suggest that it was included precisely to protect the rights of people who were vulnerable not because they were married, but because they were not married. It is not easy to see why, if it was not regarded as a prototypical source of unfair discrimination in our society, marital status was itemised in section 9(3) in the first place. By implication its inclusion problematises the vulnerability of the unmarried, and directs constitutional attention to the specific difficulties they face. The obvious classes of people requiring protection against unfair discrimination in this category would be single parents, divorcees, widows, gay and lesbian couples and cohabitants.

[201] Once more it will be instructive to look at the manner in which the Canadian Supreme Court has approached the question. In *Miron,*[66] where the applicants

[66] Above n 5.

challenged an accident compensation statute on the grounds that it provided for the needs of married dependents only, McLachlin J held as follows:

> "Exclusion of unmarried partners from accident benefits available to married partners under the policy violates s. 15(1) of the *Charter*. Denial of equal benefit on the basis of marital status is established in this case, and marital status is an analogous ground of discrimination for purposes of s. 15(1). First, discrimination on that basis touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Second, marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1). Persons involved in an unmarried relationship constitute an historically disadvantaged group, even though the disadvantage has greatly diminished in recent years. A third characteristic sometimes associated with analogous grounds, namely distinctions founded on personal, immutable characteristics, is also present, albeit in attenuated form. While in theory, the individual is free to choose whether to marry or not to marry, in practice the reality may be otherwise. Since the essential elements necessary to engage the overarching purpose of s. 15(1) — violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making — are present, discrimination is made out."[67]

[202] The point was reinforced in the same matter by L'Heureux-Dubé J, who stated that the question whether or not persons in relationships analogous to marriage have typically suffered historical disadvantage is not clear-cut, partly because the modern phenomenon of common law cohabitation as an alternative to marriage is a comparatively recent one. She went on to observe that the subgroups within the ground of marital status that have typically suffered the most historical disadvantage and marginalisation are individuals who are single parents, or are divorced or separated. The mere fact that the common law spouses are not in the first group that

[67] Id at 420.

comes to mind when considering historical disadvantage does not mean, however, that such relationships have escaped completely from societal opprobrium.[68] She concluded that in fact

> "non-traditional relationships outside of marriage have in the past generally been frowned upon and considered undesirable by large portions of society. Only recently have they come to be increasingly accepted. That they have become more accepted does not mean, however, that they are now accepted without reservation into the mainstream of society.
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> . . . .
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> I therefore have no difficulty concluding that persons in opposite-sex relationships analogous to marriage have suffered, and continue to suffer, some disadvantage, disapproval and marginalization in society, and are therefore somewhat sensitive to legislative distinctions having prejudicial effects."[69]

[203] South African society has indeed become far more tolerant than it once was towards different ways of creating families, including cohabitation not formalised in marriage. Yet there can be no doubt that many prejudices of the past linger on, particularly against women who are seen as not conducting their lives in a manner befitting their culture or religion. A certain degree of conventional disdain coupled with moral disapproval is still directed at unmarried couples. By the very nature of their unconventional relationship they are regarded as either immoral, irresponsible or defiant. This will be irrespective of the actual degree of commitment, seriousness and stability of their family relationships.

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[68] Id at 469.

[69] Id at 469-70.

[204] It is important to stress at this point that the issue is not whether members of religious or cultural communities should as a matter of faith be free to regard marriage as a sacred contract which constitutes the only acceptable gateway to legitimate sexual intimacy and cohabitation. Nor is it to query the corollary right of such believers to condemn those who are guilty of what they may regard as fornication and adultery. Clearly their entitlement as part of their religious belief to criticise what they regard as misconduct remains unchallenged. The question, rather, is whether the state should be bound by such concerns. Going further, it is whether the state is required or entitled by these, or by more secular considerations, to give exclusive recognition for purposes of spousal maintenance to married survivors only. In seeking to answer this question, I will consider why the state gives pre-eminence to the institution of marriage, examine the constitutional values that marriage both embodies and promotes, and then ask whether these require that marriage be given absolute status under the Act.

(v) The institution of marriage

[205] In *Satchwell*[70] this Court acknowledged the role of marriage in society in the following terms:

> "In terms of our common law, marriage creates a physical, moral and spiritual community of law which imposes reciprocal duties of cohabitation and support. The

[70] *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).

> formation of such relationships is a matter of profound importance to the parties, and indeed to their families and is of great social value and significance."[71]

As the SALRC Paper comments, the rights and obligations associated with marriage are vast. Besides the religious and social importance of marriage, marriage as an institution was (at the time the SALRC Paper was produced) the only source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights.[72] The SALRC Paper adds that marriage is also important in regulating the legitimacy of children and the financial relationship between the parties on breakdown of the relationship.[73]

[206] As this Court said in *Dawood*,[74] "[t]he decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most, people . . . ." I would add that our painful history provides additional reasons why the institution of marriage should receive support. In the pre-democratic era the racist policies of the state involved disgraceful use of the law in ways that showed profound disrespect for the marriages of the majority. Thus the migrant labour system, administered under racist laws and enforced by racist courts, deliberately targeted the self-sufficiency and autonomy of rural African families,

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[71] Id at para 22.

[72] Above n 24 at 161-2 para 7.1.9.

[73] Id at 162.

[74] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 37.

forcing married men to live in what were called bachelor quarters in the towns. Prohibitions on inter-racial marriage and the refusal of the law to recognise Hindu and Muslim marriages prevented people from marrying persons of their choice and from receiving recognition of the marriage rites and ceremonies appropriate to their beliefs. A host of laws permitted gross intrusion by police and state officials into the intimate lives of the majority, who as a result were compelled to live in chaotic social and legal circumstances. Special support for marriage today accordingly helps heal the ravages of the past. It promotes social stability and supports dignity by giving state recognition to fundamental choices people make about their lives.

[207] Formalisation of marriages provides for valuable public documentation. The parties are identified, the dates of celebration and dissolution are stipulated, and all the multifarious and socially important steps which the public administration is required to make in connection with children and property, are facilitated. Furthermore, the commitment of the parties to fulfil their responsibilities is solemnly and publicly undertaken. This is particularly important in imposing clear legal duties on the party who is in the stronger position economically. And, since the economically advantaged party is usually the man, the result in general terms is that the solemnisation of marriage tends to favour gender equality rather than the reverse.

[208] There can accordingly be no doubt that the institution of marriage is entitled to very special recognition and protection by the law. The issue, however, is not whether

marriage should in many respects be privileged. Clearly it has to be. The question is whether it must be exclusive.

[209] For convenience, I will refer to the principle of restricting claims under the Act to married survivors only, as the 'exclusivity principle'. The first constitutional issue, then, is whether the exclusivity principle is compatible with the prohibition of unfair discrimination on the grounds of marital status. If it is held to be unfair, the next matter for decision is whether such unfairness is justifiable under section 36 of the Constitution.[75] It is not easy to separate the question of fairness from that of justification, since each involves elements of proportionate balancing, and inevitably there will be overlap between them. Nevertheless I will deal with each in turn, on the basis that the focus of fairness is on the impact on the interests of those affected, while the emphasis in the case of justification is on the public interest.

(vi) The fairness of limiting the benefits of the Act to married persons only

[75] Section 36 (1) states the following:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is 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 purpose of the limitation;
> (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."

[210] Any consideration of the fairness of the exclusivity principle must take account of this Court's emphasis on the need to recognise diversity of family formations in South Africa. In the *First Certification* case[76] the Court stated that:

> "Families are constituted, function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms."[77]

In *Dawood*[78] O'Regan J said that:

> "[F]amilies come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."[Footnote omitted.]

Ackermann J made similar statements in *National Coalition (2)*,[79] dealing with the rights of same-sex life partners:

> "It is important to emphasise that over the past decades an accelerating process of transformation has taken place in family relationships, as well as in societal and legal concepts regarding the family and what it comprises. *Sinclair and Heaton*, after alluding to the profound transformations of the legal relationships between family members that have taken place in the past, comment as follows on the present:

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[76] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

[77] Id at para 99.

[78] Above n 74 at para 31.

[79] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 47.

> 'But the current period of rapid change seems to 'strike at the most basic assumptions' underlying marriage and the family.
>
> . . .
>
> Itself a country where considerable political and socio-economic movement has been and is taking place, South Africa occupies a distinctive position in the context of developments in the legal relationship between family members and between the State and the family. Its heterogeneous society is "fissured by differences of language, religion, race, cultural habit, historical experience and self-definition" and, consequently, reflects widely varying expectations about marriage, family life and the position of women in society.'" [Reference omitted.]

Similarly, Skweyiya J in *Du Toit*[80] emphasised:

> "[F]amily life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change."[Reference omitted.]

[211] In each of the above matters there was a specific legal issue which prompted a general observation about the need to adopt a flexible and evolutionary approach to family life.[81] I do not think it is appropriate to cherry-pick statements from the above cases simply on the basis that they appear to be favourable to any particular outcome in the present matter. Though all highlight the importance of the courts not being

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[80] *Du Toit and Another v Minister of Welfare and Population Development and Others* (*Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC) at para 19.

[81] Thus, in the *First Certification* case the question was whether the failure of the Bill of Rights expressly to include a right to marry and constitute a family was inconsistent with one of the principles binding on the Constitutional Assembly. In *Dawood* the reminder about diversity and not entrenching particular forms of family, was expressed. *National Coalition (2)* and *Du Toit* were both concerned with same-sex couples who, in terms of the common law definition of marriage and in terms of the Marriage Act 25 of 1961, were not able to get their unions recognised as marriages even if they so wished. The same jurisprudential movement away from giving legal recognition only to registered marriages was reflected in *Daniels*, which dealt in part with the Act which is being considered in the present matter.

bound by traditional views of how families should properly be constituted, none deals expressly and directly with the issue of the rights of unmarried heterosexual life partners. Indeed, each case underlines how important its specific social, historical and legal context is.[82]

[212] The one unifying theme lurking in the evolving approach to all the different forms of family units being created is that the general purpose of family law is to promote stability, responsibility and equity in intimate family relations. In this context it is significant that the specific objective of the Act is to furnish a preferred claim to a survivor who is not otherwise provided for and finds herself in need. In the present matter, hardship on its own, even if associated with the status of not being married, would not in itself be sufficient to establish unfairness. The Constitution does not seek to take to its bosom and respond to all the inequities to be found in our

[82] Thus the cases concerning the rights of same-sex partners can be distinguished from the present one on the basis that gay and lesbian couples could not marry, even if they wished to do so. At the same time, these cases established that difficulties of proving that such unions constituted permanent life partnerships, could be overcome, and gave guidance as to how this should be done. In *Daniels*, on the other hand, there was no legal impediment to persons who were Muslim from formalising their marriages under the Marriage Act, which they could do either by following up their religious ceremonies with a civil one, or else by being married by an Imam who was recognised as a marriage officer. The exercise of choice not to regularise the unions under the Marriage Act had to be understood in the context of the hegemonic exclusion from recognition of Muslim marriages effected by the common law as applied by the courts in the pre-constitutional era. There was thus no reason for interpreting the word "spouse" in the Act (as well as in the Intestate Succession Act) so as not to include them. In that matter, then, the fact that they chose not to formalise their marriages under the Marriage Act did not debar them from claiming maintenance under the Act (or a share of the estate under the Intestate Succession Act). I will go no further than suggesting that the cases provide three indications of indirect relevance to the issues before us. The first is that, while pronouncing emphatically on the need not to straight-jacket families in conventional forms, this Court has expressly refrained from taking any position for or against the recognition of heterosexual unmarried life partnerships. The second is that in relation to questions of how to prove the existence of permanent life partnerships, one may say that in the case of a non-formalised union, where there is a judicial will, there will be a judicial way, and problems of proof will be overcome. The third is that a choice not to formalise one's relationship under the Marriage Act will not inevitably and of itself extinguish a claim by a survivor to maintenance under the Act (*Daniels* above n 45). It is the context that must be decisive, and in particular the social, political and legal factors which are said to have produced the discriminatory treatment resulting in unfairness.

society. Not every unfairness in life becomes unfairness in law. In order for unfairness in a constitutional sense to be established, there must be a specific link between the survivor's intimate relationship with the deceased, her state of need, the overall appropriateness in the circumstances of debarring her from being able to claim maintenance, and the resulting impact on her dignity of re-inforcing the negative type-casting of her as an unworthy person because she was not married.

[213] The critical question accordingly must be: is there a familial nexus of such proximity and intensity between the survivor and the deceased as to render it manifestly unfair to deny her the right to claim maintenance from the estate on the same basis as she would have had if she and the deceased had been married? I believe that there are in fact at least two circumstances in which, applying this test, it would be unfair to exclude permanent, non-married life partners from the benefits of the Act.

[214] The first would be where the parties have freely and seriously committed themselves to a life of interdependence marked by express or tacit undertakings to provide each other with emotional and material support. The unfairness of the exclusion would be particularly evident if the undertakings had been expressed in the form of a legal document. Such a document would satisfy the need to have certainty, at least inasmuch as it establishes a clear commitment to provide mutual support within their respective means and according to their particular needs. Like a marriage certificate, the document would thus both prove the seriousness of the commitment and at the same time satisfy the need for certainty.

[215] What should be central, however, is the serious content of the mutual commitment and not the particular form in which it is expressed. Thus the undertaking could be inferred from conduct that clearly established a relationship acknowledging a mutual duty of support. In *Satchwell*[83] Madala J pointed out that:

> "[H]istorically our law has only recognised marriages between heterosexual spouses. This narrowness of focus has excluded many relationships which create similar obligations and have a similar social value.
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> . . . .
>
> The law attaches a duty of support to various family relationships, for example, husband and wife, and parent and child. In a society where the range of family formations has widened, such a duty of support may be inferred as a matter of fact in certain cases of persons involved in permanent, same-sex life partnerships. Whether such a duty exists or not will depend on the circumstances of each case."[84]

These sentiments were directed specifically at the situation of same-sex couples. I believe that a similar approach would be apposite in the case of cohabitants. What *Satchwell* establishes is that one can infer as a matter of fact whether a duty exists, not from any principle of the common law, but from the actual life circumstances of the parties in each case.

[216] Unless the purpose of the Maintenance Act is to stigmatise unmarried life partners as being beyond the pale, I can see little reason in fairness why the

[83] Above n 70.

[84] Id at paras 22 and 25.

responsibility for maintenance should not survive the death of a partner where either by express or by tacit agreement, each has undertaken as part of their relationship to support the other within his or her means. If anything, the element of voluntarism and autonomy is particularly strong in these circumstances. Resistant to acknowledging the need to respect such undertakings are notions in society of 'living in sin' and 'bohemianism', reminiscent of stereotypical notions imposed by the intransigent 'Calvinist and conservative' public morality of yesteryear. Whether consciously expressed or unconsciously held, these are inappropriate for an open and democratic society that acknowledges diversity of lifestyle and bases itself on respect for human dignity, equality and freedom.

[217] In considering the claims of manifestly meritorious survivors any eagerness to uphold mainstream respectability must accordingly cede to the need to acknowledge the reality of committed, if heterodox, family relationships. The issue should not be seen exclusively as one of the sanctity of marriage, or simply of the important social purpose that marriage serves, but as one of the integrity of the family relationship. Conventional condemnation of such relationships, though less powerful than it used to be, is a dangerous backcloth against which to consider fundamental rights. The danger lies precisely in the apparently natural and commonsensical character of regarding marriage as normal and anything outside of it as deviant, thoughtless, bizarre or objectionable.

[218] Secondly, I am of the view that responsibility for maintenance can arise not only from express or tacit agreement but directly from the nature of the particular life partnership itself. The critical factor will be whether the relationship was such as to produce dependency for the party who, in material terms at least, was the weaker and more vulnerable one (and who, in all probability, would have been unable to insist that the deceased enter into formal marriage). The reciprocity would be based on care and concern rather than on providing equal support in material or financial terms.

[219] One thinks of the woman who bore children fathered by the deceased, looked after them in infancy, saw them through school, cared for the home, attended to the needs of the deceased and nursed him through sickness and the infirmities of old age. While he earned and accumulated assets, she nurtured the family and remained penniless. Because of the way in which our patriarchal society has allocated roles and responsibilities, it will not have been unusual for the deceased to have accumulated assets and paid towards the upkeep of the home, while the survivor contributed what she had to offer, namely, her care and sweat equity. The deceased might in fact have resisted requests by her that they get married in terms of their religion or before a magistrate. Yet whether or not she can show that she sought marriage and he did not, the crucial fact remains that there is a direct relationship between her present need and her past relationship with the deceased. In the words of the Equality Act, what matters is whether in the relationship there was a commitment to reciprocal support.

[220] In the not uncommon circumstances mentioned above the nexus between the survivor and the estate is so strong that I do not think any meaningful distinction can be drawn between what is legally unfair and what is socially and morally unfair. It must be borne in mind that the claim is not being brought to establish unfairness under the common law, or even to show that the common law itself is unfair. The issue is whether the statute, interpreted in the light of the common law as it stands, impacts unfairly on a class of persons because of their marital status. Had the purpose of the Act been primarily to promote marriage as an institution, it might not have been unfair to exclude unmarried people from its reach. The purpose of the Act, however, was to provide a statutory claim against the estate for recently bereaved widows in need. The key ingredients are the familial relationship, intimacy and need. Taking them in combination, in the circumstances of the very typical example given above, I conclude that to exclude the survivor simply because she has no marriage certificate, is not only socially harsh, it is legally unfair.

[221] Maintenance by its nature is concerned with survival. Relegation to poverty, coupled with the imputation of having been a lawless interloper in the life of the deceased, severely affronts the dignity of the survivor. The indignity is all the greater where the relationship with the deceased was marked by intense mutuality of concern and freely given reciprocal support.[85] Where legal formulae function in a

[85] The disrespect is intensified if the only question asked relates to who contractually undertook to provide money or goods. Contributions are made according to ability and in response to need. In *Satchwell* what was at issue was a potentially sizeable claim for a survivor's pension chargeable against the public purse. In these circumstances the need to establish reciprocity of spousal-like undertakings of support was particularly strong. In the case of a claim based on subsistence needs against the very estate that the survivor contributed to through years of devoted support, the material interdependency should be seen as part of a broad mutual undertaking to provide the kind of reciprocal support that binds intimate partners together.

stereotypical manner that is impertinent to those affected, serious equality issues are engaged. As so often happens in cases where prejudice is habitual and mainstream, the hurt to those affected is not even comprehended by those who cause it, and passes unnoticed by members of the mainstream.

[222] I should add that while it is true that caring for one's family is one of life's great joys, and as such calls for no extra reward, fairness does not inevitably translate into sacrifice. As this Court said in *Baloyi,*[86] the purpose of constitutional law is to convert misfortune to be endured into injustice to be remedied.[87] It would indeed be a perverse interpretation of family law that obliged one to disregard the fact that the circumstances of need in which a typical survivor might find herself, were produced precisely by her selfless devotion to the deceased and their family during his lifetime. I believe it is socially unrealistic, unduly moralistic and hence constitutionally unfair, for the Act to discriminate against the powerless and economically dependent party, now threatened with destitution, on the basis that she should either have insisted on marriage or else withdrawn from the relationship.

[223] The issues are not simple. There is a great social need to promote marriage as an institution which provides stability, security and predictability for intimate family relations. By so doing our society stresses the importance of people taking responsibility for their lives, and showing respect for the fact that they are members of

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[86] Above n 20.

[87] Id at para 12.

a law-governed and interdependent community. It encourages self-reliance and self empowerment; helps people escape from a world made up of victimisers and victims into one consisting of free and equal people; and induces the previously disadvantaged and subordinated to advance in life by calling on their inner strengths rather than allowing themselves to fall into dependence on external support.

[224] At the same time it is necessary to acknowledge and respond in a sensitive and practical manner to the fact that people have had to accommodate themselves to harsh and diverse life circumstances over which they may have had little control. Many have been obliged to shoulder burdens heavier than any notion of fairness would tolerate. All measures aimed at redistribution of such uneven loads, whether through family law or welfare law, risk being criticised as being calculated to undermine self-reliance. Yet, while over-paternalism can be disempowering and negate the very objective of achieving equality, what has disparagingly been called the concept of judicial tough love[88] can be unduly insensitive to the actual and overwhelming problems people have had to face in life. The knowledge that the law will intervene to provide basic justice will in fact assist such people to overcome a sense of helplessness and fatalism. That, indeed, is why courts intervene to protect fundamental rights. In so doing they enhance rather than undermine dignity and self-respect.

[88] Roberts *Clarence Thomas and the Tough Love Crowd* (New York University Press, 1995).

[225] The reality against which the Act must be interpreted is that many recently bereaved, elderly, and poor women find themselves with no assets or savings other than their clothing and cooking utensils, little chance of employment and only the prospect of a state old-age pension to keep them from penury. Thus, while it is necessary to emphasise the importance of people taking responsibility for their lives, and to acknowledge the extraordinary self-reliance shown by many women in the face of extreme hardship, the law cannot ignore the fact that lack of resources has left many women with harsh options only. Their choice has been between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other. Any consideration of the fairness or otherwise of excluding from maintenance claims people who chose the latter path, must take account of this.

[226] It follows from the above that the exclusivity principle operates unfairly in at least two broadly defined sets of circumstance, neither of which is so far-fetched, hypothetical or unusual as to escape the net of constitutional concern. In each case the unfairness operates both directly and indirectly. In direct terms it treats the unmarried claimants in a way that disrespects the actual commitment they have shown to their families through a lifetime of endeavour, while excluding them from being potential beneficiaries under the Act. Furthermore, it tells the world that there is something unworthy and not respectable about them because they had a family without getting married. Indirectly, it impacts on all persons living in permanent intimate life partnerships outside of marriage. It reinforces the stereotype that, irrespective of the

actual character of their relationship and the reality of their commitment to each other, they are all irresponsible and unconcerned about the need to live in a good family relationship that is infused with love, concern and mutual support.

[227] There might well be other circumstances in which it would be unfair to stigmatise a surviving cohabitant as being unworthy of claiming spousal maintenance. The two examples given, however, are sufficient to establish that the Act is invalid for under-inclusivity. I conclude therefore that the blanket nature of the exclusivity principle results in unfair discrimination in conflict with section 9(3) of the Constitution.

Justifiability

[228] There appear to be two possible arguments based on public interest which could be advanced in favour of justifying retention of the exclusivity principle, in spite of the fact that it operates unfairly.

[229] The first is connected with problems of proof. The argument is that the absence of a marriage certificate makes it difficult to determine whether the life partnership ever existed or whether it continued until the death of the deceased. There are undoubtedly great advantages in terms of certainty that flow from the registration of marriages, and concomitant disadvantages related to difficulties of proof which would result from the proposed recognition for certain purposes of non-formalised cohabitation.

[230] It needs to be remembered, however, that the claim for maintenance stems from the social regard to be given to commitment, intimacy, interdependency and stability in the family. In the case of a married survivor these will be presumed to have existed as a matter of law. However brief, unstable and non-intimate the marriage might have been, the certificate alone would suffice to grant a claim. In the case of the unmarried survivor, on the other hand, the partnership relationship would have to be proved as a matter of fact.

[231] As the SALRC Paper makes clear, the problems of proof are far from insuperable.[89] The many statutes that have encompassed the rights of cohabitants since the achievement of democracy presuppose that appropriate proof can be found. The SALRC Paper shows[90] that there is rich international experience[91] that can be

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[89] Above n 24 at 9 para 1.4.7.

[90] Id chapter 6 at 72-158.

[91] The Property (Relationships) Act 1984 (NSW) of New South Wales, Australia provides a useful example of a broad definition coupled with indicators for use by the court. Section 4 of the Act states the following:

"De facto relationships

> (1) For the purposes of this Act, a de facto relationship is a relationship between two adult persons:
>
> (a) who live together as a couple, and
> (b) who are not married to one another or related by family.
>
> (2) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:
>
> (a) the duration of the relationship,
> (b) the nature and extent of common residence,
> (c) whether or not a sexual relationship exists,
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,
> (e) the ownership, use and acquisition of property,
> (f) the degree of mutual commitment to a shared life,
> (g) the care and support of children,
> (h) the performance of household duties,

drawn on. In addition it is possible to build on and adapt the factors already enunciated by this Court in relation to problems of proof concerning same-sex committed life partnerships.[92]

[232] In my view, then, such difficulties of proof as exist might be of relevance to the remedy that should be crafted. They do not justify the continuation of unfair treatment to manifestly meritorious survivors who find themselves in need after a lifetime of devotion to the family relationship.

[233] The second and more substantial contention put forward to justify the exclusivity principle is that any departure from it would undermine the institution of marriage, which must be supported at all costs. As this judgment has indicated, the

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> (i) the reputation and public aspects of the relationship.
>
> (3) No finding in respect of any of the matters mentioned in subsection (2)(a)-(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.
>
> (4) Except as provided by section 6, a reference in this Act to a party to a de facto relationship includes a reference to a person who, whether before or after the commencement of this subsection, was a party to such a relationship."

[92] In *National Coalition (2)* above n 79 at para 88, the following factors were considered in order to decide whether a same-sex life partnership is permanent: "the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep for the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another." The Court noted that "[n]one of these considerations are indispensable for establishing a permanent partnership."

I would add that in the case of heterosexual permanent partnerships proof would generally be easier. There would be a much greater likelihood of children, and not having had to cope with homophobia, the partners would have been freer to associate in public as an intimate couple.

institution of marriage plays a particularly important role in South Africa today and must without doubt be supported by the law. It is not clear to me, however, how marriage is dignified through the imposition of unfairness on those who for one reason or another live their lives outside of it.

[234] The law would continue to privilege marriage, even if partnerships are given limited recognition. The purpose of family law is to promote stability and fairness in family relationships. Marriage is the most widely recognised and most straightforward way of achieving this. The law recognises this fact. Mere production of a marriage certificate is sufficient to establish the degree of commitment and seriousness that the Act requires. No proof need be provided of permanency, intimacy, cohabitation, fidelity or shared lives. The law attributes to marriage all these qualities in irrebutable fashion. It will continue to privilege married survivors. Thus, even if the executors of the estate could show that none of the above qualities existed in fact, the survivor would still be able to lodge a claim for maintenance, simply on the basis that she and the deceased had been married.

[235] Furthermore, whether or not Parliament decides one day to narrow or eliminate the gap between married couples and unmarried life partners, I do not believe that in the interim the institution of marriage can only survive if alternative forms of family organisation are disregarded in all circumstances. Indeed, the element of voluntariness which lies at the heart of marriage is threatened rather than enhanced if

people feel coerced into marrying for fear of adverse consequences if they fail to do so.

[236] It follows that the continued blanket exclusion of domestic partners from the ambit of the Act, irrespective of the degree of commitment shown to the family by the survivor, cannot be justified. The Act is accordingly invalid to the extent that it excludes unmarried survivors of permanent intimate life partnerships as identified above, from pursuing claims for maintenance.

PART THREE

THE REMEDY

[237] The Minister of Justice and Constitutional Development points out that a law reform process is currently underway which seeks to make a determination on whether domestic partnerships should be protected, and if so, exactly how that protection should be secured. She states that the South African Law Reform Commission is considering proposals for law reform with regard to the following issues:

- whether domestic partnerships should be legally recognised and regulated;
- whether marital rights and obligations should be further extended to domestic partnerships;
- whether a scheme of registered partnerships should be introduced;

- whether marital rights, obligations and benefits should require registration or marriage and which should depend only on the existence of a domestic relationship;
- whether legislation should provide for same-sex marriage; and
- whether marital rights and obligations should be further extended to people living in interdependent relationships having no sexual element.

There are various options currently being considered by the South African Law Reform Commission. These may be broadly divided into the following categories:

1.1. Same sex partnerships;

1.2. Registered partnerships; or

1.3. Unregistered partnerships.

The Minister accordingly avers that the backdrop against which relief by this Court must be viewed is that it should not stifle the law reform process that is currently underway.

[238] I find these arguments persuasive. The very factor which gives rise to constitutional concern, namely, the huge variety of non-standard family relationships in South Africa, is the one that makes crafting a remedy in the present matter particularly difficult. Problems of proof arise, and although not insuperable, as the gay and lesbian permanent life partnership cases showed, they pose difficulties. There are problems about de facto polygamy. There are difficulties of overlap and interaction between various statutes, as well as potential impact on the common law.

Third parties stand to be affected. It has implications for inheritance law. Above all, we are concerned with sensitive social issues requiring maximum impact from all concerned. They cry out for democratic debate and legislative solution. I believe that over-ambitious judicial prescription could impede comprehensive legislative reform and retard rather than advance the achievement of fairness in this field.

[239] In these circumstances I believe the best way forward is to follow a non-prescriptive remedial path. I would declare the Act to be unconstitutional to the extent of the inconsistency outlined in this judgment, and suspend the operation of the declaration of invalidity for two years. This would give Parliament a free hand as to how the under-inclusiveness of the Act should best be remedied.

[240] The question then arises as to whether a special order would need to be made to vindicate any entitlement of the applicant in this matter. I believe not. This is not because I have doubts as to whether her relationship was of a kind that merited the protection of the Act. Acceptance of a duty of mutual support was built into the relationship of interdependence between herself and the deceased. This was not a casual affair but a committed, enduring and intensely intimate[93] marriage-like relationship, one that survived over many years all the stresses of the bipolar condition which affected the moods of the deceased. She provided what she had to offer,

[93] As the Canadian Law Commission points out in its report on recognising and supporting close personal adult legal relationships:

> "People value their close personal relationships for the quality of care and support they provide. Intimates usually provide the most meaningful forms of care and support, such as sharing resources to provide food, shelter and clothing, providing personal services and guidance, attending to emotional needs, volunteering information or advice, or using abilities or skills to offer assistance in solving problems." Above n 31.

namely, companionship, management of the household and personal support in every way, while he contributed companionship and a regular allowance for her needs and the needs of the household. Tacitly, if not expressly, a clear duty of mutual support was undertaken. What deprives her of the right to be a claimant now is the fact that reasonable provision has in fact been made for her under the will.

[241] It should be noted, however, that an important part of her objective in bringing the case (with the support of the Women's Legal Centre) was to highlight the marginalisation by the law of women cohabitants in situations similar to hers. I believe that guided by the principles outlined above, the legislature is constitutionally obliged to determine and provide for the circumstances in which permanent life partnerships should qualify for maintenance. In the result, to the extent that in my view the litigation should lead to a declaration of invalidity on the grounds of under-inclusivity, the applicant should have the satisfaction of succeeding in her moral objective, if not in her material one.

[242] Since preparing this judgment I have had the opportunity of reading the judgment by Mokgoro and O'Regan JJ. In succinct terms, and through a close examination of how family law operates in the broad landscape of our legal system today, it captures core aspects of the reasoning which I believe should govern this matter. Though I prefer to locate the issues in a wider context, I align myself with the specific considerations they advance, and concur in the order they propose.

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For the first and second respondents:	G J Marcus SC and S Cowen instructed by the Women's Legal Centre.
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