

Life Partners:

Do you have the same protections as married spouses?



Why Life Partners Still Need Cohabitation Agreements and Wills

"Census data of 2016 reveals that approximately 3.2 million South Africans cohabit outside of marriage and that this number is increasing steadily." (Extract from judgment below)

What happens if your life partner dies without leaving you anything in their will ("Last Will and Testament")? Do you have the same protections as married spouses do?

A lot of the media coverage around the recent Constitutional Court decision dealing with this question may have given the impression that life partners are now as fully protected as if they were in a formal marriage, but that is not so – not yet anyway.

First, some background.

Protections for surviving spouses only, not for unmarried life partners

As a starting point, note that the widely-believed and persistent myth of a "common law marriage" is just that – a myth.

And the hard truth is that if a life partner dies intestate (without making a will), the other cannot inherit on the same basis as can a married spouse. Nor can the surviving life partner claim maintenance from the deceased estate on the same basis as a surviving spouse can.

Spouses enjoy these protections in terms of two Acts –

1. The "Maintenance of Surviving Spouses Act" provides for a spouse to claim maintenance from the deceased estate.
2. The "Intestate Succession Act" deals with cases where a deceased spouse left no valid will and provides for a spouse to receive only a "child's share" of the estate (in other words, to share equally with any children) – far from ideal of course if the intention was to leave them more, but a lot better than nothing.

Until now those Acts have left any unmarried life partner high and dry. Incidentally, note here that we are talking about opposite-sex life partners in that same-sex partners have for years enjoyed intestate succession rights - an anomaly of which much was made in this court case.

The Court's decision, and why life partners must still protect their positions

An unmarried man, although intending to marry his (female) partner, died before doing so. He left substantial assets but his will was outdated, leaving everything to his (since deceased) mother. The executor of his deceased estate rejected, primarily on the basis of existing law, her claims to inherit from the estate or to be granted maintenance from it.

Confirming High Court declarations of constitutional invalidity, the Constitutional Court held the relevant sections of the Acts to be invalid as they stand, and ordered that they be read so as to include life partners in their protections.

However there are critical limitations to bear in mind -

1. **The orders of invalidity aren't in force yet.** The Court suspended the orders for 18 months (to June 2023) to give Parliament time to remedy the defects. Perhaps Parliament will move quickly on this and do the necessary before mid-2023, but perhaps it won't. And in the mean time, your lack of protection remains.
2. **You will still have to prove your entitlement.** You will have to convince the executor and Master of the High Court (possibly in the face of opposition from the deceased's other family members) that –
 - a. You were in "a permanent life partnership" (our courts apply a number of tests in assessing this),
 - b. As partners you "undertook reciprocal duties of support" (in this case the partners were held to have been "involved in a relationship that comprised most, if not all, characteristics of a marriage"),
 - c. For your maintenance claim, that your claim is for your "reasonable maintenance needs", and
 - d. For your intestate succession claim, that you have "not received an equitable share in the deceased partner's estate".

Even if you think you will have no problem in proving all those things, it is of course much easier and safer to avoid any possible grey areas or dispute by properly recording your status and your agreed undertakings to each other.

3. **"Intestate" Succession is always second prize.** As we said above, a "child's share" of an estate is a lot better than nothing, but if you want your partner to inherit everything, dying without a will risks prejudicing them badly. Leaving a valid will is the only way to nominate the executor of your choice, and to choose for yourself what happens to your estate on death. It could well be the most important document you ever sign.

Life partners: Sign wills and a cohabitation agreement - now!

That's a lot of uncertainty and potential for conflict and delay, and there could well be a lot at stake (in this case, some R10m worth of assets in total) but the good news is that it is all very easily avoided –

1. Have professional wills drawn up (or have your existing wills checked for necessary changes or updates) and
3. Enter into a full cohabitation agreement recording exactly what your status is and what undertakings you make to each other. Remember there is no such thing as a "common law" marriage in South Africa – if you aren't formally married, a cohabitation agreement is the only safe alternative.

A final thought – no one likes to contemplate their own deaths, but Death by its very nature often knocks without warning, and we live in particularly dangerous times.

So don't delay – get moving on this now!

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MINITZERS ATTORNEYS
STEFAN VAN NIEKERK
021 871 1224
stefan@minitzers.co.za