The link between the assumption of support between life partners and the recognition and protection of life partnerships in South Africa

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Summary

South African family law does not recognise a “law of life partnerships” and accords only piecemeal statutory and judicial recognition to life partnerships. While legislation to formally recognise life partnerships have been proposed, development of the law in this regard has thus far been driven almost exclusively by judicial precedent. The judiciary has adopted two different approaches as far as it relates to the role of a duty of support in recognising life partnerships and in determining whether life partners could qualify for spousal benefits. Under the first approach the courts derive a duty of support from the fact that the partners lived together with some form of permanence. The duty of support is therefore not a prerequisite for the existence of a life partnership but flows from the life partnership. Under the second approach a duty of support cannot be automatically inferred even though the partners lived together with some form of permanence. An undertaking of a duty of support between the partners is a prerequisite for the recognition and benefits of a life partnership. The legislature has proposed legislative proposals towards the recognition of life partnerships. The Domestic Partnerships Bill and the Single Marriage Statute proposed provision for the registration of life partnerships. Under the Domestic Partnerships Bill, the assumption of a duty of support is one of a number of factors for the recognition of a life partnership and therefore not required qualifying prerequisite for the recognition and protection of life partnerships. Under the Single Marriage Statute, the parties must have cohabited in a life partnership and have assumed a permanent responsibility for supporting each other. A permanent responsibility for supporting each other is made a prerequisite for recognition and protection of life partnerships. Although the mentioned proposed legislation provides for the recognition of life partnerships the legislature is advancing the Marriage Bill that provides recognition to all forms of marriage under a single Act. The Marriage Bill does not provide for life partnerships. Life partners will therefore have to rely on piecemeal recognition by the courts for the foreseeable future. The position in South Africa is compared to legislation in British Columbia in Canada and the Republic of Ireland. Both jurisdictions provide for the recognition of life partnerships. In British Columbia partners must cohabit for a specific time period in a marriage-like relationship. In Ireland an intimate and committed relationship is required with a prescribed time period and financial dependence. The jurisdictions both follow an ascription model. It is concluded that an ascription model similar to that of British

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Columbia would provide the most extensive protection for life partners in South Africa. The duty of support should not be a prerequisite for recognition and protection of a life partnership but rather a consequence of such a relationship.

Key terms

Life partnerships; Domestic partnerships; Family law; South Africa; Canada; British Columbia.

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Table of Contents

Chapter 1 : Introduction 1

1.1 Research problem 1

1.2 Methodology 11

1.3 Motivation for choice of foreign law 12

1.4 Research Questions 13

1.5 Limitations 13

1.6 Structure/framework 14

Chapter 2 : Requirements for the recognition of a life partnership and the significance of the assumption of a duty of support between life partners 16

2.1 Introduction 16

2.2 Judicial recognition of life partnerships in South African family law 16

2.2.1 Introduction 16

2.2.2 Recognition of life partnerships after the Constitution 17

2.2.3 Recognition after enactment of the Civil Union Act 30

2.3 Conclusion 42

Chapter 3 : Legislative proposals for the protection of life partnerships with reference to the duty of support in South Africa 46

3.1 Introduction 46

3.2 Domestic Partnerships Bill 47

3.2.1 Introduction 47

3.2.2 Registered domestic partnerships 47

3.2.3 Unregistered domestic partnerships 48

3.3 Single Marriage Statute 53

3.3.1 Introduction 53

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3.3.2 The preamble to the Single Marriage Statute 54
3.3.3 The definition of a life partnership in the Single Marriage Statute 54
3.3.4 Recognition of life partnerships in the Single Marriage Statute 55
3.3.5 The registration of life partnerships 56
3.4 Review of Aspects of Matrimonial Property Law 57
3.4.1 Introduction 57
3.4.2 Division of accumulated assets at termination of life partnerships 58
3.4.3 Universal partnerships for unmarried intimate partners 59
3.5 Marriage Bill 62
3.6 Conclusion 63
Chapter 4 : Role of assumption and duty of support between life partners in terms of foreign law 68
4.1 Introduction 68
4.2 British Columbia, Canada 68
4.2.1 Introduction 68
4.2.2 The Family Law Act (FLA) 70
4.3 The Republic of Ireland (Ireland) 82
4.3.1 Introduction 82
4.3.2 Classification in terms of the Cohabitants Act 83
4.4 Conclusion: A comparison between British Colombia, Ireland and South Africa 91
Chapter 5 : Conclusion and recommendations 95
5.1 Conclusion 95
5.2 Recommendation 100
Bibliography 105

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Chapter 1: Introduction

1.1 Research problem

Prior to the promulgation of the Constitution of the Republic of South Africa, 1996 (Constitution) only monogamous marriages entered into by two opposite-sex partners under the Marriage Act 25 of 1961 (Marriage Act) were recognised under South African family law. Even though the Constitution does not explicitly acknowledge or protect a right to a family or marriage, it does uphold the right to dignity,[1] the right to equality[2] and the right to freedom of religion, belief, and opinion.[3] These rights justified the extension of the protection of relationships beyond the scope of the monogamous, opposite-sex marriage envisaged by the Marriage Act to include other forms of marriage .[4]

Three different marriage statutes currently govern three different forms of marriage in South Africa: the Marriage Act, which still governs monogamous opposite-sex civil marriages entered in terms of the common law; the Recognition of Customary Marriages Act 120 of 1998 (RCMA), which provides for monogamous and polygynous customary marriages according to "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples";[5] and the Civil Union Act 17 of 2006 (CUA), which provides for same-sex and opposite-sex marriages and civil partnerships.[6]

Marriages that are concluded solely in terms of religious law (for instance Muslim or Hindu law) constitute a fourth category of marriages, known as "purely religious marriages".[7] Although such marriages have until recently not been fully recognised under South African law, certain spousal benefits have been extended to religious

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[1] S 10 of the Constitution.
[2] S 9.
[3] S 15.
[4] *Chairperson of the Constitutional Assembly, Ex parte: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) paras 96 – 103 (*Certification* case) and *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) (*Fourie*).
[5] S 1 definition of "customary marriage" and "customary law".
[6] The CUA was enacted *primarily* to cater for same-sex marriages following a ruling of the apex court in South Africa in *Fourie*.
[7] Smith "The dissolution of a life or domestic partnership" in Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships* (2014) 407.

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marriages on a piecemeal basis by the judiciary.[8] In the recent case of *Women's Legal Centre Trust v The President of the Republic of South Africa*[9] (*Women's Legal Centre Trust*) the Constitutional Court declared the Marriage Act and the Divorce Act 70 of 1979 (Divorce Act) and our common law definition of marriage unconstitutional to the extent that these statutes and definition do not formally recognise Muslim marriages.[10] The Divorce Act has been amended by the Divorce Amendment Act 1 of 2024[11] on 6 May 2024 to allow for Muslim marriages to be terminated by divorce under the Divorce Act. Legislation has not yet been passed to address the unconstitutionality of the common law definition of marriage.[12]

This dissertation will, however, focus exclusively on another type of relationship that has traditionally also not been formally recognised by our law – life partnerships in the narrow sense of the word.[13] Life partnerships in the narrow sense are relationships in which two adult partners, irrespective of gender, live together in a permanent intimate partnership without being legally married under the Marriage Act, the CUA, the RCMA or concluding a civil partnership under the CUA.[14] Various other terms are used to describe life partnerships in the narrow sense, for example domestic partnership,[15] cohabitation, living together and common law marriage.[16] The term preferred by South African courts[17] and authors,[18] however, seems to be "life partnerships". For purposes of this dissertation "life partnerships" will therefore be used to refer to life partnerships

[8] Heaton and Kruger *South African Family Law* (2015) 255-256; Van Heerden, Skelton and Du Toit (eds) *Family Law in South Africa* (2021) 234-239.
[9] 2022 5 SA 323 (CC).
[10] Paras 68, 86 at 1.5.
[11] GN 4821 in GG 50651 of 14 May 2024, assented to on 6 May 2024.
[12] A Marriage Bill was introduced to Parliament by the Minister of Home Affairs on 13 December 2024 that amongst other things provided for the recognition of religious marriages. See para 3.5 below.
[13] According to Smith (2014) 406 life partnerships in the broad sense includes both parties who live together in a permanent relationship analogous to a marriage without going through a marriage ceremony or partners who concluded a marriage not recognised by the law.
[14] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 17 (*National Coalition*); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC) paras 9, 10 and 16 (*Satchwell* (CC)); *Volks v Robinson* 2005 5 BCLR 446 (CC) para 104 (*Volks*); *Bwanya v Master of the High Court, Cape Town* 2022 3 SA 250 (CC) para 1 (*Bwanya* (CC)); Hahlo "The Law of Concubinage" 1972 *SALJ* 321; Smith (2014) 406-407; Barratt (ed) *Law of Persons and the Family* (2023) 333 and Van Heerden, Skelton and Du Toit (2021) 250.
[15] This term is employed in the Domestic Partnership Bill GN 36 in *GG* 30663 of 14 January 2008.
[16] Hahlo *The South African Law of Husband and Wife* (1985) 34-35; Smith (2014) 390-391 and Heaton and Kruger (2015) 255.
[17] *National Coalition* para 1; *Satchwell* (CC) para 12 and *J v Director General, Department of Home Affairs* 2003 5 SA 621 (CC) para 19 (*J v Director General*).
[18] Smith (2014) 391 and Heaton and Kruger (2015) 255.

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in the narrow sense and "life partners" to the parties involved in such partnerships. Purely religious marriages that are solemnised outside the provisions of the Marriage Act, CUA or RCMA, are excluded from life partnerships in the narrow sense for purposes of the present study.[19]

South African family law does not recognise a "law of life partnerships" in the same way that it recognises a "law of marriage".[20] South African family law accord only piecemeal statutory[21] and judicial[22] recognition to life partnerships. Because of the *ad hoc* recognition of life partnerships, life partners are not in the same position as spouses or civil union partners who have formalised their union in terms of the Marriage Act, RCMA or the CUA. Life partnerships are not expressly regulated by law and do not have invariable consequences.[23] For example, there is no *ex lege* reciprocal duty of support between the life partners.[24] The division of property at the termination of the life partnership is not governed by a default or elected matrimonial property system applicable to the partnership.[25] A formally recognised marriage or civil union thus provides financial security and protection which is not available to life partners.[26] Life partners can however make use of common law principles to ensure some level of protection.[27] Life partners, irrespective of their sex, may agree that some consequences will apply to their relationship by entering into a contract either

[19] Smith (2014) 406-407.
[20] Hahlo 1972 *SALJ* 321 and Smith (2014) 389.
[21] Insolvency Act 24 of 1936; Estate Duty Act 45 of 1955; Pension Funds Act 24 of 1956; Income Tax Act 58 of 1962; Intestate Succession Act 81 of 1987 (ISA); Maintenance of Surviving Spouses Act 27 of 1990 (MSSA); Compensation for Occupational Injuries and Diseases Act 130 of 1993; Maintenance Act 99 of 1998; Domestic Violence Act 116 of 1998; Medical Schemes Act 131 of 1998; Rental Housing Act 50 of 1999, Judges' Remuneration and Conditions of Employment Act 47 of 20021, Immigration Act 13 of 2002 and Children's Act 38 of 2005.
[22] *Satchwell* (CC); *Gory v Kolver (Starke Intervening)* 2007 4 SA 97 (CC) (*Gory* (CC)); *Laubscher v Duplan* 2017 2 SA 264 (CC) (*Laubscher*); *Bwanya* (CC)*;* Smith (2014) 390; Smith "Intestate succession and surviving heterosexual life partners: Using the jurists 'laboratory' to resolve the ostensible impasse that exists after *Volks v Robinson*" 2016 *SALJ* 287-289; Bonthuys "A duty of support for all South African unmarried intimate partners part 1: The limits of the cohabitation and marriage based models" 2018 *PELJ* 12 and Bonthuys "A duty of support for all South Africans unmarried intimate partners part 2: Developing customary and common law and circumventing the *Volks* judgement" 2018 *PELJ* 6-8.
[23] Hahlo 1972 *SALJ* 321; Hutchings and Delport "Cohabitation: A responsible approach" 1992 *De Rebus* 122-123 and Smith (2014) 389.
[24] *Fourie* para 65 and *Volks* para 56.
[25] Smith (2014) 428-430.
[26] *Volks* paras 55 and 56.
[27] *Volks* para 125; SALRC *Domestic Partnerships Report* (2006) 110-111 para 3.1.12 and Smith (2014) 428.

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expressly or tacitly.[28] The scope of the contractual protection will depend on the specific terms they agree to in the contract.[29]

The development of the law in relation to the recognition of life partnerships has followed a different path depending on the type of life partnership. Same-sex life partners were initially afforded more protection than opposite-sex life partners. The constitutionality of the different treatment was justified by the fact that opposite-sex couples had the choice to marry whereas same-sex couples did not.[30] Just before the enactment of the CUA the court in *Gory v Kolver (Starke Intervening)*[31] (*Gory* (CC)) confirmed that same-sex partners can inherit intestate from each other if the threshold criteria of permanence and a reciprocal duty of support existed while the partners were both still living.[32] The preferential treatment of same-sex life partnerships continued even after the enactment of the CUA that has given same-sex life partners the choice to formalise their relationship on the same basis as their opposite-sex counterparts. In *Laubscher v Duplan*[33] (*Laubscher*) the Constitutional Court confirmed that same-sex partners would continue to qualify as surviving spouses for purposes of the Intestate Succession Act 81 of 1987 (ISA) until the legislature intervened, which to date has not occurred.[34]

The Constitutional Court in *Volks v Robinson*[35] (*Volks*), however, was not prepared to extend spousal benefits to opposite-sex life partners for purposes of the Maintenance of Surviving Spouses Act 27 of 1990 (MSSA) on the same basis. The majority judgement relied on the "choice argument" to justify its conclusion arguing that, unlike parties to a same-sex relationship before the CUA came into operation, nothing prevented opposite-sex partners from getting married.[36] The Constitutional Court found there was a significant difference between a surviving life partner in an opposite-

[28] *Butters v Mncora* 2012 4 SA 1 (SCA) (*Butters*) para 18; Bonthuys "Family contracts" 2004 *SALJ* 885.
[29] Hutchings and Delport 1992 *De Rebus* 125; Smith (2014) 431-436 and Heaton and Kruger (2015) 256-260.
[30] *Volks* para 154; *Gory* (CC) para 19; *National Coalition* paras 37-38; Smith (2014) 396.
[31] 2007 4 SA 97 (CC).
[32] *Gory* (CC) para 66.
[33] 2017 2 SA 264 (CC).
[34] *Laubscher* para 24.
[35] 2005 5 BCLR 446 (CC).
[36] *Volks* para 154.

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sex life partnership and a surviving spouse in a marriage.[37] A life partnership can be continued or terminated at will without any formalities and does not at conclusion create an *ex lege* duty of support as in the case of a formal marriage.[38] The court emphasised the importance of the function marriage plays in society, which is constitutionally and internationally protected.[39] The court also argued that a duty of support cannot be extended after death when such a duty did not exist by operation of law during the lifetime of the parties.[40] On this basis the majority found it justifiable for the law to differentiate between married and unmarried persons[41] and consequently held that the MSSA did not infringe on the dignity of opposite-sex life partners, thereby rejecting the constitutional challenge.[42]

Notwithstanding the *Volks* decision, the Constitutional Court in *Bwanya v Master of the High Court, Cape Town*[43] (*Bwanya* (CC)) extended the application of ISA and the MSSA to all permanent life partners "in which the partners undertook a reciprocal duty of support".[44] The court did not formally overturn the precedent of *Volks*, arguing that the "choice argument" is a matter of fact and not law.[45] Whether the parties have a real choice should be determined on the facts in each case separately.[46] The ruling effectively undermined the precedent in *Volks*.[47] The order was suspended until 31 June 2023[48] to provide Parliament the opportunity to correct the constitutional defects in the Acts. Parliament passed the Judicial Matters Amendment Act 15 of 2023 (JMAA)

[37] *Volks* paras 51-55.
[38] *Volks* paras 55-56.
[39] *Volks* paras 51-54.
[40] *Volks* paras 57-60.
[41] *Volks* para 54.
[42] *Volks* para 62.
[43] 2022 3 SA 250 (CC).
[44] *Bwanya* (CC) para 95.
[45] *Bwanya* (CC) para 61.
[46] *Bwanya* (CC) para 61.
[47] In the majority decision in *Bwanya* (CC), Madlanga J states: "I am convinced that *Volks* was wrongly decided… But that is not enough. The doctrine of precedent stipulates that a court may depart from its previous decision if that decision was clearly wrong… The test is a stringent one. And 'mere lip service to the doctrine of precedent is not enough; …deviation from previous decisions should not be undertaken lightly'" (para 46). He continues: "Much as I am convinced that the *Volks* decision is wrong, I am unable to make the jump and conclude that it was clearly wrong. Does this mean I must reach the same conclusion as *Volks*? I think not." Madlanga J then concludes: "It is a factual question: as a matter of fact, is there a choice to marry or not to marry? That being the case, I do not see why this Court's view in *Volks* on that question of fact should be binding on us" (para 62).
[48] Order was made on 31 December 2021 and suspended for 18 months.

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amending ISA and MSSA to correct the defect on 3 April 2024.[49] The differentiation in the partial recognition of same-sex and opposite-sex life partnerships has thus been removed. The *ad hoc* consequences of same-sex and opposite-sex life partnerships are now generally the same.[50] The aspect of this judgment that is of particular importance for purposes of the present study is the fact that life partnerships are recognised for purposes of these Acts only if "the parties undertook a reciprocal duty of support".[51]

The judiciary appears to adopt two different approaches regarding the role that the duty of support plays in the recognition of life partnerships. In some cases, the courts derive an existing duty of support between life partners from the fact that they lived together with some form of permanence.[52] In *Langemaat v Minister of Safety and Security*[53] (*Langemaat*), for example, the court stated: "Parties to a *same-sex* union, which has existed for years in a common home, must surely owe a duty of support, in all senses, to each other".[54] Contrary to this approach is the approach followed in *Satchwell v President of the Republic of South Africa*[55] (*Satchwell* (CC)) and *Bwanya* (CC) according to which a duty of support cannot automatically be inferred despite the fact that the parties had lived together with some form of permanence. According to these judgments the parties must also have undertaken a duty of support towards each other to qualify for spousal benefits.[56]

In the first approach financial support is seen as one of the many non-exhaustive factors indicating and pointing towards the permanence of a life partnership.[57] When the permanence of a life partnership is proved, a duty of support is automatically

[49] GN 4597 in *GG* 50430 of 3 April 2024.
[50] *Bwanya* (CC) paras 81-93. There are a few exceptions such as s 21 of the Insolvency Act and s 1 of the Compensation for Occupational Injuries and Diseases Act.
[51] *Satchwell* (CC) para 37.
[52] *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T); *Butters* para 37; *National Coalition* para 88 and Smith *The Development of South African Matrimonial Law with Specific Reference to the Need for and the Application of a Domestic Partnership Rubric* (Unpublished LLD thesis University of the Free State 2009) 214.
[53] 1998 3 SA 312 (T).
[54] *Langemaat* 316(H).
[55] 2002 6 SA 1 (CC).
[56] Paras 23, 24, 38 and Smith (2009) 214.
[57] *National Coalition* para 88.

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inferred according to the first approach.[58] Whereas in the second approach, a duty of support is seen as a separate additional pre-requisite to qualify for recognition and relief.[59] Under the second approach the parties must, in addition to the permanence of the life partnership, prove that they did indeed undertake to support each other (either tacitly or expressly).[60] In this regard Madala J in *Satchwell* (CC) stated that one "cannot impose obligations towards partners where those partners themselves have failed to undertake such obligations".[61] Thus, in terms of the second approach only the conclusion of a marriage creates an *ex lege* duty of support between partners.[62] When a marriage terminates such a duty can only exist if it is extended by agreement, court order or legislation.[63] To apply similar consequences to a life partnership according to the court the relationship must have been akin to marriage, in other words not only did a *consortium omnis vitae* exist[64] between the partners but the parties must have undertaken a duty of support.[65] In terms of this (second) approach, the courts must establish a contractual duty of support in order to extend spousal consequences to a life partnership, it is not sufficient to merely infer such a contractual duty from the permanent nature of the relationship.[66] In cases where life partners did not agree to such an undertaking in express terms, the courts will have to determine such commitment based on the actions and circumstances of the partners.[67] According to *Bwanya* (CC) the parties will have to prove a reciprocal duty of support in addition to proving characteristics in their relationship similar to a *consortium omnis vitae* for purposes of qualifying for benefits under the ISA and the MSSA.[68] From the above it is evident that the courts have adopted an inconsistent approach towards affording

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[58] Schäfer "Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships" 2006 *SALJ* 629-630.
[59] Schäfer 2006 *SALJ* 630. Schäfer explains this as the "proportionality principle", the requirements needed to prove the existence of a domestic partnership are dependent on the type of relief sought. If the claim has financial implications the need arises to prove a consortium and a reciprocal duty of support. Alternatively, if the claim has no financial implications, they will merely prove the existence of a *consortium omnis vitae*.
[60] *Satchwell* (CC) para 34.
[61] *Satchwell* (CC) para 24.
[62] *Volks* para 56.
[63] Heaton and Kruger (2015) 157.
[64] The factors provided in *National Coalition* to prove the existence of a life partnership effectively determines whether there is *consortium omnis vitae* (Schäfer 2006 *SALJ* 629-630).
[65] *Satchwell* (CC) para 34.
[66] Bonthuys 2004 *SALJ* 885-887.
[67] *Langemaat* para 316H; *National Coalition* para 88; *Satchwell* (CC) and *Bwanya* (CC).
[68] *Bwanya* (CC) para 95.

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spousal benefits to life partnerships as far as the assumption of support between the life partners is concerned.[69]

The abovementioned inconsistency is merely one of the many ways in which the existing legal position regarding life partnerships is unsatisfactory. The *ad hoc* recognition of life partnerships, generally speaking, does not provide for financial security and protection of life partners. Legislation would seem to be the most obvious and expeditious solution to address the inadequacies in the law in this regard.[70] If the law is to bring parity between spouses and life partners, some form of permanence akin to marriage would have to be required. The question is whether an undertaking to support each other would merely be one of the various factors that would show permanence or whether an undertaking to support each other would have to be proven in addition to other factors showing permanence? A distinction needs to be drawn between financial and emotional support. When the courts refer to a duty of support between the life partners, it is implied to be a financial duty of support and not an emotional duty of support. Emotional support is however considered by the courts to be part of the factors that can be used to prove a life partnership.[71] In the context of this dissertation "assumption of support" and "duty of support" refer to financial support. Once the relationship between the partners has met the qualifying threshold criteria, it can be assumed that the legislation would make a reciprocal duty of support an invariable consequence of the life partnership. The duty of support can arguably therefore be a qualifying criterion as well as an invariable consequence of the life partnership, once recognised.

The South African Law Reform Commission (SALRC) embarked on an investigation into the plight of domestic partners (as life partners were then called) in 2001 and a discussion paper was published in 2003[72] which culminated into a report in 2006.[73] As

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[69] Coetzee-Bester and Louw "Domestic partners and the 'choice argument': *Quo vadis*?" 2015 *PELJ* 2960; *Langemaat*; *National Coalition; Satchwell* (CC)*; J v Director General; Du Toit v Minister of Welfare and Population Development 2003 2 SA 198 (CC)* (*Du Toit v Minister of Welfare*)*; Du Plessis v Road Accident Fund 2004 1 SA 359 (SCA)* (*Du Plessis*) and *Gory* (CC).

[70] Smith "Rethinking *Volks v Robinson*: The implication of applying a 'contextualised choice model' to prospective South African domestic partnership legislation" 2010 *PELJ* 294, Sloth-Nielsen "What are the implications of *Bwanya v The Master of the High Court* for customary law?" 134.

[71] *Satchwell* (CC); *Bwanya* (CC) and *EW v VH (Women's Legal Centre Trust as amicus curiae)* 2023 2 All SA 404 (WCC) (*EW*).

[72] SALRC *Domestic Partnerships Discussion Paper* (2003).

[73] SALRC *Domestic Partnerships Report* (2006).

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a result, the Department of Home Affairs published the Domestic Partnerships Bill of 2008 for comment on 14 January 2008.[74] The Bill provides for the recognition of both registered and unregistered domestic partnerships between same-sex and opposite-sex parties.[75] In terms of the Bill a registered domestic partnership would allow for automatic rights and obligations similar to those arising from a marriage and automatically create a duty and right of support between the parties.[76] The Bill also provides for unregistered domestic partners to approach the court for relief after the termination of the partnership (*ex post facto)* as a result of the death of one partner or separation.[77] The Bill would allow for property division, intestate succession, and maintenance claims at termination should the parties qualify as unregistered domestic partners.[78] In order to determine whether a relationship qualifies for legal protection as an unregistered domestic partnership in terms of the Bill, the court is enjoined to consider the surrounding circumstances and factors such as the duration and nature of the relationship, common residence, financial dependence or interdependence, any arrangements for financial support, degree of mutual commitment to a shared life, to mention but a few of the factors stated in the relevant clause.[79]

Although this Bill has not been enacted, the way in which the Bill envisages the protection of unregistered domestic partnerships may still be of interest. The fact is that life partners often refrain from formalising their relationship through no choice of their own. If one of the partners is opposed to entering into a formal marriage because she or, more often than not, he wishes to be free of the constraints and formal obligations imposed by the law, there is little the other partner can do (except, of course, to terminate the relationship) – especially if there is a form of power imbalance resulting from social and economic inequality[80] in the relationship.[81] A partner may be

[74] *GN* 36 in *GG* 30663 of 14 January 2008.
[75] Unregistered domestic partnerships can be proved in terms of a set of factors including "the degree of financial dependence or interdependence, and any arrangements for financial support, between the unregistered domestic partners (cl 26(2)).
[76] Cls 9, 14, 18 and 19 of the Domestic Partnerships Bill.
[77] Cls 28 and 29.
[78] Cls 26-30.
[79] Cl 26.
[80] *Bwanya* (CC) para 64.
[81] *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 31; SALRC *Domestic Partnerships Report* (2006) 25-27 paras 2.2.8-2.2.14; Goldblatt "Regulating domestic partnerships – A necessary step in the development of South African family law" 2003 *SALJ* 610, 613, 614; Smith (2014) 394; Barratt (2023) 333.

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unable to formalise the relationship for economic reasons, such as the inability to pay *lobolo* to conclude a customary marriage.[82] One or both of the partners may be in an existing civil marriage or customary marriage which he/she/they do not wish to dissolve.[83] In such cases the *ex post facto* recognition of the life partnership may be the only way of protecting the most vulnerable of life partners.

The SALRC's investigation into domestic partnerships has been overrun by the SALRC's current investigation into the feasibility of a Single Marriage Statute in South Africa.[84] The investigation includes recommendations to formally recognise life partnerships.[85] The SALRC has proposed two Bills, namely the Protected Relationships Bill[86] and the Recognition and Registration of Marriages and Life Partnership Bill.[87] The only difference between the Bills is the terminology used. Under the Protected Relationship Bill, marriages and life partnerships are included in the term "protected relationship" whereas under the Recognition and Registration of Marriages and Life Partnerships Bill the protected and recognised relationships are not included under one umbrella term. Protected life partnerships (under the option 1-Bill) and marriages and life partnerships (under the option 2-Bill) would nevertheless be regulated in the exact same way whatever terms are used. It is noteworthy for present purposes that the Bills define a life partnership as a relationship "where the parties cohabit and have assumed permanent responsibility for supporting each other".[88] The assumption of a duty of support between the partners is thus clearly made a qualifying prerequisite for protection under these Bills and conform to the second approach adopted by the judiciary as indicated above. In terms of clause 12 of the Bills, life partnerships will be formally recognised and have the same consequences as those unions currently recognised and thus create an *ex lege* right and duty of support.[89] The assumption of support and the way in which the proposed Bills envisage the

[82] Other economic reasons include unemployed women cohabit with men because they have no other choice or source of income, a divorced person or surviving spouse who receives maintenance, pension or income from an annuity may choose a life partnership rather than lose the financial benefits of maintenance, pension, or annuity on remarriage.
[83] SALRC *Domestic Partnerships Report* (2006) 30 para 2.2.26.
[84] SALRC *Project 144: Single Marriage Statute Discussion Paper 152* (2021).
[85] SALRC *Single Marriage Statute Discussion Paper* (2021) 31-32.
[86] SALRC *Single Marriage Statute Discussion Paper* (2021) Annexure B1 135-152.
[87] SALRC *Single Marriage Statute Discussion Paper* (2021) Annexure B2 153-171.
[88] SALRC *Single Marriage Statute Discussion Paper* (2021) Annexure B1 137 cl 1(xi),155 cl 1(xi).
[89] SALRC *Single Marriage Statute Discussion Paper* (2021) Annexures B1 143 and B2 161.

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formal recognition and protection of life partnerships will form an important part of the present investigation.

The proposals by the SALRC, led to the publication of the Marriage Bill in December 2023 by the DHA.[90] Surprisingly the Marriage Bill makes no mention of life partnerships.[91] To complicate matters further, the SALRC released a discussion paper in June 2023 reviewing aspects of matrimonial property law that considers the possibility of introducing changes to the patrimonial consequences of life partnerships in anticipation of the enactment of the Single Marriage Statute.[92]

The dissertation will focus on the role that the assumption of support between life partners should play in the recognition, consequences and protection of life partnerships in South Africa. The aim of the dissertation is to determine the role of the assumption of support in the context of the current and anticipated future recognition and protection of life partnerships in South Africa. Developments in other comparable jurisdictions such as those in British Columbia in Canada and the Republic of Ireland (Ireland) will be investigated to inform the best possible approach for South Africa.[93]

1.2 Methodology

A qualitative desktop review using textual analyses and comparative research is proposed, by providing a critical analysis of existing and proposed legislation, case law, peer reviewed journal articles and textbooks.

As to the comparative part of the research, the *status quo* in South Africa will be compared with the position in other jurisdictions, such as British Columbia and Ireland. Foreign law, as discussed below, may provide alternative solutions to the legal problems that persist in relation to the assumption of support and the recognition and consequences of life partnerships.

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[90] Marriage Bill [B43-2023] *GG* 49887 of 13 December 2023.
[91] Home Affairs "The consultative stakeholder engagements for the development of the marriages policy" September 2019 https://www.dha.gov.za/index.php/notices/1286-the-consultative-stakeholder-engagements-for-the-development-of-the-marriages-policy#:~:text=The%20new%20single %20 Marriage%20Act,the%20Constitution%20of%20the%20RSA. (last accessed 10 July 2024).
[92] SALRC *Matrimonial Property* (2023) xiii para 7.
[93] See Chapter 4 below.

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1.3 Motivation for choice of foreign law

Canada, and in particular British Columbia, and Ireland recognise life partnerships by means of formal legislation. In both Irish and British Columbian law, a duty of support is considered a consequence and not a pre-requisite to prove the existence of the partnership. In both jurisdictions the recognition of life partnerships is determined by a combination of discretionary criteria and a firm rule. The discretionary criteria are applied to determine the nature of the relationship which is combined with a firm rule that the relationship must have existed for a specific duration.

Irish law makes provision for civil partnerships, cohabitants, and qualified cohabitants in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act of 2010 (Cohabitants Act).[94] The Irish law provides for various claims against the other partner, similar to remedies at divorce or death of a spouse.[95] Duty of support is regarded as a consequence and not a pre-requisite of a life partnership in terms of Irish law. The pre-requisites for a life partnership under Irish law is cohabitation for at least five years or when the parties have one or more dependent children, they must have cohabited for a minimum of two years.[96]

In British Columbia, the Family Law Act of 2011 (FLA)[97] defines a spouse for purposes of the Act as a person that is married to another person or has cohabited with another person in a marriage-like relationship for a period of at least two years continuously, or has a child with the other person.[98] The Canadian law, and specifically the law in British Columbia, requires a time period that automatically awards the status of a spouse and makes the partner entitled to remedies similar to marriage.[99] As already indicated earlier, in British Columbia the duty of support is therefore not a prerequisite to qualify for relief but rather a consequence.

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[94] Mee "Cohabitation law reform in Ireland" 2011 *CFLQ* 333; Fergus "Out of the shadow of the Constitution: Civil partnership, cohabitation and the constitutional family" 2012 *IJ* 202; Sloan "The changing concept of 'family' and challenges for family law in Ireland" in Scherpe (ed) *European Family Law Volume II: The Changing Concept of Family and Challenges for Domestic Family Law* (2016) 134 and Harding "Marriage equality: A seismic shift for family law in Ireland 2016 *ISFL* 259, 266.
[95] Ss 174-192 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act of 2010 (Cohabitants Act).
[96] S 172(5) read with s 171 of the Cohabitants Act.
[97] Family Law Act of British Columbia SBC 2011.
[98] S 3(1) of the FLA.
[99] Parts 5, 6 and 7 of the FLA.

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The legal position in these jurisdictions will inform the conclusion on the way forward in South Africa.

1.4 Research Questions

The primary research question: What is the link between the assumption of support and the legal recognition and protection of life partnerships?

Secondary questions will include the following:

- What are the current disadvantages experienced by life partners as a result of the non-recognition of life partnerships?
- What are the factors currently used in case law to determine whether life partners qualify for spousal benefits?
- Do the SALRC's current legislative proposals provide a viable framework for the recognition and consequences of life partnerships?
- Are there solutions for our current situation in other comparable jurisdictions such as those of Canada and Ireland?
- What role should the assumption of support play in the recognition and protection of life partnerships in South Africa?

1.5 Limitations

The aim of the dissertation is to determine the role of the assumption of support in the context of the current and anticipated future recognition and protection of life partnerships in South Africa. The development of the law in this regard has thus far been driven almost exclusively by judicial precedent. For this reason, the study will be limited to case law directly addressing the role of the duty of support in recognising life partnerships and proposed future legislation. The study will not include cases related to other aspects of the recognition of life partnerships such as cases dealing with parental responsibilities and rights; guardianship and joint adoption;[100] and children conceived by artificial insemination.[101] Due to length limitations of the dissertation existing legislation currently recognising life partnerships for specific purposes will not be discussed, because the aim of the dissertation is to anticipate the legal direction of

[100] *Du Toit v Minister of Welfare*.
[101] *J v Director General*

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future legislation recognising life partnerships in totality and not merely for a specific purpose.

1.6 Structure/framework

Chapter 1 – Introduction

This chapter contains the introduction to the topic under investigation. It provides an overview of the research problem, indicates the research questions and the methodology, provide the motivation for the use of foreign law in the dissertation and providing an outline of the structure of the dissertation.

Chapter 2 – Requirements for the recognition of a life partnership and the significance of the assumption of a duty of support between life partners

This chapter will discuss the development of the law relating to the recognition of life partnerships in South Africa over the years through judicial precedent as well as the current role and impact of the duty of support in South Africa. It will be highlighted how and to what extent the current fragmented recognition of life partnerships provides insufficient protection to life partners.

Chapter 3 – Legislative proposals for the protection of life partnerships with reference to the duty of support in South Africa

The proposed Domestic Partnerships Bill, with reference to the 2003 and 2006 SALRC reports, will be investigated. The current investigation by the SALRC on a Single Marriage Statute and the proposals for recognition of life partnerships as well as the Marriage Bill and the Review of Aspects of Matrimonial Property Law will be discussed. The legislative proposals for the protection of life partnerships with reference to the duty of support will be critically analysed and the possible impact of the proposals will be discussed.

Chapter 4 – Role of assumption and duty of support between life partners in terms of foreign law

The legal position of life partnerships in British Columbia and Ireland and the importance and role of the duty of support will be investigated and compared to the position in South Africa.

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Chapter 5 –Conclusion and recommendations

A conclusion will be drawn on the role that the assumption of support plays and should play in the recognition and protection of life partnerships in South Africa. A proposal will be made on the best possible approach for South Africa drawn from the comparative study in the previous chapter.

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Chapter 2: Requirements for the recognition of a life partnership and the significance of the assumption of a duty of support between life partners

2.1 Introduction

This chapter will provide an overview of the extent to which the assumption of financial support between life partners has played a role in the recognition, consequences and protection of life partnerships in South Africa. While legislation to formally recognise life partnerships has been proposed,[102] the development of the law in this regard has thus far been driven almost exclusively by judicial precedent.[103] The chapter will consequently trace the increased willingness of the courts to regard life partnerships as worthy of protection and treat life partners for certain purposes as spouses by discussing the most important judgments to date. Given the primary focus of the dissertation, the discussion will be limited to those cases that have made pronouncements on the assumption of a duty of support in relation to the recognition and protection of life partnerships.

As already indicated in chapter 1,[104] the courts have not always been entirely clear about the role that should be played by the assumption of a duty of support in the course of establishing whether a life partnership should be recognised and considered worthy of protection. To avoid unnecessary confusion the chapter will trace the trajectory of developments in this regard in chronological order.

2.2 Judicial recognition of life partnerships in South African family law

2.2.1 Introduction

The timeline within which the judicial recognition of life partnerships will be traced has for ease of reference been divided into the following two distinguishable stages: After

[102] Domestic Partnerships Bill, which have not been passed into legislation (see para 3.2). The SALRC proposed draft concept Bills in the SALRC *Single Marriage Statute Discussion Paper* (2021) Annexure B1 135-152 and B2 153-171 and SALRC *Matrimonial Property* (2023) that recognise life partnerships and the proprietary consequences (see para 3.4).
[103] See eg *Langemaat*; *National Coalition*; *Satchwell* (CC); *Gory* (CC) and *Bwanya* (CC). The cases cited are examples but not a complete list of cases that developed the law.
[104] Para 1.1.

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the adoption of the Constitution and after the promulgation of the CUA. An introductory general overview of the developments during each of the stages will be followed by a discussion of each of the cases pertinent to the focus of this investigation.

2.2.2 Recognition of life partnerships after the Constitution

2.2.2.1 Introduction

The courts first recognised same-sex life partners as spouses on an *ad hoc* basis, under the constitutional rights to dignity, equality, and protection against unfair discrimination based on marital status and sexual orientation.[105] The courts found that the law unfairly discriminated against partners in same-sex life partnerships since the relationship was functionally the same as the relationship between spouses but same-sex partners did not have the choice to formalise their relationship.[106] The position of opposite-sex life partners was different with reference to the "choice argument", because they had the option to formalise their relationship by entering into a marriage, as spouses and access benefits automatically.[107] For this reason same-sex life partners, in a relationship with all the characteristics of a marriage, could be entitled to equal protection before the law, because they could not formalise their relationship. The cases that are deemed relevant in this context are *Langemaat*, *National Coalition* and *Satchwell*.

When an opposite-sex surviving partner, applied to be recognised as a surviving spouse under the MSSA in *Volks*, the Constitutional Court turned the application down.[108] The court applied the choice argument and found that treating unmarried opposite-sex life partners different from married spouses did not violate the dignity of the unmarried partners.[109] Based on the available choice of opposite-sex life partners to formalise their relationship the differential treatment was not regarded as unconstitutional by the court because the parties did not choose to formalise their

[105] *Gory* (CC) para 19.
[106] *Langemaat* para 316C; *National Coalition* paras 22 and 23; *Satchwell* (CC) para 37.
[107] *Volks* paras 51-55.
[108] *Volks* para 68.
[109] *Volks* para 62.

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relationship.[110]

In *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae*); *Lesbian and Gay Equality Project and Others v Minister of Home Affairs*[111] (*Fourie*) the unsatisfactory piecemeal recognition of same-sex life partners was addressed. The common law definition of marriage and the marriage formula in section 30(1) of the Marriage Act was declared unconstitutional and invalid.[112] The legislator was ordered to address the non-recognition of same-sex marriages within twelve months from the order.[113]

The Constitutional Court in *Gory* (CC) had to decide on whether it was unconstitutional to exclude same-sex life partners from the ambit of section 1(1) of ISA and therefore from the benefits spouses were entitled to under the Act.[114] The court in *Gory* (CC) handed down its order one week before the promulgation of the CUA.[115] The court declared the exclusion unconstitutional.[116] The unconstitutionality was rectified by ordering the reading in of "or a partner in a permanent life partnership of the same-sex where the partners undertook a reciprocal duty of support" after the word "spouse".[117] Van Heerden AJ[118] made it clear that surviving same-sex life partners should be included under the ISA, regardless of the enactment of the CUA. Before *Gory* (CC), it was assumed that should same-sex life partners have the choice to marry the preferential treatment of same-sex life partners would no longer be applicable.[119] Against this general expectation, the CUA did not remove the distinction between same-sex and opposite-sex life partners.[120]

An indication of the courts' pronouncements on the importance of life partners to

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[110] *Volks* paras 54-56. The judgment was however not unanimous. The minority of the court deemed the exclusion of opposite-sex domestic partners from the benefits under the Act as unfair discrimination on ground of marital status.
[111] 2006 1 SA 524 (CC).
[112] *Fourie* paras 82 and 114.
[113] *Fourie* para 156.
[114] ISA only confers rights on a "spouse".
[115] ISA only confers rights on a "spouse".
[116] *Gory* (CC) para 19.
[117] *Gory* (CC) para 66.
[118] *Gory* (CC) para 29.
[119] See eg Bilchitz and Judge "For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa" 2007 *SAJHR* 496-497 and Picarra "*Gory v Kolver NO* 2007 (4) SA 97 (CC)" 2007 *SAJHR* 566-568.
[120] Based on the Constitutional Court's judgment in *Volks.*

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assume a duty of support to be recognised follows in the following paragraphs. The case of *Du Plessis*, discussed under a separate heading, is also deemed important even though the case was not directly concerned with the recognition of a life partnership.

2.2.2.2 *Langemaat v Minister of Safety and Security*[121]

This case was the first decision to recognise the existence of a reciprocal duty of support between same-sex life partners who permanently lived together. The court found that a same-sex life partner qualifies as a dependent for purpose of a medical aid.[122] The court confirmed that "parties to a same-sex union, which has existed for years in a common home, must surely owe a duty of support, in all senses, to each other".[123]

What is of interest is that the duty of support was inferred because the parties shared a common home for almost twelve years.[124] There was no investigation into any sort of express or implied undertaking of a duty of support. The mere fact that the parties had lived together akin to a marriage in a permanent life partnership for twelve years was sufficient for the court to infer a financial dependency between the same-sex life partners.[125] The contribution of this case towards South African family law is that this was the first decision recognising a reciprocal duty of support between same-sex partners in a permanent life partnership.

2.2.2.3 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[126]

In this case the question concerned the constitutionality of section 25(5) of the Aliens Control Act 96 of 1991[127] which, in brief, authorised the issue of an immigration permit to the spouse of a permanent resident of South Africa but did not offer an equal choice for the life partner of a South African permanent resident with whom the latter was in a long-term same-sex relationship. The court declared the impugned section of the

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[121] 1998 3 SA 312 (T).
[122] *Langemaat* 317H-J.
[123] *Langemaat* 316H.
[124] *Langemaat* 316H read with 314A-B, 318J.
[125] *Langemaat* 316H.
[126] 2000 2 SA 1 (CC).
[127] The Act was replaced by the Immigration Act 13 of 2002 on 30 May 2002.

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Aliens Control Act unfairly discriminated on grounds of sexual orientation, marital status and the right to dignity.[128] An order was made for the reading in of "or a partner in a permanent same-sex life partnership" after the word "spouse" in section 25(5).[129] What is of importance is the court's discussion on *consortium omnis vitae* and how it related to the permanence of a life partnership to determine whether the partnership was similar to a marriage and therefore worthy of protection. The fact that the Constitutional Court confirmed that same-sex partners could also establish a *consortium omnis vitae* between them[130] was significant since this implied that life partners could, like their married counterparts, also acquire rights to financial security, including support, housing and sharing of household expenses.[131]

The court provided an open list of factors to be considered when having to determine whether a same-sex relationship could be deemed permanent.[132] Some of the factors on the list refer to financial dependency and support, to wit, "whether and to what extent the partners share the responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; and whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits".[133] In this case financial support was thus considered only one of multiple factors to determine whether the relationship qualified to be recognised as a permanent life partnership.[134]

2.2.2.4 *Satchwell v President of the Republic of South Africa*[135]

In this case the applicant applied for the provisions of the Judges' Remuneration and Conditions of Employment Act 88 of 1989[136] and the accompanying regulations that prevented same-sex partners of judges from receiving the same pension benefits as their married counterparts. The court held that the differentiation amounted to unfair

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[128] *National Coalition* para 97.
[129] *National Coalition* para 98.
[130] *National Coalition* para 53.
[131] *National Coalition* para 53.
[132] *National Coalition* para 88.
[133] *National Coalition* para 88.
[134] *National Coalition* para 88.
[135] 2002 6 SA 1 (CC).
[136] The Act was repealed by the Judges' Remuneration and Conditions of Employment Act 47 of 2001 on 22 November 2001.

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discrimination on the grounds of marital status and sexual orientation.[137] The parties cohabited for a period of more than fourteen years, they purchased a home and registered the home in both their names and they were accepted as a family unit by their family and friends.[138] The court concluded that there was a financial interdependence between the parties as they shared financial obligations, made joint decisions and were beneficiaries in each other's insurance policies and wills.[139]

The court *a quo*, *Satchwell* (T) referred with approval to *Langemaat* where it was highlighted that the parties to a life partnership must have lived together for a significant period to qualify for the spousal benefits.[140] The court *a quo* determined whether the life partnership was permanent in nature to qualify for spousal benefits. It did not expressly inquire into the existence of a duty of support but inferred such a duty from the permanent nature of the relationship.[141] In *Satchwell* (CC) the Constitutional Court stated that although marriage automatically creates a duty of support,[142] life partners would have to prove they lived in a stable and permanent relationship before the duty can be inferred.[143] The Constitutional Court stated that one "cannot impose obligations towards partners where those partners themselves have failed to undertake such obligations".[144] The Court held that the existence of a reciprocal duty of support between life partners is a question of fact and can be inferred from the surrounding circumstances.[145] The Constitutional Court ordered that the words "or partner, in a permanent same-sex life partnership in which the parties have undertaken reciprocal duties of support" be read into the statute and its regulations after the word "spouse" to remedy the unconstitutionality.[146]

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[137] *Satchwell* (CC) para 23.
[138] *Satchwell* (CC) para 4.
[139] *Satchwell* (CC) paras 5 and 25.
[140] *Satchwell* (T) para 16.
[141] *Satchwell* (T) para 16.
[142] *Satchwell* (CC) paras 22.
[143] *Satchwell* (CC) para 25.
[144] *Satchwell* (CC) para 24.
[145] *Satchwell* (CC) para 25. Also see *National Coalition* para 88 where the court listed factors that can be indicative if present in surrounding circumstances that the parties have undertaken reciprocal duties of support. In *Du Plessis* paras 14 and 15 the court inferred the parties undertook a duty of support because the partners were in a stable and permanent relationship that resembled a marriage relationship.
[146] *Satchwell* (CC) para 37.

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Contrary to the decisions in *Langemaat* and *Satchwell* (T) where the duty of support was inferred from the fact that the parties had a relationship akin to marriage or a *consortium omnis vitae*, the court in *Satchwell* (CC) held that the duty of support will only be recognised once the parties have proved the existence thereof.[147] Not only must the parties prove a permanent life partnership, but also the fact that they have undertaken a duty of support towards each other in order to be entitled to similar benefits to that of spouses.[148]

The court in *Satchwell* (CC) stated:

> "Whether such a duty of support exists or not will depend on the circumstances of each case. In the present case the applicant and Ms Carnelley have lived together for years in a stable and permanent relationship. They have been accepted and recognised as constituting a family by their families and friends and have shared their family responsibilities. They have made financial provision for one another in the event of their death."[149]
>
> According to the same court:
>
> "[T]he High Court" [*Satchwell* (T)] … omits an important requirement. It fails to have regard to the requirement of a reciprocal duty of support… partners must have *undertaken and committed themselves* to reciprocal duties of support."[150]

2.2.2.5 *Volks v Robinson*[151]

The Constitutional Court in *Volks* was not prepared to extend spousal benefits to opposite-sex life partners for purposes of the MSSA on the same basis as same-sex life partners. The majority judgment relied on the "choice argument" to justify its

[147] *Satchwell* (CC) paras 23-25.
[148] *Satchwell* (CC) para 25.
[149] *Satchwell* (CC) para 25.
[150] *Satchwell* (CC) para 34. My emphasis. From this it is evident that in *Satchwell* (T) the court merely implied a duty of support from the circumstances of the case, similar to *Langemaat*. In contrast to *Satchwell* (CC) which require the parties to undertake a duty of support. The matter returned to the Constitutional Court in *Satchwell v President of South Africa* 2003 (4) SA 266 (CC) (*Satchwell* 2 (CC)). The regulations under the Judges Remuneration and Condition of Employment Act were replaced by new regulations which were substantially the same as the regulations declared unconstitutional and amended by *Satchwell* (CC). The Constitutional Court in *Satchwell* 2 (CC) merely confirmed the decision in *Satchwell* (CC) and declared the new regulations unconstitutional.
[151] 2005 5 BCLR 446 (CC).

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conclusion arguing that, unlike parties to a same-sex relationship before the CUA came into operation, nothing prevented opposite-sex partners from getting married.[152] In the words of Ngcobo J the "choice argument" implies:

> "[T]he law expects those opposite-sex 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."[153]

The Constitutional Court not only differentiated between same-sex and opposite-sex life partnerships but also between a surviving life partner in an opposite-sex life partnership and a surviving spouse in a marriage.[154] The court indicated that a life partnership can continue or end without any formalities and does not at conclusion create an *ex lege* duty of support. In contrast a marriage has formal requirements for conclusion and termination and does create an *ex lege* duty of support.[155] The court emphasised the fact that marriage serves an important social function which is constitutionally and internationally recognised.[156] The court further argued that a duty of support cannot be extended after death if the duty of support did not exist between the parties when the deceased partner was still alive.[157] The willingness to enter and to sustain a marriage, in the court's view, is confirmation of acceptance of the moral and legal obligations, including the reciprocal duty of support and other invariable consequences of marriage, that will continue after the death of one of the spouses.[158] On this basis the majority found to differentiate between married and unmarried persons is justifiable in law[159] and consequently found that the MSSA did not violate

[152] *Volks* para 54-58.
[153] *Volks* para 92, per Skweyiya J at para 58.
[154] *Volks* paras 51-55.
[155] *Volks* paras 55-56.
[156] *Volks* paras 52-54.
[157] *Volks* paras 57 and 60.
[158] *Volks* para 56, per Ngcobo J at paras 91 and 92.
[159] *Volks* para 54.

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the dignity of opposite-sex life partners thereby rejecting the constitutional challenge.[160]

Ngcobo J in his separate but concurring judgment reiterated that a reciprocal duty of support is an invariable consequence of marriage that can be extended by the MSSA after death.[161] He stated that although this protection is not afforded to surviving partners in life partnerships, the rights can still be protected through drafting a will and therefore can be regarded as a disadvantage but not unfair discrimination.[162] According to Ngcobo J protection under the MSSA depended on the choice to marry and the acceptance of moral and legal obligations which form the invariable consequences of a marriage.[163] To establish a duty of support in a life partnership, in Ngcobo's view, the parties would have to either expressly agree on such a duty of support or it would have to be inferred from the conduct of the parties in his opinion, which creates too much uncertainty in establishing such a relationship.[164]

The majority's reasoning on choice was criticised in the dissenting judgments of O'Regan and Mokgoro JJ jointly, on the one hand, and Sachs J, on the other. O'Regan and Mokgoro JJ dissented from the majority decision on the principle that it does not help the court to focus on the choice to marry but it should rather focus on the unequal bargaining power of women in South Africa as well as the dependency on their partners.[165] O'Regan and Mokgoro JJ considered factors such as the length of the relationship, contribution towards household expenses, an accepted "intimate relationship between the partners" as proof that the parties "considered themselves to constitute a permanent life partnership in which they undertook duties of mutual support".[166] From this they concluded that a life partnership could be socially and functionally the same as a marriage.[167] O'Regan and Mokgoro JJ concluded that it amounted to unfair discrimination if partners in a life partnership, with the same social function as a marriage, are not protected similarly to spouses in a marriage.[168] They

[160] *Volks* para 62.
[161] *Volks* para 88.
[162] *Volks* para 90.
[163] *Volks* para 91.
[164] *Volks* para 95.
[165] *Volks* paras 132 and 134.
[166] *Volks* para 104.
[167] *Volks* para 108.
[168] *Volks* para 135.

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found that "cohabitation relationships in which duties of support had been mutually undertaken, whether tacitly or expressly, and where those surviving partners are in financial need" should not be excluded from protection.[169] They emphasised that the extension should be limited to "a narrow class of cohabitation relationships"[170] where the relationship is permanent in nature and the parties have "undertaken reciprocal duties of support".[171] The support should only be in a relationship that has a similar social function to a marriage.[172] O'Regan and Mokgoro JJ proposed that the defect in the MSSA should be corrected by reading-in the words "surviving partner of a permanent life partnership terminated by 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's estate".[173]

Sachs J in his dissenting judgment in *Volks* made a valuable comment on the choice that women have when he acknowledged the fact that: "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 hand".[174] Sachs J in his dissent affirmed that choice must be understood in the light of the circumstances when it was made.[175] In his view, social and economic hardship may be so acute that choice is limited or renders a person's choice to stay or leave a relationship meaningless.[176] He also emphasised that the fact that the respondent had had the option to get married, even though the option was not exercised by the respondent, should not be sufficient to serve as a basis for concluding that a life partner in the respondent's position is not entitled to maintenance.[177] Sachs J confirmed that the option of marrying often only exists in theory.[178]

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[169] *Volks* para 136.
[170] *Volks* para 140.
[171] *Volks* para 140.
[172] *Volks* para 141.
[173] *Volks* para 139.
[174] *Volks* para 225.
[175] *Volks* para 164-166.
[176] *Volks* paras 156-169.
[177] *Volks* paras 213.
[178] *Volks* paras 155-162. Also see Schäfer 2006 *SALJ* 641-644 for reasons why a choice to marry should be regarded as existing only in theory.

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Sachs J stated that the majority judgment in *Volks* failed to appreciate the social context and practical realities related to choice.[179] In his view whether a reciprocal duty of support exists *ex lege* or *ex contractu*, it is worthy of protection.[180] According to Sachs J "what should be central, however, is the serious content of the mutual commitment and not the particular form in which it is expressed".[181] To determine whether a duty of support was established Sachs J stated that "[w]hat *Satchwell* establishes is that one can infer as a matter of fact whether a duty [to support] exists"[182] from the facts of each case and that "the undertaking could be inferred from conduct that clearly established a relationship acknowledging a mutual duty of support".[183] In this regard he concluded that "what *Satchwell* establishes is that one can infer as a matter of fact whether a duty [of support] exists, not from any principle of the common law, but from the actual life circumstance of the parties in each case".[184] He emphasised that "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".[185]

2.2.2.6 Gory v Kolver[186]

In *Gory* (CC) the question was whether the deceased and his male partner (the applicant) were involved in a permanent life partnership, with reciprocal duties of support.[187] This aspect was contested by the parents of the deceased, who asserted their sole right as heirs to their son's estate who died in 2005 without leaving a will.[188] The same-sex partners did not have a marriage ceremony but the deceased partner presented the applicant with an expensive ring that they referred to as his wedding band and that they displayed to certain family members of the deceased at a social event while mentioning that this was the "real thing" when referring to their

[179] *Volks* paras 151-152.
[180] *Volks* para 213.
[181] *Volks* para 215.
[182] *Volks* para 215.
[183] *Volks* para 215.
[184] *Volks* para 215.
[185] *Volks* para 218.
[186] 2007 4 SA 97 (CC).
[187] *Gory* (CC) para 1.
[188] *Gory* (CC) para 3.

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relationship.[189] This public proclamation of their relationship was viewed by the court *a quo* as similar to that of a marriage ceremony.[190] The parties lived together in a common home that was purchased jointly although the ownership was only registered in the one partner's name because the other partner was HIV-positive. They had intended to draw up an agreement recording the non-owner's half-share interest in the property but had not done so by the time that the owner died.[191] Both partners contributed to the costs of their shared home and jointly contributed towards the bond payments and household necessities.[192]

Whether a reciprocal duty of support existed was core to the applicant's case.[193] The court inferred the reciprocal duty of support from the existence of factors indicating that the life partnership was similar to a marriage:

> "The evidence tendered by the applicant that there was a permanent partnership in which the partners had undertaken reciprocal duties of support is convincing and corroborated in many ways… [t]he result in my view is that it is evident that, if it was possible for the applicant and deceased to get married, they would have got married..."[194]

Therefore, Hartzenberg J had "no hesitation in finding that they *assumed reciprocal duties of support*"(Own emphasis).[195]

Based on the factual findings of the court *a quo* the Constitutional Court found that section 1(1) of the ISA was unconstitutional for not including partners in a permanent same-sex life partnership who had undertaken reciprocal duties of support.[196]

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[189] *Gory v Kolver* 2006 (5) SA 145 (T) (*Gory* (T)) para 7. The facts were not repeated in the Constitutional Court decision, and this necessitates reference to the court *a quo* for the facts (*Gory* (CC) para 2).
[190] *Gory* (T) para 18.
[191] *Gory* (T) paras 5 and 6.
[192] *Gory* (T) para 6.
[193] *Gory* (T) paras 1, 4 and 18.
[194] *Gory* (T) para 18.
[195] *Gory* (T) para 18.
[196] *Gory* (CC) para 43.

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2.2.2.7 Other relevant cases

In *Du Plessis v Road Accident Fund*[197] (*Du Plessis*) the Supreme Court of Appeal clarified the meaning of the phrase "undertaken a duty of support" as used in *Satchwell* (CC). For the dependant's action to succeed in a life partnership a legal enforceable duty of support must exist.[198] To reach this conclusion the court had to determine whether the relationship was similar to a marriage and this in the court's view, implied considering the requirements for a life partnership,[199] and whether a reciprocal duty of support existed between the partners,[200] which was in essence similar to the process in *Satchwell* (CC) where the court determined whether the life partners were eligible for recognition and relief.[201]

In *Du Plessis* a surviving life partner and his male partner were in a partnership for eleven years when the appellant's partner died in a motor vehicle accident and claimed for loss of support.[202] The partners had a non-legal ceremony as close as possible to an opposite-sex marriage before witnesses in order to show the seriousness of their relationship and to publicise their commitment.[203] They confirmed that if it had been possible, they would have married.[204] The partners were acknowledged as a married couple by their families and friends and lived in a common home in a stable and permanent relationship but there was no indication of joint ownership of their family home.[205] They however pooled their income.[206] When the plaintiff was medically boarded in 1994 and his income was substantially reduced, his partner said that he would support him, which he did until he died.[207] The partners were further sole heirs

197 2004 1 SA 359 (SCA).
198 *Du Plessis* para 11. On the duty of support and the dependant's action, see Smith and Heaton "Extension of the dependant's action to heterosexual life partners after *Volks NO v Robinson* and the coming into operation of the Civil Union Act – thus far and no further?" 2012 *THRHR* 473; Scott "Erkenning van deliktuele vordering van deelgenoot aan permanente heteroseksuele verhoudings weens doodslag van 'n ander deelgenoot" 2013 *TSAR* 784; Scott "The *boni mores* takes a strange turn" 2019 *TSAR* 805.
199 *Du Plessis* para 13.
200 *Du Plessis* para 14.
201 Smith and Heaton 2012 *THRHR* 473 and Scott 2013 *TSAR* 786.
202 *Du Plessis* para 15.
203 *Du Plessis* para 14.
204 *Du Plessis* para 14.
205 *Du Plessis* para 15.
206 *Du Plessis* para 15.
207 *Du Plessis* para 4.

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in each other's wills.[208] The fact that the parties had gone through a marriage ceremony similar to an opposite-sex marriage ceremony was to the court an indication that they had tacitly undertaken a duty of support.[209] It was clear from the circumstances that they lived together and that they supported each other throughout the duration of their permanent life partnership.[210]

In *Du Plessis,* Cloete JA held that while the recognition of a reciprocal duty of support had long been tied to opposite-sex civil marriages, the Constitutional Court in *National Coalition* had already acknowledged same-sex conjugal relationships as "another form of life partnership".[211] Additionally, *Satchwell* (CC) expressly stated that a duty in such relationships could be inferred from the facts of a particular case, depending on the surrounding circumstances.[212] Although the word "inferred" is used in *Satchwell* (CC), read in context the court required that the parties have "undertaken and committed themselves" to support each other and the duty of support was not merely inferred from the facts but a tacit agreement to maintain was established through the surrounding circumstances proved by the plaintiff.[213] In *Du Plessis*, on the other hand, the court required the plaintiff to prove "a legally enforceable duty of support on the part of the deceased".[214] Cloete JA held that the facts placed before the court in this case made an even more compelling case for such a duty than in *Satchwell* (CC).[215] The court found that by undergoing a marriage ceremony before witnesses similar to an opposite-sex marriage, the parties expressed their intention to enter into a relationship similar to a marriage with all its consequences, including a reciprocal duty of support.[216] From this it followed that the parties "tacitly undertook a reciprocal duty of support".[217] The court then stated that "by such an undertaking …[t]he deceased, therefore, owed the plaintiff a contractual duty of support".[218] The court concluded that "the plaintiff proved that the deceased undertook to support him with the intention of

[208] *Du Plessis* para 15.
[209] *Du Plessis* para 14.
[210] *Du Plessis* para 14.
[211] *Du Plessis* para 12 in referring to *National Coalition*.
[212] *Du Plessis* para 13.
[213] *Satchwell* (CC) para 34. See discussion of *Satchwell* (CC) in para 2.2.2.4 above.
[214] *Du Plessis* para 11.
[215] *Du Plessis* paras 14-16.
[216] *Du Plessis* para 14.
[217] *Du Plessis* para 14.
[218] *Du Plessis* para 15.

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being legally bound by such an undertaking".[219] A duty of support was therefore not merely inferred from the facts but established through proof of a contractual duty of support which was undertaken tacitly.[220] The court thus requires that the contractual duty of support cannot merely be inferred from the surrounding circumstances but that a tacit contract must be established through proof of the conduct of the parties.[221] Permanence was not sufficient to infer a tacit contractual duty of support – the partners must in addition to the permanence prove that they have undertaken a contractual duty of support.[222]

2.2.3 *Recognition after enactment of the Civil Union Act*

2.2.3.1 Introduction

After the enactment of the CUA, same-sex partners were given the choice to formalise their union on the same basis as opposite-sex couples. In *Paixão v RAF*[223] (*Paixão* (SCA)) the court found that a tacit agreement between the parties in an opposite-sex life partnership established a reciprocal duty of support worthy of protection by the law.[224] By following the approach in *Paixão* (SCA) the Constitutional Court in *Bwanya* (CC) moreover, levelled-up the position of opposite-sex permanent life partners by also affording them the same recognition and protection under ISA and MSSA as same-sex permanent life partners, as explained in more detail below. After the decision in *Bwanya* (CC) it is also deemed prudent to refer to other cases such as *McDonald v Young*[225] (*McDonald*), *Verheem v Road Accident Fund*[226] (*Verheem*) and *Jacobs v RAF*[227] (*Jacobs*) that explains the reasoning behind the acknowledgement of opposite-sex life partnerships and the role of the duty of support. Most recently, the court in *EW v VH (Women's Legal Centre Trust as amicus curiae)*[228] (*EW*) was confronted for the first time with a claim for maintenance by a life partner after the

[219] *Du Plessis* paras 15-16.
[220] *Du Plessis* para 15.
[221] *Du Plessis* paras 14-16.
[222] *Du Plessis* paras 15 and 16.
[223] 2012 (6) SA 377 (SCA).
[224] *Paixão* (SCA) para 36.
[225] 2012 3 SA 1 (SCA).
[226] 2012 2 SA 409 (GNP).
[227] 2019 2 SA 275 (GP).
[228] 2023 2 All SA 404 (WCC).

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termination of an opposite-sex life partnership not based on the death of one of the partners. The court found that although in principle such a partner might have a claim it was not prepared to decide on the matter because the legislature is in the process of drafting legislation in this regard.[229]

2.2.3.2 *Paixão v RAF*[230]

Although *Paixão* (SCA) concerns a dependant's claim,[231] it paved the way for the decision in *Bwanya* (CC) to depart from the precedent in *Volks* and requires a brief summary before *Bwanya* (CC) is discussed. According to the court for the Plaintiff to succeed with the dependant's claim the plaintiff had to prove that there was a legally enforceable right to claim maintenance from the deceased.[232] A legally enforceable right does not only entail a duty of support but also that the duty of support must be worthy of protection.[233] Whether the duty of support is worthy of protection will depend on the nature of the relationship, being akin to a family relationship, between the parties and whether the *boni mores* regards the duty of support in such a relationship as worthy of protection.[234]

The deceased man was married in Portugal under Portuguese law, but he was separated from his wife for some time before his death.[235] During the existence of the marriage, in 2003, he started to live with another woman in South Africa.[236] His marriage was dissolved in June 2007, and he died in a motor vehicle accident in January 2008 only six months after the dissolution of his marriage.[237] The marriage-like nature of the life partnership was of importance and the court referred to these factors to indicate that the deceased cohabitant had established the existence of a tacit agreement to support the claimant, while the deceased was still married to his

[229] *EW* para 32.
[230] 2012 (6) SA 377 (SCA).
[231] *Paixão* (SCA) para 36.
[232] *Paixão* (SCA) para 12.
[233] *Paixão* (SCA) para 12.
[234] *Paixão* (SCA) para 17.
[235] *Paixão* (SCA) para 5.
[236] *Paixão* (SCA) para 7.
[237] *Paixão* (SCA) para 10.

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Portuguese wife.[238] Mathlopo J in the court *a quo*[239] ruled that South African law does not allow for a married party to be a spouse in another marriage. Accordingly, the law also does not allow anyone to be a partner in a permanent life partnership and a legally valid marriage simultaneously.[240] On appeal the court held that a tacit agreement between the parties in an opposite-sex life partnership established a reciprocal duty of support worthy of protection by the law, even though the deceased was in a valid marriage with another woman.[241] According to the court, this was determined by a change in the *boni mores.*[242] Cachalia JA said that he did not wish to "demean the value of the importance placed by society on marriage as an institution" but rather wanted to extend the protection provided by the law to the dependants of a deceased.[243] The court emphasised that the life partnership functions as a family and highlighted the growing acceptance of life partnerships by the general community and emphasised the marriage as a traditional family form is no longer the norm in South Africa.[244] This "general sense of justice of the community" demanded that the protection afforded by the common law by the dependant's action be extended to opposite-sex life partners who had concluded a contract for reciprocal support.[245] This extension was thus made because the nature of the relationship was similar to the family relationship in a legally recognised marriage.[246]

In essence the court inferred a tacit contract for reciprocal support from the life partners conduct and surrounding circumstances:[247]

> "Proving the existence of a life partnership entails more than showing that the parties cohabited and jointly contributed to the upkeep of the common home. It entails, in my view, demonstrating that the partnership was akin to and had similar characteristics — particularly a reciprocal duty of support — to a

[238] *Paixão* (SCA) para 20. See Scott 2013 *TSAR* 787 who maintains that the decision is incorrect and implies that life partners have more legal protection than spouses.
[239] *Paixão v RAF* 2011 ZAGPJHC 68 (*Paixão* (JHC)).
[240] *Paixão* (JHC) paras 28-30.
[241] *Paixão* (SCA) para 36.
[242] *Paixão* (SCA) para 13.
[243] *Paixão* (SCA) para 40.
[244] *Paixão* (SCA) paras 31-36.
[245] *Paixão* (SCA) para 36.
[246] *Paixão* (SCA) para 40.
[247] *Paixão* (SCA) para 39.

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> marriage. Its existence would have to be proved by credible evidence of a conjugal relationship in which the parties supported and maintained each other. The implied inference to be drawn from these proven facts must be that the parties, *in the absence of an express agreement, agreed tacitly that their cohabitation included assuming reciprocal commitments* — ie a duty to support — to each other."[248]

The court noted in this regard the deceased had in fact supported the claimant and her daughters for more than five years.[249] She had moved in with the deceased in 2003 while recovering after a period in hospital.[250] The claimant nursed him and he supported her financially during this period.[251] A year later, the claimant was retrenched from her job.[252] The deceased told her that she should not go back to work.[253] He undertook to support her and her children, and he did just that, "by taking full responsibility for the family's food, holidays…" as well as the university education of one of the claimant's daughters and the school fees of another.[254] The deceased and the claimant executed a joint will in 2005 in which they each nominated the other as sole heir of the entire estate of the first dying.[255] They were regarded in a permanent relationship by the people close to them and the deceased promised to marry the claimant in the future but it never happened.[256] The court was not of the opinion that cohabitation would always give rise to an enforceable duty of support, even when cohabitation was of long duration.[257] The court required that the parties have subjectively committed themselves to a reciprocal duty of support.[258]

At first it seems that the *Paixão* (SCA) decision is contrary to that of *Volks* which, based on the choice argument, found that no duty of support is created between opposite-sex life partners. However, *Paixão* (SCA) can be distinguished from *Volks* and is not

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[248] *Paixão* (SCA) para 29. My emphasis.
[249] *Paixão* (SCA) para 20.
[250] *Paixão* (SCA) para 19.
[251] *Paixão* (SCA) para 20.
[252] *Paixão* (SCA) paras 8 and 20.
[253] *Paixão* (SCA) para 8.
[254] *Paixão* (SCA) para 8.
[255] *Paixão* (SCA) paras 19-20, 7-9.
[256] *Paixão* (SCA) paras 20 and 21.
[257] *Paixão* (SCA) para 17.
[258] *Paixão* (SCA) para 17.

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bound to the precedent in *Volks*. The claim in *Paixão* (SCA) was based on a tacit contractual agreement that established a duty of support as opposed to *Volks* where the issue was "whether a spousal benefit arising from a legally recognised marriage should also be available to a surviving partner of a life partnership".[259] The duty of support in *Paixão* was based on a contract between the partners instead of an extension of the *ex lege* duty of support.[260]

2.2.3.3 *Bwanya v Master of the High Court, Cape Town*[261]

In *Bwanya* (CC) the applicant, Ms Bwanya, and the deceased, Mr Ruch, were life partners who cohabited from 2014 until the death of Mr Ruch's in April 2016.[262] The people close to them acknowledged the fact that they were in a marriage-like relationship and that they were engaged.[263] They wanted to get married and discussed the option of having a baby.[264] Ms Bwanya was provided with financial support by Mr Ruch, and she provided him with "love, care, emotional support, and companionship".[265] Mr Ruch's passed away unexpectedly before they could travel to Zimbabwe to Ms Bwanya's family for *lobolo* negotiations.[266] The sole heir of Mr Ruch's estate was his mother, as nominated in his will.[267] However, his mother had predeceased him in 2013. He consequently died intestate.[268] Ms Bwanya lodged one claim in terms of the ISA and the other in terms of the MSSA against the deceased estate of Mr Ruch.[269] The claims were rejected by the executor of the deceased estate on the basis that the ISA and the MSSA afforded benefits only to married persons.[270] Ms Bwanya challenged the constitutionality of both Acts.[271]

Ms Bwanya argued that the term "spouse" in the ISA and the MSSA was unconstitutional and should be remedied by reading in "or partner in a permanent

[259] *Paixão* (SCA) para 26.
[260] *Paixão* (SCA) para 22.
[261] 2022 3 SA 250 (CC).
[262] *Bwanya* (CC) paras 3 and 7.
[263] *Bwanya* (CC) paras 4 and 6.
[264] *Bwanya* (CC) paras 4 and 6.
[265] *Bwanya* (CC) para 5.
[266] *Bwanya* (CC) para 6.
[267] *Bwanya* (CC) para 7.
[268] *Bwanya* (CC) paras 7.
[269] *Bwanya* (CC) para 8.
[270] *Bwanya* (CC) para 8-9.
[271] *Bwanya* (CC) para 9.

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opposite-sex life partnership in which the partners have undertaken reciprocal duties of support".[272] She further claimed that the definition of “marriage” in section 1 of the MSSA is invalid and unconstitutional and should be remedied by reading in “a person in a permanent life partnership in which the partners undertook reciprocal duties of support”.[273]

Ms Bwanya’s challenge to ISA’s wording was based on *Gory* (CC) and *Laubscher,*[274] where benefits under the ISA were extended to partners "in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support".[275] In *Bwanya* (CC) the challenge to the constitutionality of ISA was based on the argument that to afford benefits to unmarried same-sex life partners and not to unmarried opposite-sex life partners will amount to discrimination based on sexual orientation.[276] The Constitutional Court confirmed the order of the Western Cape High Court that failure to extend ISA benefits to opposite-sex life partners would be unfair discrimination based on sexual orientation.[277]

Ms Bwanya’s challenge to the MSSA included that the words “have undertaken reciprocal duties of support” should be read in.[278] The High Court challenge that she relied on included an argument similar to the one used in *Volks.*[279] She claimed that the MSSA was unconstitutional because it did not provide protection to opposite-sex unmarried permanent life partners who had been in a life partnership similar to a marriage.[280] Therefore, discrimination based on marital status was the issue that lead to a violation of her right to dignity.[281] The Western Cape Division of the High Court was unable to make a decision on this ground as the court felt itself bound to the decision by the Constitutional Court in *Volks*.[282] The Constitutional Court in *Volks* held that the failure of the MSSA to include unmarried opposite-sex life partners under the

[272] *Bwanya* (CC) para 9.
[273] *Bwanya* (CC) para 2.
[274] *Bwanya* (WCC) paras 154-155.
[275] *Bwanya* (WCC) para 146. Also see *Gory* (CC) para 43 and *Laubscher* para 2.
[276] *Bwanya* (CC) para 2.
[277] *Bwanya* (WCC) para 92.
[278] *Bwanya* (WCC) para 2.
[279] Para 2.2.2.5.
[280] *Bwanya* (WCC) para 2.
[281] *Bwanya* (WCC) para 2.
[282] *Bwanya* (WCC) para 200.

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definition of a spouse did not constitute impermissible discrimination on the ground of marriage, nor infringed upon the dignity of the claimant.[283] Ms Bwanya appealed to the Constitutional Court to overturn its own precedent.[284] In *Bwanya* (CC) Madlanga J emphasised that the doctrine of precedent is a core component of the rule of law without which decision on legal issues would be "directionless and hazardous".[285] The *Volks* decision was clear on the fact that discriminating between couples who were formally married and unmarried life partners in very identical situations was not unreasonable.[286] The justification of the majority in *Volks* for this was that unmarried life partners had intentionally chosen "not to marry" and can therefore not claim the same protection as married couples.[287] In considering whether the court was bound by the *Volks* judgment, the majority in *Bwanya* (CC) per Madlanga J stated that the court had additional information available that was not available to the court at the time of the *Volks* decision and from that information it is clear that for many women there is no economic independence and in many permanent life partnerships "the choice not to marry is illusory".[288] In *Bwanya* (CC) the court focused on whether having a "choice" not to marry is a "real choice" in all situations.[289] The court found that choice was a question of fact and not a question of law and therefore differed from case to case.[290] The question is not whether there is absolutely no choice but whether the choice may realistically be exercised.[291] The court considered the real question of importance to be whether life partners in unmarried permanent life partnerships are entitled to legal and constitutional protection.[292]

The *Bwanya* (CC) majority relied on the Supreme Court of Appeal decision in *Paixão* (SCA) and not the majority decision in *Volks.*[293] The court noted that since

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[283] *Bwanya* (WCC) para 12.
[284] *Bwanya* (CC) para 37.
[285] *Bwanya* (CC) para 46.
[286] *Bwanya* (CC) para 40.
[287] *Volks* paras 58 and 91-93.
[288] *Bwanya* (CC) paras 62 and 64**.** The courts argument in *Bwanya* (CC) is explained in *KRG v Minister of Home Affairs* para 9: "The Constitutional Court [in *Bwanya* (CC)] held that the question is not whether there absolutely is a choice, but whether, realistically, in the particular circumstances, a choice may be exercised".
[289] *Bwanya* (CC) para 61.
[290] *Bwanya* (CC) para 61.
[291] *Bwanya* (CC) para 64.
[292] *Bwanya* (CC) para 68.
[293] *Bwanya* (CC) para 71.

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Volks, the common law was developed substantially.[294] The court in *Paixão* (SCA) found that a legally enforceable duty of support did indeed exist between the deceased and Mrs Paixão during their life partnership, based on the law of contract, even though the deceased was in a valid marriage with another woman.[295] Through the partner's conduct and the surrounding circumstances it was determined that a tacit contract of reciprocal support existed between the partners.[296] In *Bwanya* (CC), the court held that *Paixão* (SCA) was not only based on contract but also whether the parties were in a relationship akin to marriage.[297] According to the court in *Bwanya* (CC), the Supreme Court of Appeal in *Paixão* (SCA) would not have supported the delictual claim if the contract was entered into between friends and not life partners in a permanent life partnership. According to *Bwanya* (CC), the Supreme Court of Appeal in *Paixão* (SCA), held that the marriage-like relationship established the right to be afforded legal protection.[298] The court in *Bwanya* (CC) found that there is no need to distinguish between the reciprocal duty of support in marriage and life partnerships on the basis that the one arises automatic by operation of law as an invariable consequence of marriage and the other by contract.[299] Due to the fact that the duty of support in a life partnership is based on contract the court included "undertaken a duty of support" in its order.[300]

The *Bwanya* (CC) judgment ruled that denial of the section 2(1) maintenance benefit in terms of the MSSA to permanent life partners who had undertaken duties of reciprocal support constitutes unfair discrimination.[301] *Bwanya* (CC) endorsed the perception that families are many and varied and that all forms, including life partnerships, are worthy of protection by the law.[302]

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[294] *Bwanya* (CC) para 71.
[295] *Paixão* (SCA) para 36.
[296] *Paixão* (SCA) paras 19-21.
[297] *Paixão* (SCA) para 39 quoted in *Bwanya* (CC) para 71.
[298] *Bwanya* (CC) para 71. Further see Barratt 2022 *PELJ* 7.
[299] *Bwanya* (CC) para 71.
[300] Madlanga J, in the majority decision stated: "with this development, it seems to me it can no longer be fitting to distinguish the duty of support existing in the two categories of familial relationships (i.e. marriage relationship and permanent life partnership) purely on the basis that one arises by operation of law and the other arises from agreement" (*Bwanya* (CC) para 71). For the order see *Bwanya* (CC) para 95.
[301] *Bwanya* (CC) para 73.
[302] *Bwanya* (CC) para 32.

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Notwithstanding the *Volks* decision, the Constitutional Court in *Bwanya* (CC) extended the application of the ISA and the MSSA to all permanent life partners "in which the partners undertook a reciprocal duty of support".[303] The ISA and MSSA has subsequently been amended by the JMAA.[304] Section 1 of ISA was amended by inserting subsection (1A) "the word 'spouse', wherever it appears in this section, includes a partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support".[305] The definition "marriage" in section 1 of MSSA was amended to include "for the purposes of this Act includes a permanent life partnership in which the partners undertook reciprocal duties of support".[306] The definition of "spouse" in section 1 of MSSA was amended to include "for the purposes of this Act, includes a person in a permanent life partnership in which the partners undertook reciprocal duties of support".[307] The definition of the word "survivor" in section 1 of the MSSA "includes the surviving partner of a permanent 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".[308] The differentiation in the recognition of same-sex and opposite-sex life partnerships has thus been removed. The consequences of same-sex and opposite-sex life partnerships are now the same as far as their entitlement to claim under the ISA and MSSA are concerned.[309]

The aspect of the *Bwanya* (CC) judgment that is of particular importance for purposes of the present study is the fact that life partnerships would be recognised for purposes of these Acts only if "the parties undertook a reciprocal duty of support".[310] The requirement of such an undertaking seems to contradict the initial claim by the applicant in *Volks* to the extent that she wanted the court to find that life partnerships *per se* give rise to an *ex lege* duty of support.[311] While it is not made entirely clear, the court in *Bwanya* (CC) seems to impose on life partners an additional burden in the

[303] *Bwanya* (CC) para 95.
[304] GN 4597 in *GG* 50430 of 3 April 2024.
[305] S 14 of the JMAA.
[306] S 15(a) of the JMAA.
[307] S 15(b) of the JMAA.
[308] S 15(c) of the JMAA.
[309] *Bwanya* (CC) paras 81-93.
[310] *Bwanya* (CC) para 95.
[311] See para 2.2.2.5 above.

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form of proving that there was an undertaking of support between themselves in addition to proving the existence of a life partnership.[312]

2.2.3.4 *EW v VH (Women's Legal Centre Trust as amicus curiae)* [313]

In this case the applicant and respondent were in a relationship for nine years. The responded vacated their common home on 6 April 2022 when the relationship deteriorated.[314] The applicant brought a claim against her partner for interim maintenance in terms of the common law or in the alternative if the common law does not "recognise an *ex lege* duty of support for unmarried opposite-sex life partners" to develop the common law.[315] Consequently this is the first case where a partner in a life partnership brought an interim application for support similar to spousal support after the termination of their relationship not brought about by the death of one of the partners.

The couple entered their relationship while still involved with previous partners, but eventually moved in together and cohabited until April 2022.[316] They had three children together.[317] The applicant claimed that she was a party to a permanent life partnership with the respondent in which they have undertaken mutual duties of support.[318] The applicant confirmed that the permanent life partnership was established, among other things, by the fact that the parties were involved in a romantic relationship for over nine years, the parties participated in a ceremony similar to a marriage, they are the parents of three minor children born from the relationship, they shared a home for more than seven years, in the eyes of the community they were seen as married, they referred to each other as spouses, the respondent supported the applicant financially, the parties contributed to the expenses of their common home relative to their means, the parties provided emotional support, love and affection towards each other, and the applicant raised their minor children.[319] The majority judgment found that the applicant could not make a claim for interim maintenance, as would usually be the case at

[312] *Bwanya* (CC) para 95.
[313] 2023 2 All SA 404 (WCC).
[314] *EW* para 1.
[315] *EW* para 2.
[316] *EW* para 1.
[317] *EW* para 1.
[318] *EW* para 3.
[319] *EW* para 60.

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divorce proceedings, because the current legislation around life partnerships was not finalised.[320] The application was dismissed without a cost order.[321] The court established that a duty of support can be established under certain circumstances[322] but the court was nevertheless of the opinion that the *ex lege* duty of support of life partners should be determined by the legislature and not the court.[323]

2.2.3.5 Other cases

The cases below relate to how a contractual duty of support must be established for the recognition and relief of a life partnership. The approach on how an "undertaking to support" between life partnerships should be proved is relevant with reference to *Bwanya* (CC) to determine whether a duty of support has been established by agreement. In other words, to establish whether the parties have "undertaken a duty of support" it may be assumed an approach similar to that followed in the cases discussed below will be followed by the courts.

(a) *McDonald v Young*[324]

In *McDonald v Young* (*McDonald*) the appellant and the respondent lived together for almost seven years in an opposite-sex life partnership.[325] The parties were both in their fifties when they met.[326] The appellant had no regular income and no assets at the time of entering the relationship while the respondent on the other hand was a woman of considerable means.[327] The appellant confirmed that an express oral joint venture relating to immovable property existed between them and that the agreement had been entered into with the aim of securing his financial independence.[328] The probability of a joint venture agreement was contrary to all reasonable probabilities

[320] *EW* paras 26-29.
[321] *EW* para 53.
[322] *EW* para 41.
[323] *EW* para 32. In the dissenting judgement Wille J however, confirmed that the applicant must first prove the facts establishing that the duty of support existed, and that it existed in a familial setting. When proven, the applicants right to legal protection will be established. The minority judgement hints at the second approach in *EW* paras 60-64.
[324] 2012 3 SA 1 (SCA).
[325] *McDonald* para 1.
[326] *McDonald* para 3.
[327] *McDonald* para 3.
[328] *McDonald* para 4.

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and had to be dismissed.[329] In the alternative he claimed maintenance on the basis of an *ex lege* duty of support owed by the respondent,[330] alternatively that the respondent tacitly assumed a contractual obligation to support him.[331] The appellants evidence and reliance on a tacit maintenance agreement was contradictory to the claim that an express joint venture agreement pertaining to property had been concluded.[332] The aim of this agreement had been to secure the appellant's financial independence which is contrary to entering a tacit contract in terms of which the respondent would maintain him for an indefinite period.[333] The court found that it cannot infer a tacit contract in direct contrast to the appellant's testimony.[334] The court confirmed that a tacit contract is inferred from surrounding facts, conduct and circumstances.[335] The respondent's conduct was not consistent with a tacit undertaking to maintain the appellant.[336] Evidence of this was that the appellant had throughout the course of the relationship drafted agreements and proposals aimed at defining the party's financial relationship and had testified that the reason for doing so was to avoid that he ends up without any means if the relationship were to terminate.[337] The court however, had no objection to the possibility of finding a tacit agreement to support, from the conduct of the parties, to be drawn in appropriate circumstances.[338]

(b) *Verheem v Road Accident Fund*[339]

Verheem v Road Accident Fund (*Verheem*) is authority for the recognition of a contractual reciprocal duty of support relating to an opposite-sex life partnership.[340] The plaintiff and her male life partner had cohabited for thirteen years in a permanent life partnership, they had two children together and the deceased raised a child born to the plaintiff before he had met her along with the parties' two children.[341] They were

[329] *McDonald* para 14.
[330] Relying on *Volks* the court confirmed that cohabitation does not give rise to an *ex lege* duty of support para 19 and *Paixão* (SCA) para 26.
[331] *McDonald* paras 15 - 21.
[332] *McDonald* para 14.
[333] *McDonald* para 22.
[334] *McDonald* para 23.
[335] *McDonald* para 24 and *Paixão* (SCA) para 18.
[336] *McDonald* para 13-14.
[337] *McDonald* para 24.
[338] *McDonald* para 25.
[339] 2012 2 SA 409 (GNP).
[340] *Verheem* para 4.
[341] *Verheem* para 2.

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regarded as a committed couple by family and friends, and they had intended to marry but financial constraints precluded them.[342] The court found that the plaintiff proved a tacit contract with the deceased from the surrounding circumstances including that the deceased was the sole breadwinner and she had to attend to the household and children, and she was completely dependent on him.[343] This agreement to support "was not merely an undertaking but was in fact a binding contract in that the deceased clearly did so with the intention of being legally bound".[344] The behaviour of the parties was thus deemed sufficient to recognise a contractual duty of support in this case.[345]

(c) *Jacobs v RAF*[346]

In *Jacobs* the court found that the deceased had a duty to support his life partner even though he was in a co-existing marriage.[347] The court found that a duty of support was established through a tacit contract inferred from the surrounding circumstances and conduct of the parties.[348] The claimant as an unmarried person in an opposite-sex life partnership succeeded with the dependant's action.[349] Collis J found that cohabitation as an alternative to marriage, even where one of the parties is married to someone else is widely accepted in the South African community, presumably with the intention of indicating that the *boni mores* has changed and a tacit agreement to support under these circumstance would not be regarded as *contra bonis mores*.[350]

2.3 Conclusion

From the foregoing discussion it seems as though the judiciary has adopted two different approaches as far as it relates to the role of a duty of support in recognising life partnerships and in determining whether life partners could qualify for spousal benefits.

[342] *Verheem* para 2.
[343] *Verheem* para 4.
[344] *Verheem* para 12.
[345] *Verheem* para 4.
[346] 2019 2 SA 275 (GP).
[347] *Jacobs* paras 20-22.
[348] *Jacobs* paras 12-13.
[349] *Jacobs* paras 21-22.
[350] *Jacobs* para 20.

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In the first approach followed in *Langemaat* and *Satchwell* (T) the courts inferred a duty of support between life partners from the fact that they lived together with some form of permanence.[351] The courts did not require additional proof of any contractual undertaking of support from the parties and suggested that the duty of support could be inferred when the parties lived in a permanent life partnership akin to marriage.[352] Sachs J, in one of the minority decisions in *Volks*, states clearly "that responsibility for maintenance can arise not only from express or tacit agreement but directly from the nature of the particular life partnership itself".[353] In terms of the first approach, support is seen as one of the many non-exhaustive factors indicating and pointing towards the permanence of a life partnership.[354] According to this approach, a duty of support can be inferred when the permanence of a life partnership has been proved.[355]

The first approach followed in *Langemaat*[356] and *Satchwell* (T)[357] differs from the second approach followed in *Satchwell* (CC)[358] and *Bwanya* (CC).[359] Under the second approach a duty of support cannot be inferred even though the parties had lived together with some form of permanence. According to *Bwanya* (CC) and *Satchwell* (CC) the parties must also have undertaken a duty of support towards each other to qualify for spousal benefits.[360] In addition to a measure of permanence, a duty of support is thus seen as an additional, separate pre-requisite to qualify for recognition and relief.[361] Under this approach the parties must, in addition to the permanence of the life partnership, prove that they did indeed undertake to support each other, either tacitly or expressly.[362] The rationale behind this approach seems to be that only the conclusion of a marriage can create an *ex lege* duty of support between partners.[363] When a marriage terminates such a duty can only exist if it is extended by agreement,

[351] *Langemaat* 316H and Smith (2009) 214.
[352] *Langemaat* 316H.
[353] *Volks* para 215.
[354] *National Coalition* para 88.
[355] Schäfer 2006 *SALJ* 629-630.
[356] Para 2.2.2.2.
[357] Para 2.2.2.4 n 48.
[358] Para 2.2.2.4.
[359] Para 2.2.3.3.
[360] Paras 23, 24, 38; Barratt 2022 *PELJ* 11 and Smith (2009) 214.
[361] Schäfer 2006 *SALJ* 630.
[362] *Satchwell* (CC) paras 23, 24 and 34.
[363] *Volks* para 56.

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court order or legislation.[364] To apply similar consequences to a life partnership the relationship must have been akin to marriage, in other words not only did a *consortium omnis vitae* exist[365] between the life partners but the parties must also have undertaken a duty of support.[366]

According to the second approach simply proving a life partnership is not enough to recognise a life partnership but proof of a contractual undertaking of a duty of support is also required.[367]

The reasoning of the second approach was extended in *Satchwell* (CC) to same-sex partners prior to the CUA who could not conclude a valid marriage at that time. For a life partner to obtain pension benefits under the Judges' Remuneration and Conditions of Employment Act the parties had to have "undertaken a duty of support" as confirmed in the second approach followed by the South African courts.[368] In interpreting the decision of *Satchwell* (CC), the court in *Du Plessis* emphasised that to "undertake a duty of support" implies an express or tacit contractual undertaking.[369] In the instance of opposite-sex life partnerships, the contractual duty of support was not deemed adequate in *Volks*, since the parties had the "choice" to marry.[370] However, the courts started to deviate from this approach in delictual claims for opposite-sex life partnerships in cases such as *Paixão, Verheem* and *Jacobs*.[371] Eventually the Constitutional Court in *Bwanya* (CC) moved away from non-recognition of opposite-sex life partnerships but insisted that the parties had "undertaken a duty of support".[372]

In terms of the second approach, it seems as though the courts will have to establish a contractual duty of support in order to extend spousal consequences to a permanent life partnership.[373] The emphasis has therefore changed from the mere existence of a permanent life partnership from which a contractual duty of support can be inferred,

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[364] Heaton and Kruger (2015) 157.
[365] The factors provided in *National Coalition* to prove the existence of a life partnership effectively determines whether there is *consortium omnis vitae* (Schäfer 2006 *SALJ* 629-630).
[366] *Satchwell* (CC) para 34.
[367] *Satchwell* (CC) para 34.
[368] *Satchwell* (CC) para 34.
[369] *Du Plessis* para 15.
[370] *Volks* paras 57 and 60.
[371] Paras 2.2.3.2 and 2.2.3.5.
[372] Para 2.2.3.3.
[373] Bonthuys 2004 *SALJ* 885-887.

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such as in *Langemaat* and *Satchwell* (T), to a provable assumption of support. In cases where life partners had not agreed to such an undertaking in express terms, the courts were willing to acknowledge such an undertaking based on the actions and circumstances of the partners to establish a tacit contract of support.[374] In addition to permanence a contract is also required, and this additional onus would seem to limit the extent of the current legal recognition given to life partnerships.[375]

From the first approach it is evident that merely a relationship akin to marriage needs to be proved by any of the indicative factors set out by the court and once proven, a contractual duty of support will be inferred from the permanent nature of the relationship. An undertaking to support, *per se*, is therefore not a prerequisite for recognition of the life partnership.

The courts currently seem to be unanimous in the adoption of the second approach which requires not only proof of a relationship similar in form to marriage but also that the parties have undertaken a duty to support each other.

The next chapter will examine proposed amendments to the South African family law and how the proposals relate to the protection and recognition of life partnerships with reference to the duty of support.

[374] *Satchwell* (CC) and *Bwanya* (CC).
[375] Bonthuys 2004 *SALJ* 886-887.

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Chapter 3: Legislative proposals for the protection of life partnerships with reference to the duty of support in South Africa

3.1 Introduction

The SALRC embarked on an investigation into the plight of domestic partners (as life partners were then called) in 2001 and published a discussion paper in 2003[376] which culminated into a report in 2006.[377] As a result, the DHA published the Domestic Partnerships Bill of 2008 for comment on 14 January 2008.[378] This Bill, however, was never enacted.

In an effort to promote the unification of the various matrimonial laws in South Africa, the SALRC in 2019 embarked on an investigation into the viability of enacting a single marriage statute.[379] After incorporating the comments on its Issue Paper, the SALRC has proposed two Bills: The Protected Relationships Bill and the Recognition and Registration of Marriages and Life Partnerships Bill, collectively referred to as the Single Marriage Statute by the SALRC.[380] The proposals by the SALRC, led to the publication of the Marriage Bill in December 2023[381] by the DHA that makes no mention of life partnerships.[382] To complicate matters further, the SALRC released a discussion paper in June 2023 reviewing aspects of matrimonial property law that considers the possibility of introducing changes to the patrimonial consequences of life partnerships in anticipation of the enactment of the Single Marriage Statute.[383]

This chapter will outline these legislative proposals and critically assess the possible impact should the respective proposals and Bills be enacted. Particular attention will

[376] SALRC *Domestic Partnerships Discussion Paper* (2003).
[377] SALRC *Domestic Partnerships Report* (2006).
[378] *GN* 36 in *GG* 30663 of 14 January 2008.
[379] SALRC *Single Marriage Statute Discussion Paper* (2021) 1 para 1.1.
[380] SALRC *Single Marriage Statute Discussion Paper* (2021) 2 para 1.5.
[381] Marriage Bill [B43-2023] *GG* 49887 of 13 December 2023.
[382] Home Affairs "The consultative stakeholder engagements for the development of the marriages policy" September 2019 https://www.dha.gov.za/index.php/notices/1286-the-consultative-stakeholder-engagements-for-the-development-of-the-marriages-policy#:~:text=The%20new %20single%20 Marriage%20Act,the%20Constitution%20of%20the%20RSA (last accessed 2024-07-10).
[383] SALRC *Matrimonial Property* (2023) xiii para 7.

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be paid to how the proposed legislative provisions envisage the role to be played by the duty of support in the process of recognising and regulating life partnerships.

3.2 Domestic Partnerships Bill

3.2.1 Introduction

The SALRC embarked on an investigation into the legal disadvantages suffered by domestic partners (as life partners were then referred to) in 2006 and concluded that legislation is required to rectify the situation.[384] As a result, the DHA published the Domestic Partnerships Bill of 2008 for comment on 14 January 2008.[385] The Bill provided for the recognition of both registered[386] and unregistered[387] domestic partnerships between same-sex and opposite-sex partners.[388]

3.2.2 Registered domestic partnerships

The Bill provided for partners to register their domestic partnership with a registration official at the DHA in the presence of both partners.[389] Persons married under the Marriage Act or the RCMA, or who entered into a civil union in terms of the CUA, could not register a domestic partnership.[390] Domestic partners could regulate the consequences of their partnership by concluding a partnership agreement.[391] This agreement would be registered and attached to the registration certificate.[392] The partnership agreement could be enforced against third parties.[393] The moment the partnership was registered, certain consequences similar to a marriage automatically attached to the partnership.[394] A reciprocal duty of support, in accordance with the

[384] SALRC *Domestic Partnerships Report* (2006) 7 para 1.2.16.
[385] GN 36 in *GG* 30663 of 14 January 2008.
[386] Ch 3.
[387] Ch 4.
[388] Definition of "domestic partnership" in cl 1: "A registered domestic partnership or unregistered domestic partnership between two persons who are both eighteen years of age or older and includes a former domestic partnership".
[389] Cls 5 and 6.
[390] Cl 4.
[391] Cl 7(3).
[392] Cl 6(6).
[393] Cl 6(6).
[394] Ch 3 part II.

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domestic partners' financial means and needs, was established between the partners at registration of the partnership.[395]

Under the Bill domestic partners did not share their partnership in community of property by default, but the parties could conclude a registered domestic partnership agreement to regulate the financial aspects of their partnership.[396] The domestic partners could agree to pool their resources and share their estate in community of property should they have desired to do so.[397]

The partnership could be terminated by deregistration without intervention by the court if the partners did not have minor children.[398] The partners could enter an agreement on termination to regulate the financial consequences of the termination.[399] If there was a dispute, the partners could approach the court for assistance.[400] Clause 8 made provision for court division of partnership property and clause 22 made provision for an order for the just and equitable division and distribution of the partnership assets. The court could further order one partner to transfer assets to the other partner.[401] However, if the partners had minor children, the domestic partnership could not be terminated by deregistration but had to be terminated by the court to ensure that the interests of the children could be protected.[402]

3.2.3 Unregistered domestic partnerships

Chapter four of the Bill dealt with the legal position of domestic partners on the dissolution of their unregistered domestic partnership. In terms of the Bill unregistered domestic partnerships would not have required any formal commitment or registration.[403] There were no consequences similar to that of marriage for as long as the partnership existed.[404] The Bill proposed that consequences could be attached to

[395] Cl 9.
[396] Cls 7 and 8.
[397] Cl 7.
[398] Cls 12 and 14.
[399] Cl 14.
[400] Cl 12.
[401] Cl 22(3).
[402] Cls 15 and 16.
[403] Definition of "unregistered domestic partnership" in Cl 1.
[404] Ch 3 part II is only applicable to registered domestic partnerships.

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the relationship upon dissolution of the domestic partnership under certain circumstances.[405]

The Bill provided a list of factors that the court had to consider, rather than specific requirements for the recognition of an unregistered domestic partnership.[406] To determine whether a relationship qualified for legal protection at dissolution as an unregistered domestic partnership in terms of the Bill, the court was enjoined to consider the surrounding circumstances and factors such as:

(a) "[T]he duration and nature of the relationship;
(b) the nature and extent of the common residence;
(c) the degree of financial dependence or interdependence and any arrangements for financial support, between the unregistered domestic partners;
(d) the ownership, use and acquisition of property;
(e) degree of mutual commitment to a shared life;
(f) the care and support of children born of the unregistered domestic partnership;
(g) the performance of household duties;
(h) the reputation and public aspects of the relationship; and
(i) the relationship status of the unregistered domestic partnership with third parties."[407]

The above list would not have been a closed list, and the court could have had regard to some or all of the factors, any combination of the factors, or other factors the court deemed appropriate under the circumstances.[408]

In terms of section 26 of the Bill, a partner in an unregistered domestic partnership could seek relief from the court following the termination of the partnership due to separation or the death of the other partner.[409] The Bill therefore provided for unregistered domestic partners to approach the court for relief *ex post facto*.

[405] Cl 26.
[406] Cls 26(2) and 26(3).
[407] Cls 26(2) and 26(3).
[408] Cl 26(3).
[409] Cl 26(1).

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The Bill allowed for property division, intestate succession, and maintenance claims at termination should the parties qualify as unregistered domestic partners.[410] Compliance with clause 26 did not allow the applicant to automatic relief as the relief was reliant on the discretion of the court.[411] Once the relationship was recognised as an unregistered domestic partnership, the court was provided with a wide judicial discretion to make any order pertaining to property division, maintenance, or intestate succession at dissolution of the partnership.[412]

3.2.3.1 Maintenance after separation

The Bill did not provide for an *ex lege* reciprocal duty of support and partners could not claim maintenance from each other during the existence of an unregistered domestic partnership, except as provided for in the Bill.[413] A party in an unregistered domestic partnership could not approach the court for a maintenance order where one of the parties was also a spouse in a civil marriage or civil union or a partner in either a civil partnership or a registered domestic partnership with a third party.[414]

A partner could only apply for maintenance after separation.[415] Under the Bill the court would have had a wide discretion to make an order that was just and equitable.[416] Maintenance awards would be made for a specific period.[417] The Bill provided a list of factors that the court had to consider when deciding whether to award maintenance and determining the amount and nature of the maintenance award. The court would have had to consider:

[410] Cls 26-30. The ISA and the MSSA was recently amended to include all permanent life partners "in which the partners undertook a reciprocal duty of support".
[411] Cls 28-30.
[412] Cls 28-30.
[413] Cl 27.
[414] Cl 26(4).
[415] Cl 28(1).
[416] Cl 28(1).
[417] Cl 28(1).

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(a) "[T]he age of the unregistered domestic partners;
(b) duration of the unregistered domestic partnership;
(c) standard of living of the unregistered domestic partners prior to separation;
(d) the ability of the applicant to support himself or herself adequately in view of him or her having custody of a minor child of the unregistered domestic partnership;
(e) the respective contributions of each unregistered domestic partner to the unregistered domestic partnership;
(f) the existing and prospective means of each unregistered domestic partner;
(g) the respective earning capacities, future financial needs and obligations of each unregistered domestic partner; and
(h) the relevant circumstances of another unregistered domestic partnership or customary marriage of one or both unregistered domestic partners, where applicable, insofar they are connected to the existence and circumstances of the unregistered domestic partnership; and any other factor which, in the opinion of the court, should be considered."[418]

Clause 28 of the Bill did not require the partners to have undertaken a duty of support during the existence of the relationship to qualify for maintenance after dissolution. The listed factors are the same as those listed in section 7(2) of the Divorce Act, which provides for maintenance after divorce.[419] Under both the Bill and the Divorce Act the maintenance clause grants the court extensive powers to order maintenance when the requesting spouse is in need, especially where the requesting spouse's financial dependency results from the family responsibilities they undertook throughout the partnership.[420]

[418] Cl 28(2).
[419] Cl 28(2).
[420] *Kooverjee v Kooverjee* 2006 6 SA 127 (C) and *EH v SH* 2012 4 SA 164 (SCA).

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3.2.3.2 Maintenance after death of an unregistered domestic partner

The Bill made provision for a surviving partner of an unregistered domestic partnership, if dissolved by death, to bring an application to court for an order for the provision for their reasonable maintenance needs from the estate of the deceased to the extent that they were unable to provide for such needs from their own means and earnings.[421] The maintenance order would only have been in force until the surviving domestic partner died, remarried, or entered into another registered domestic partnership.[422]

The court had to consider the following factors when determining the reasonable maintenance needs of the surviving partner in an unregistered domestic partnership under the Bill:

(a) "[T]he amount in the estate of the deceased available for distribution to the heirs and legatees;
(b) the existing and expected means, earning capacity, financial needs and obligations of the surviving unregistered domestic partner;
(c) the standard of living of the surviving unregistered domestic partner during the subsistence of the unregistered domestic partnership and his or her age at the time of death of the deceased;
(d) the existence and circumstances of multiple relationships between the deceased and an unregistered domestic partner, and between the deceased and a customary spouse; and
(e) any other factor the court regards as relevant."[423]

A surviving partner's maintenance claim in a partnership would have held the same preference in claims against the deceased's estate as the claim of a dependent child of the deceased.[424] In the case of competing claims between the dependent child of the deceased and the surviving unregistered domestic partner, the court could consider all the relevant circumstances of the unregistered domestic partnership and

[421] Cl 29(1).
[422] Cl 29(1).
[423] Cl 30.
[424] Cl 29(3)(a).

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make an order that is just and equitable in the circumstances.[425] In the event that the surviving unregistered domestic partner was also the guardian of a minor dependent child of the unregistered domestic partnership, the court would have had to make a just and equitable order regarding the conflicting claims against the deceased estate having regard to all the surrounding circumstances of the unregistered domestic partnership.[426]

3.3 Single Marriage Statute

3.3.1 Introduction

The SALRC's investigation into domestic partnerships seems to have been overrun by the SALRC's investigation into the feasibility of a Single Marriage Statute in South Africa.[427] According to the SALRC the anticipated objective of the legislation is to clarify the application of marriage laws to different relationships, including life partnerships, to provide for validity requirements for and the registration of life partnerships, and to recognise and enforce the rights of parties in life partnerships.[428] The SALRC proposed two Bills, namely the Protected Relationships Bill[429] and the Recognition and Registration of Marriages and Life Partnerships Bill.[430] The only difference between the two Bills is the terminology used. Under the Protected Relationships Bill, marriages and life partnerships are included in the term "protected relationship" whereas under the Recognition and Registration of Marriages and Life Partnerships Bill the protected and recognised relationships are not included under one umbrella term. If enacted, protected life partnerships (under the Protected Relationships Bill) and marriages and life partnerships (under the Recognition and Registration of Marriages and Life Partnerships Bill) would nevertheless be regulated in the exact same way, whatever terms are used.

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[425] Cl 29(3)(b). The court has the same discretion in terms of a competing claims between a surviving partner and a surviving customary spouse cl 29(3)(c).
[426] Cl 29(3)(d). See Cl 29(3) regarding the powers of the executor of the deceased partner's estate and s 2(3)(d) of the MSSA. The ISA and the MSSA were recently amended to include all permanent life partners "in which the partners undertook a reciprocal duty of support".
[427] SALRC *Single Marriage Act Issue Paper* (2019) and SALRC *Single Marriage Statute Discussion Paper* (2021).
[428] SALRC *Single Marriage Statute Discussion Paper* (2021) xi – xii, 31-32.
[429] SALRC *Single Marriage Statute Discussion Paper* (2021) Annexure B1 135-152.
[430] SALRC *Single Marriage Statute Discussion Paper* (2021) Annexure B2 153-171.

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3.3.2 The preamble to the Single Marriage Statute

The suggested preamble acknowledges the current fragmented development of family relationships in South Africa and further acknowledges that the legislature should extend benefits to all relationships worthy of protection. In terms of the preamble legislative recognition of all relationships will establish a fair outcome should disputes arise and will promote the right to equality, dignity and freedom of conscience, religion, thought and opinion.[431]

The preamble to the Single Marriage Statute declares life partnerships may be worthy of protection and for that reason require recognition to prevent discrimination based on marital status[432] and sets out to extend legislative benefits to all relationships worthy of protection, including life partnerships.[433] The preamble places emphasis on the eradication of discrimination against women in relationships. The main objective of the new legislation according to the preamble is to protect vulnerable parties and to ensure fairness in family disputes.[434] Goldblatt's view is confirmed in the preamble when vulnerable parties in life partnerships are not protected, they often become poorer when families break down.[435] Therefore the lack of legal protection afforded to life partnerships makes women and children living in these arrangements more vulnerable.[436]

3.3.3 The definition of a life partnership in the Single Marriage Statute

The Single Marriage Statute[437] provides for three forms of "marriage or life partnership" (or protected relationship),[438] including -

(a) existing marriages any subsisting marriage law;
(b) existing religious or cultural marriage or relationship; and

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[431] SALRC *Single Marriage Statute Discussion Paper* (2021) 25.
[432] See para 3.3.3 below.
[433] Preamble of the Single Marriage Statute.
[434] Preamble of the Single Marriage Statute.
[435] Goldblatt 2003 *SALJ* 611.
[436] Goldblatt 2003 *SALJ* 611; *Certification* case paras 99-100. In the *Certification case* it was established that every member of a family, regardless of its form, has a constitutional right to equality and dignity, especially when the members are vulnerable within the relationship.
[437] Under the Recognition and Registration of Marriages and Life Partnerships Bill.
[438] Under the Protected Relationships Bill.

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(c) "life partnerships where the parties *cohabit and assumed a permanent responsibility for supporting each other*" (own emphasis).[439]

The first two forms are recognised if the parties comply with the legislative, religious, or cultural requirements.[440] However, the relevant form for this study is life partnerships where parties cohabit without concluding any form of marriage, including a cultural or religious marriage. For the purposes of the Single Marriage Statute parties in a life partnership must "cohabit and have assumed a permanent responsibility for supporting each other".[441]

The assumption of a duty of support between the partners is clearly made a qualifying prerequisite for recognition and protection under the Single Marriage Statute and conforms to the second approach adopted by the judiciary.[442] Under the second approach, as explained in chapter 2, to be protected the parties must, in addition to the permanence of the life partnership, prove that they had indeed undertaken to support each other (either tacitly or expressly).[443] It is worth noting that while the Single Marriage Statute, like the judiciary, requires an assumed "permanent responsibility for supporting each other", the Statute also requires cohabitation for recognition and protection of a life partnership.[444]

3.3.4 Recognition of life partnerships in the Single Marriage Statute

The requirements for the recognition of a valid life partnership[445] under the Single Marriage Statute are:

(a) The parties must be 18 or older on the date of entering into the life partnership;
(b) all parties must give free and informed consent; and
(c) all parties must have the capacity to enter into a life partnership.[446]

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[439] Cl 1(xvi).
[440] Cl 1(xvi) (aa) and (bb).
[441] Cl 1(xvi)(cc): "any life partnership, where the parties cohabit and have assumed permanent responsibility for supporting each other".
[442] As discussed in para 2.3 above.
[443] *Satchwell* (CC) para 34.
[444] Cl 1(xvi)(cc).
[445] Cl 1(xvi)(cc).
[446] Cl 4(1).

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A life partnership that does not comply with the validity requirements will be null and void.[447] In addition to the abovementioned requirement the parties must have cohabited and assumed a permanent responsibility for supporting each other.[448] In terms of clause 12 of the Single Marriage Statute, life partnerships who comply with these requirements will be formally recognised and have the same consequences as those unions currently recognised and thus create an *ex lege* duty of support. The parties to a life partnership cannot exclude the application of the proposed Act to their relationship.[449]

3.3.5 The registration of life partnerships

Parties must register their life partnerships, but non-compliance will not influence the validity of the life partnership.[450] Alternative means than registration to prove an unregistered life partnership will be allowed.[451] Despite this possibility in the Single Marriage Statute, the SALRC is of the opinion that there should be a duty on the life partners to register their relationship.[452]

The life partnership must be registered in person before a registering officer.[453] Each life partner must confirm in the other partner's presence on a prescribed form that they have the intention to enter into a life partnership.[454] If it is not possible for both life partners to be present, either one of the life partners can apply to the registering officer to register the relationship.[455] Life partnerships must be registered within twelve months from the promulgation of the Act or such a longer time frame as may be determined by the Minister from time to time.[456] If a life partnership is for any reason not registered a person with sufficient interest may apply to the registering officer to register a life partnership.[457] Such an applicant must supply the registering officer with all the information required by the registering officer to enquire into the existence of

[447] Cl 4(2).
[448] Cl 1(xvi)(cc).
[449] Cl 3(2).
[450] Cl 8(1).
[451] Cl 8(8).
[452] SALRC *Single Marriage Statute Discussion Paper* (2021) 89 para 2.119.
[453] Cl 8(1)(a).
[454] Cl 8(1)(a).
[455] Cl 8(1)(b).
[456] Cl 8(2).
[457] Cl 8(2)(c).

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the life partnership.[458] A registering officer must register the relationship if satisfied that a life partnership exists between the partners.[459] The registering officer must record:

(a) "[T]he identity of the parties;
(b) the date of the relationship;
(c) the consent of the parties;
(d) that there is no lawful impediment to the registration of the relationship;
(e) that the parties are not related on account of consanguinity, affinity or an adoptive relationship…;
(f) the property system and whether it is –
    (i) in or out of community of property, or
    (ii) out of community of property, with or without accrual;
(g) a partnership agreement, if any; and
(h) any other prescribed particulars."[460]

A registration certificate must be issued by the registering officer once the relationship is registered. The registration certificate is *prima facie* proof of the life partnership.[461] A registering officer has the power to refuse registration of a life partnership if the officer is not satisfied that a valid life partnership exists between the parties.[462]

The court can order registration of any protected relationship or life partnership upon application and after investigation into the matter.[463] The court can also order cancellation or rectification of a life partnership.[464]

3.4 Review of Aspects of Matrimonial Property Law

3.4.1 Introduction

The SALRC is in the process of reviewing aspects of matrimonial property law, including the option to provide for the sharing of assets accumulated during a life

[458] Cl 8(2).
[459] Cl 8(3).
[460] Cl 8(3).
[461] Cl 8(7).
[462] Cl 8(5).
[463] Cl 8(6)(a).
[464] Cl 8(6)(b).

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partnership as the partnership is defined in the Single Marriage Statute.[465] The Commission acknowledged the need for a statutory framework to support life partners without discriminating on the basis of sex or gender and ensures that no women are excluded from legal relief because they are in a life partnership.[466] The Commission released a discussion paper in this regard in June 2023.[467] There is currently no clear proposal for future legislation, only an indication of what the SALRC believes should be the necessary amendments.[468] Although the discussion paper provides various options, the SALRC indicates a preferred solution.[469] Only the solutions preferred by the SALRC will be discussed, as these will presumably form the basis for further reports and eventually a Bill.

3.4.2 Division of accumulated assets at termination of life partnerships

There is currently no default property system for parties that live together in a life partnership. Proprietary claims can only be made based on a life partnership agreement or a universal partnership agreement which are both based on contract.[470]

The SALRC recommends that where unmarried life partners have not entered an agreement to regulate the division of their assets before the dissolution of the life partnership, they will share equally in the assets accumulated during the life partnership.[471] Where no agreement to regulate the division of assets exists, the courts will be given a discretion, to order an equitable redistribution of partnership assets when the life partnership is terminated.[472]

When making an equitable redistribution of partnership assets under these circumstances, the court would be obliged to take the following factors into consideration:[473]

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[465] SALRC *Matrimonial Property* (2023) xiii para 7.
[466] SALRC *Matrimonial Property* (2023) xii-xiii.
[467] SALRC *Matrimonial Property* (2023).
[468] See eg SALRC *Matrimonial Property* (2023) xv para 13(a) and xxiii paras 45(a), 46, and 149 paras 7.35-7.36.
[469] See eg SALRC *Matrimonial Property* (2023) xv para 13(a) and xxiii paras 45(a), 46, and 149 paras 7.35-7.36.
[470] Van Heerden, Skelton and Du Toit (2021) 262 and 265 and Heaton and Kruger (2015) 259.
[471] SALRC *Matrimonial Property* (2023) xv para 13(a).
[472] SALRC *Matrimonial Property* (2023) xv para 13(a) and xxiii paras 45(a), 46, and 149 paras 7.35-7.36.
[473] SALRC *Matrimonial Property* (2023) 149 para 7.36.

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(a) "Any agreement between the partners, including a universal partnership agreement before or during the course of the relationship;
(b) the duration of the relationship;
(c) whether the partners shared a common residence;
(d) whether the partners participated in some form of marriage ceremony or event or ceremony acknowledging the relationship;
(e) whether either or both of the parties, in good faith, believed they were in a valid marriage;
(f) if one of the partners is a spouse in an existing marriage, whether either or both of the partners were aware of the existence of the marriage;
(g) any substantial misconduct by either partner, including domestic violence and financial abuse directed at the other partner or any other members of the household;
(h) the conduct of the parties, particularly any actual sharing of financial and other resources or expenses during the subsistence of the relationship;
(i) any contributions made by either partner to the acquisition or growth of assets by the other partner;
(j) the equal value of non-financial contributions, in particular any caring labour provided by the parties, including care of the home, and care for children and other dependent members of the household; and
(k) whether one partner had given up or reduced their careers or economic activities in order to care for the home and any family members or members of the household."[474]

3.4.3 Universal partnerships for unmarried intimate partners

According to the SALRC life partners would be able to prove a universal partnership to share in the assets generated from the partnership.[475] Life partners would be able to claim a portion of the assets generated during their relationships if a written, oral, or tacit universal partnership contract between the life partners can be proved by the

[474] SALRC *Matrimonial Property* (2023) 149 para 7.36.
[475] SALRC *Matrimonial Property* (2023) 154 para 7.57.

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applicant.[476] To be successful the following terms would have to be proved, on a balance of probabilities:[477]

> "[F]irstly, that each of the parties bring something into the partnership or binds themselves to bring something into it, whether it be money, or labour, or skill. The second element is that the partnership business should be carried on for the joint benefit of both parties. The third is that the object should be to make a profit. A fourth element proposed by Pothier, namely, that the partnership contract should be legitimate, has been discounted by our courts for being common to all contracts."[478]

The SALRC has proposed that the common law principles relating to universal partnerships could be codified as follows:[479]

> "A partner can claim a part of the assets amassed by the other partner if they can prove an express or tacit universal partnership agreement between the partners or spouses that:
>
> (a) each party will contribute money, labour or skills to the partnership;
> (b) the partnership will be carried on for the joint benefit of the partners;
> (c) the object of the partnership be to make a financial profit or to provide for the necessary care and upkeep of the common home and the care and upbringing of any children in the home; and
> (d) the extent of the share claimed depends on the agreement between the parties, or in the absence of an agreement, the extent of the parties' contributions."[480]

The SALRC proposes a list of factors that the court must have regard to when determining the extent of each party's contribution:[481]

[476] SALRC *Matrimonial Property* (2023) 154 para 7.57.
[477] SALRC *Matrimonial Property* (2023) 154 para 7.57.
[478] SALRC *Matrimonial Property* (2023) 154 para 7.57 quoted from *Butters* 2012 4 SA 1 (SCA) para 11.
[479] SALRC *Matrimonial Property* (2023) 155-156 para 7.64.
[480] SALRC *Matrimonial Property* (2023) 155 para 7.64(a)-(d).
[481] SALRC *Matrimonial Property* (2023) 156 para 7.64(f)-(p).

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(a) "[A]ny written or oral agreement between the partners, including a universal partnership agreement before or during the course of the relationship;
(b) duration of the relationship;
(c) whether the partners shared a common residence;
(d) whether the partners participated in some form of marriage ceremony or event acknowledging the relationship;
(e) whether either or both of the parties in good faith believed they were in a valid marriage;
(f) if one of the partners is a spouse in an existing marriage, whether either or both of the partners were aware of the existence of the marriage;
(g) any substantial misconduct by either partner, including domestic violence and financial abuse directed at the other partner or any other members of the household;
(h) the conduct of the parties, particularly any actual sharing of financial and other resources or expenses during the subsistence of the relationship;
(i) any contributions made by either partner to the acquisition or growth of assets by the other partner;
(j) the equal value of non-financial contributions, in particular any caring labour provided by the parties, including care of the home, and care for children and other dependent members of the household; and
(k) whether one partner had given up or reduced their careers or economic activities in order to care for the home and any family members or members of the household."[482]

The factors listed for determination of the extent of the contribution of the parties include some of the factors used to determine the permanence of a life partnership and those used for redistribution of assets and forfeiture of benefits during divorce.[483] If adopted into legislation the codification of the common law rules of a universal partnership, as suggested by the SALRC may provide an alternative remedy should

[482] SALRC *Matrimonial Property* (2023) 156 para 7.6.4(f)-(p). Numbering changed from original source.
[483] Van Heerden, Skelton and Du Toit (2021) 178, 181, 184 and 185.

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parties not be able to prove a life partnership, cohabitation and a permanent duty of support.

3.5 Marriage Bill

According to the DHA the diversity of the South African population makes it impossible to regulate all religious and cultural marriages under different Acts.[484] The DHA has consequently entered a process to develop a new single policy to regulate all marriages and life partnerships.[485] Shortly after the release of the Discussion Paper on the Single Marriage Statute in January 2021, the DHA released a Green Paper on Marriage in May 2021.[486] A White Paper on Marriages as a foundation for a new Marriage Bill followed in March 2022.[487] The vision statement of the White Paper, the policy paper that preceded the Marriage Bill,[488] states that the DHA will provide for:

> "South Africans of all sexual orientations, and religious and cultural persuasions to conclude legal marriages and permanent life partnerships that accord with the principles of equality, non-discrimination, human dignity and unity in diversity, as encapsulated in the Constitution."[489]

Except for the vision statement, however, the White Paper does not address the recognition of life partnerships and only makes proposals for the regulation of marriages in South Africa. The Marriage Bill published for comment on 7 July 2023, and the amended Bill introduced to Parliament by the Minister of Home Affairs on 13 December 2023 do not refer to life partnerships.[490] Although the expectation was created by the DHA that they would address life partnerships in their investigation, this was not done and the White Paper and Marriage Bill do not assist in the investigation with regard to the recognition of life partnerships and the role that the duty of support should play in this process.[491] The Bill lapsed in terms of National Assembly Rule

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[484] DHA W*hite Paper on Marriages* (2022) 6; only available at http://www.dha.gov.za/images/PDFs/White-Paper-on-Marriage-in-SA-5-May2022.pdf (last accessed on 2024-06-15).
[485] DHA *White Paper on Marriages* (2022) 6.
[486] GN 398 in *GG* 44529 of 4 May 2021.
[487] DHA *White Paper on Marriages* (2022) iii.
[488] Sloth-Nielsen 2023 *AJ* 136 n40.
[489] DHA W*hite Paper on Marriages* (2022) 23.
[490] Marriage Bill [B – 2022] GN 3648 in *GG* 48914 of 7 July 2023; Marriage Bill [B43-2023] GN 4202 in *GG* 49887 of 13 December 2023.
[491] Marriage Bill and Sloth-Nielsen 2023 *AJ* 136 n40.

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333(2) on 21 May 2024 but was revived by the National Assembly of the new Parliament on 25 July 2024.[492]

3.6 **Conclusion**

As is the case with all currently formally recognised unions, an *ex lege* duty of support will exist between parties if they register their domestic partnership in terms of the Domestic Partnerships Bill.[493] This would not be the case with unregistered domestic partners.[494]

Unregistered domestic partners would be given the option of enforcing a duty of support after termination of the partnership by proving *ex post facto* that a domestic partnership existed.[495] The existence of a domestic partnership would be determined with reference to the factors listed in the Bill or any other additional factors.[496] The approach in the Domestic Partnerships Bill is similar to the first approach by the courts in chapter 2.[497] Under the Bill partners would need to prove the existence of a domestic partnership in terms of an open list of factors.[498] To determine whether a maintenance order could be made, factors similar to those mentioned in section 7(2) of the Divorce Act would be considered by the court.[499]

Since a registered partnership in terms of the Domestic Partnerships Bill would have required consensus and active steps to be taken by both parties in the same manner already required for the conclusion of a marriage, it is difficult to see how the proposed framework would have improved the protection for unmarried life partners in this regard. As pointed out by Bonthuys, the fact that many partners do not have access to information on how, where, and when to register life partnerships, do not have the power to persuade reluctant partners to register the partnership and may be unable to afford the time and costs associated with registration of these relationships at the

[492] Parliamentary Monitoring Group "Marriage Bill (B43-2023)" https://pgm.org.za/bill/1204/ accessed on 20 August 2024.
[493] Cl 9.
[494] Cl 27.
[495] Cl 26.
[496] Cl 28.
[497] Paragraph 2.3.
[498] Cls 26(2) and 26(3).
[499] Cl 28(2).

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relevant government departments are precisely the reasons why relationships will not be registered and leave life partners in a vulnerable position.[500]

The provisions in the Bill relating to unregistered partnerships, on the other hand, could have introduced and extended protection to a large contingent of life partners, at termination of the partnership when it is needed most. The *ex post facto* recognition of a life partnership could have introduced a viable model for protection (known as the judicial discretion model) for those life partners who have neither the know-how, the choice and/or institutional access to register their relationship.[501] As such the judicial recognition model could/can provide a level of protection for the most vulnerable of life partnerships when the legislator enacts legislation to address this lacuna in our law.[502] It is important to note that the assumption of a duty to support in terms of the Bill is relegated to merely one of a number of factors for recognition of the life partnership and is therefore not considered a qualifying prerequisite for protection.[503]

The Single Marriage Statute will make provision for registered and unregistered life partnerships. Failure to register does not lead to the invalidity of life partnerships.[504] It will be possible to prove the existence of a life partnership that has not been registered. For this purpose, parties to a life partnership will have to bring evidence to convince the registration officer or the court that a life partnership existed.[505] This does not differ from the scenario described in Chapter 2 or the possibility of protection as an unregistered domestic partnership under the Domestic Partnerships Bill. The burden of proof will rest on the vulnerable party to prove that a life partnership existed due to the fact that the vulnerable party would be the one in need of recognition of the life partnership and protection. To prove a life partnership under the Single Marriage Statute would presumably be more onerous than under the Domestic Partnerships Bill. The parties would have to prove they cohabited in a life partnership and have assumed "a permanent responsibility for supporting each other".[506] It is uncertain what

[500] Bonthuys (Part 1) 2018 *PELJ* 13. Also see eg Goldblatt 2003 *SALJ* 617*;* Bonthuys (Part 1) 2018 *PELJ* 13 and Barratt (2023) 345.
[501] SALRC *Domestic Partnerships Report* (2006) 367 para 7.2.2.
[502] Sloth-Nielsen 2023 AJ 134.
[503] Cl 26(2) and 26(3).
[504] Cl 8(8).
[505] Cl 8(8).
[506] Cl 1(xvi)(cc).

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"a permanent responsibility for supporting each other" entails. To prove the existence of "a permanent responsibility for supporting each other" the parties would presumably have to make use of the listed factors used by the courts to establish a permanent life partnership and the existence of a duty of support.[507]

Under the Single Marriage Statute, the position for unregistered life partnerships will not be much different from the current position where the decision will rest with the court whether a permanent life partnership exists and whether the parties undertook a duty of support. Although the summary of the Bill states as one of its objects is to "provide for legal consequences of entering into life partnerships"[508] this is not the case. It is envisaged that the consequences of the recognition of life partnerships will be codified by other legislation.[509] Parties will have to prove the existence of an unregistered life partnership to trigger these legal consequences. Although the Single Marriage Statute can be seen as an attempt to provide legal protection to vulnerable parties in a life partnership, the lack of autonomy of vulnerable parties may render them powerless to decide whether to register their relationships or to have the resources or knowledge to seek legal assistance from courts in the event of the dissolution of a relationship.[510] Registration is not required for recognition of a life partnership but when a vulnerable partner needs protection at the dissolution of a life partnership in order to trigger legal consequences, the vulnerable party will need to bring evidence of a life partnership, permanent undertaking of support and cohabitation.

The *Review of Aspects of the Matrimonial Property Law* provides proposals on how the patrimonial and other consequences should be regulated after recognition of life partnerships under the Single Marriage Statute.[511] The Commission recommends where unmarried life partners have not entered an agreement to regulate the division of their assets before the dissolution of the life partnership, they shall have equal rights

[507] See para 2.2 above.
[508] SALRC *Single Marriage Statute Discussion Paper* (2021) xi.
[509] SALRC *Single Marriage Statute Discussion Paper* (2021) 20-21 para 1.46; O' Reilly "SALRC holds virtual workshop on Single Marriage Statute" 2021 (3) *De Rebus* https://derebus.org.za/salrc-holds-virtual-workshop-on-single-marriage-statute/ (last accessed 26 June 2024).
[510] See eg Goldblatt 2003 *SALJ* 617*;* Bonthuys (Part 1) 2018 *PELJ* 13 and Barratt (2023) 345.
[511] SALRC *Matrimonial Property* (2023) xiii.

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to share in any property accumulated during the partnership.[512] This differs from the default position recommended in the Domestic Partnerships Bill where there is no community of property between partners in a registered partnership.[513] A court can also order division, distribution and redistribution of the partnership assets that seems just and equitable – a discretion also conferred on the courts in the Domestic Partnerships Bill.[514]

Should the criteria of a life partnership not be met the alternative would be to prove a universal partnership. Codification of the requirements for a universal partnership will make the common law rules more accessible to members of the public and legal practitioners.[515] It would also be easier to raise public awareness about the benefits and drawbacks of universal partnerships.[516] No duty of support can however flow from a universal partnership.[517]

Should the proposals in the discussion paper on the Review of Aspects of Matrimonial Property Law be passed into law it will have an impact on the division of assets.[518] If assets are shared or an order for redistribution of assets are made, the maintenance needs of a vulnerable life partner at the dissolution of a life partnership might decrease and this will have an impact on the duty of support.

Under the Single Marriage Statute life partnerships may be registered as explained above and protection may be afforded by judicial discretion. However, it is evident that Parliament is currently advancing the new Marriage Bill,[519] which recognises all marriages under a singular Act, but does not include the recognition of life partnerships. Since it is probably safe to assume that life partnerships will not receive formal recognition for the time being, it seems as though life partners will still have to

[512] SALRC *Matrimonial Property* (2023) xv.
[513] Cl 7(1).
[514] Cls 22, 32 and SALRC *Matrimonial Property* (2023) xv para 14.
[515] SALRC *Matrimonial Property* (2023) 151 para 7.47.
[516] SALRC *Matrimonial Property* (2023) 151 para 7.47.
[517] Smith (2014) 440.
[518] See the discussion in para 3.4.2 above.
[519] Home Affairs "Briefing by IEC on readiness for National and Provincial Elections 2024; Briefing by Minister on Marriage Bill" 19 March 2024 https://pmg.org.za/committee-meeting/38649/ (last accessed 2024-07-09); Home Affairs "The consultative stakeholder engagements for the development of the marriages policy" September 2019 https://www.dha.gov.za/index.php/notices/1286-the-consultative-stakeholder-engagements-for-the-development-of-the-marriages-policy#:~:text=The%20new%20single%20Marriage%20Act,the%20Constitution%20of%20the%20RSA. (last accessed 10 July 2024).

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rely on piecemeal recognition by amended legislation and recognition of consequences by the courts for the foreseeable future. While it was assumed that the Domestic Partnerships Bill had become irrelevant in the pursuit of unifying matrimonial legislation, the enactment of the Marriage Bill (that ignores the plight of life partners) may now prompt a revival of interest in at least those provisions in the Domestic Partnerships Bill that relate to unregistered partnerships.[520] Currently the draft Domestic Partnerships Bill is the most comprehensive proposal available.[521]

It is important to note that the assumption of a duty of support in terms of the Domestic Partnerships Bill is one of a number of factors for recognition of a life partnership and is therefore not considered a qualifying prerequisite for recognition and protection.[522] As indicated before, the Bill thus personifies the adoption of the first approach discussed in chapter 2. Under the Single Marriage Statute, the parties must have cohabited in a life partnership and have assumed "a permanent responsibility for supporting each other".[523] A permanent responsibility for supporting each other is made a prerequisite for recognition and protection and therefore embodies the adoption of the second approach discussed in chapter 2. The Marriage Bill is irrelevant for present purposes as it fails to include the formal recognition and protection of life partnerships.

The next chapter will investigate and compare the legal position of life partnerships in British Columbia and Ireland, focusing on the importance and role of the duty of support in the recognition of such partnerships in these jurisdictions. The purpose of this investigation is to use these comparisons to inform the drafting of legislation to recognise and protect life partnerships in South Africa.

[520] Kruuse 2013 *ISFL* 361-362; Sloth-Nielsen 2023 *AJ* 138.
[521] Barratt (2023) 346.
[522] Cl 26(2) and 26(3).
[523] Cl 1(xvi)(cc).

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Chapter 4: Role of assumption and duty of support between life partners in terms of foreign law

4.1 Introduction

Canada and Ireland recognise life partnerships by means of formal legislation.[524] In both jurisdictions, a duty of support is considered a consequence and not a pre-requisite to prove the existence of the partnership.[525] In both jurisdictions the recognition of life partnerships is determined by a combination of discretionary criteria and a firm rule. The discretionary (subjective) criteria are applied to determine the nature of the relationship which is combined with a firm rule (objective criterion) that the relationship must have existed for a specific duration.[526] The legal position of life partnerships in Canada, specifically the Canadian province of British Columbia, and Ireland and the importance and role of the duty of support will be investigated. In the conclusion the position in British Columbia and Ireland will be compared to the position in South Africa.

4.2 British Columbia, Canada

4.2.1 Introduction

Canada has a common law legal system in all provinces and territories with the exception of Quebec where the French Civil Code is applied.[527] The Constitution Act of 1867 established the federal government system and four provinces. The Constitution Act of 1982 established the Charter of Rights and Freedoms and expanded the four provinces of Canada to ten provinces and three territories.[528] Canada operates under a federal system of government, with legislative powers divided between federal and provincial governments.[529] The status, consequences and regulation of life partnerships, including child custody, access, child support and

[524] The FLA of British Columbia and the Cohabitants Act of Ireland.
[525] See discussion below.
[526] See discussion below.
[527] CIA "The World Factbook" https://www.cia.gov/the-world-factbook/countries/canada/ (last accessed 4 October 2024).
[528] CIA "The World Factbook".
[529] Part VI Constitution Act 1867.

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spousal support are regulated by provincial laws.[530] The only instance where the federal government is concerned with life partnerships is the recognition of "common law marriages" for specific purposes such as federal income tax,[531] pensions[532] and certain government benefits.[533] The federal legislation ascribe certain consequences to common law marriages but does not recognise the relationship as a marriage. [534]

Since the enactment of the Charter of Rights in 1982 Canada has been at the forefront of remarkable change in their family law system responding to the change of the nature of family relationships.[535] All provinces and territories in Canada, recognise marriage-like relationships and regard partners in a marriage-like relationship as spouses and enforce spousal support after termination of the relationship,[536] with the exception of Quebec.[537] Due to the autonomy of the provinces the legislation and terminology relating to life partnerships varies from one province to the other.[538] In British Columbia the Family Law Act (FLA) regulates family law issues for spouses living in marriage-like relationships, including spousal support and division of family property.[539] Marriage and marriage-like relationships are recognised equally.[540] The FLA is an example of legislation that provides comprehensive recognition to life partnerships and it is for this reason that the recognition of life partnerships in the province of British Columbia will be discussed. A similar approach to that of British Columbia is followed by the other

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[530] Treloar and Boyd "Family law reform in (neoliberal) context: British Columbia's new Family Law Act" 2014 *IJLPF* 81.
[531] Income Tax Act RSC 1985 c 1 (5th Supp).
[532] Pension Act RSC 1985 c P-6.
[533] Immigration and Refugee Protection Act SC 2001 c 27. From a federal perspective a common law marriage is a relationship where parties have cohabited for 12 months or in certain exceptional cases have a child together without any time requirement. See for example the definition of "common-law partner" in s 248(1) of the Income Tax Act.
[534] A "common-law partner" is defined in s 248(1) of the Income Tax Act as a person in a conjugal relationship that has cohabited for 12 months with a taxpayer or is a parent of the child of the taxpayer.
[535] Rogerson (2012) 77, 97.
[536] Family Property Act RSA 2000 c F-4.7 and Interdependent Relationship Act SA 2002 c A-4.5 (Alberta); FLA (British Columbia); Family Law Act CCSM c F20 and Vital Statistics Act CCSM c V60 (Manitoba); Family Law Act SNB 2020 c 23 (New Brunswick); Family Law Act RSNL 1990 c F-2 (Newfoundland and Labrador); Family Law Act SNWT 1997 c 18 (Northwest Territories); Family Law Act SNWT 1997 c 18 (Novia Scotia); Family Law Act CSNu c F-30 (Nunavut); Family Law Act RSO 1990 c F-3 (Ontario); Family Law Act RSPEI 1988 c F-2.1 (Prince Edward Island); Interpretation Act CQLR c I-16 (Quebec); Family Property Act SS 1997 c F-6.3 (Saskatchewan); Family Property and Support Act FSY 2002 c 83 (Yukon).
[537] Government of Canada "About spousal support" https://www.justice.gc.ca/eng/fl-df/spousal-epoux/index.html (accessed on 18 September 2024).
[538] Rogerson (2012) 97.
[539] FLA.
[540] S 3(1) of the FLA.

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provinces, although cohabitation periods may be different and slight differences in consequences exist.[541]

4.2.2 The Family Law Act (FLA)

The FLA replaced the Family Relations Act on 18 March 2013.[542] Under the FLA a "spouse" is defined as a person that is married to another person or "has lived with another person in a marriage-like relationship, and has done so for a continuous period of at least two years".[543] For life partners to qualify as spouses under the FLA they must therefore prove that they entered a marriage-like relationship[544] that lasted for at least two years.[545] Recognition is based on both a discretionary concept (that of a marriage-like relationship) and a firm rule (that the marriage-like relationship lasted for at least two years).[546] The only exception is when a life partner seeks spousal support and a child has been born from the relationship. In this case, the two-year duration of the marriage-like relationship is not a prerequisite.[547]

The FLA recognises marriage and marriage-like relationships equally.[548] Couples living together in British Columbia who wish to opt-out of the FLA's obligations, including the division of family assets and spousal support, must enter into a written contract excluding the obligations.[549] The Act specifies that the relationship begins either on the date they started living together in a marriage-like relationship or the date of their marriage, whichever is earlier.[550] This implies that couples who cohabit and later marry will be regarded as spouses from the date they qualified as partners in a marriage-like relationship and not the date of their marriage. The law of British Columbia imposes a time period that automatically grants the status of a spouse to

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[541] Rogerson (2012) 96-99.
[542] Family Relations Act RSBC 1996 c 128 and Courthouse Libraries BC "Family Law Act" https://www.courthouselibrary.ca/how-we-can-help/legislation-case-law/guides/acts/family-law-act (last accessed on 16 July 2024).
[543] S 3(1).
[544] S 3(1).
[545] S 3(1)(b)(i).
[546] Aloni "Compulsory conjugality" 2021 *CLR* 71.
[547] S 3(1)(b)(ii).
[548] S 3(1).
[549] S 81 and 92 of the FLA. Also see Aloni 2021 *CLR* 75 who investigates the nature of opt-out agreements.
[550] S 3(3).

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partners in a marriage-like relationship, entitling couples to remedies similar to marriage.[551]

The recognition model of life partnerships is referred to as an ascription model of spousal status based on a period of cohabitation in a marriage-like relationship rather than registration of the relationship.[552] Spousal consequences apply automatically to all relationships that fall within the scope of the relevant legislation unless the status of the relationship is challenged by one of the partners or a third party.[553] In such disputes, the court evaluates the circumstances and makes a decision, applying judicial discretion.[554] In British Columbia, the duty of support is therefore not a prerequisite to qualify as a "spouse" but rather a consequence of the marriage-like relationship.

4.2.2.1 Interpretation of "marriage-like"

The FLA does not define "marriage-like relationship".[555] Several cases in British Columbia have addressed what constitutes a "marriage-like" relationship. The concept of "marriage-like" appears in various statutes and the interpretations of what marriage-like entails are used interchangeably when dealing with the interpretation of "spouse" in British Columbia.[556]

In *Gostlin v Kergin* (*Gostlin*),[557] the court interpreted the definition of "spouse" in the Family Relations Act, which included "a man or woman not married to each other, who lived together as husband and wife for a period of not less than two years".[558] Although the FLA replaced the Family Relations Act and the phrase "as husband and wife" is no longer used in the FLA, it is understood to be equivalent to "in a marriage-like relationship".[559] Once it was established that the parties had lived together for at least two years, Lambert JA established the nature of the relationship by determining

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[551] Parts 5, 6 and 7 of the FLA.
[552] Rogerson (2012) 97.
[553] Boyd *JP Boyd on Family Law* (2024) 585 https://wiki.clicklaw.bc.ca/index.php/JP_Boyd_on_Family_Law (last accessed on 4 October 2024).
[554] Rogerson (2012) 103.
[555] Rogerson (2012) 103.
[556] *Mother 1 v Solus Trust Company* 2019 CSC 200 (*Mother 1*) para 132.
[557] *Gostlin v Kergin* (1986) CanLII 164 (BC CA).
[558] *Gostlin* 4.
[559] Rogerson (2012) 100.

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whether the partners had "voluntarily embraced the permanent support obligations of a married couple".[560] According to the court this can be established by enquiring whether the partners would have provided financial and moral support if one of them had become disabled during the relationship.[561] Without such an undertaking the relationship could not be deemed "marriage-like".[562] Since this enquiry is deemed subjective, the court referred to other objective factors that could be of assistance in determining the nature of the relationship.[563] Such factors include whether the partners viewed themselves as in a long-term commitment, shared living accommodations, owned property together, managed finances jointly, took vacations together, and shared other aspects of their lives.[564] The most crucial consideration for the court was whether one of the parties had, by mutual agreement, surrendered financial independence and become economically dependent on the other.[565] All these factors, among others, may be considered to determine whether the parties were living together in a marriage-like relationship.[566] The significance of *Gostlin* is that it established that a couple must do more than merely cohabit; the relationship must resemble a marriage.[567] The court emphasised the importance of the parties' willingness to support each other financially and emotionally.[568] The approach is similar to that of the South African courts to determine whether a life partnership existed by requiring that the parties have undertaken a duty to support each other, although the court in *Gostlin* merely required a willingness to maintain and not an undertaking.[569]

In *Takacs v Gallo* (*Takacs*),[570] the court considered whether the deceased's girlfriend fell within the definition of "spouse" under the Family Compensation Act RSB 1996 c 126. At the time, the Act defined "spouse" as either the husband or wife of the deceased, or a person who lived with the deceased as the husband or wife for at least

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[560] *Gostlin* 5.
[561] *Gostlin* 5.
[562] *Gostlin* 5.
[563] *Gostlin* 6.
[564] *Gostlin* 6.
[565] *Gostlin* 6.
[566] *Gostlin* 5-6.
[567] *Weber v Leclerc* 2015 BCCA 492 (*Weber*) para 11.
[568] *Gostlin* 5.
[569] See 2.3 above.
[570] 1998 157 DLR (4th) 623.

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two years ending no earlier than one year before the deceased's death. It is important to note that although the case was decided prior to the enactment of the FLA, when the Family Relations Act still regulated marriage-like relationships, the definition of spouse was similar to that of the FLA. Although *Tacaks* considers the consequences of a marriage-like relationship in the Family Compensation Act, the definition in the Act is the same as that of the Family Relations Act. The Family Compensation Act deals with certain consequences of a marriage-like relationship. The interpretation of "marriage-like" is relevant when considering "marriage-like" in the FLA which determines when a partner attains the status of spouse in order to determine the recognition of life partnerships under the FLA. While *Gostlin* emphasised economic dependence as a key element of a marriage-like relationship,[571] *Tacaks* confirmed that the intention to enter a marriage-like relationship does not necessarily include financial interdependence.[572] In *Tacaks* the court emphasised the intention to have a marriage-like relationship in the future should not outweigh the actual reality of the relationship.[573] To qualify, the court held that the parties must have intended to live together indefinitely and not temporarily.[574] Thus the court in *Tacaks* moved away from financial interdependence as a requirement to the permanent nature of the relationship, which is similar to the first approach adopted by the South African courts.[575]

In *Austin v Goerz* (*Austin*),[576] the court interpreted "common law spouse" under the Estate Administration Act RSBC 1996 c 122, which defines "common law spouse" as someone who has lived and cohabited with another person in a marriage-like relationship for at least two years immediately before the other person's death.[577] The definition is similar to that of the FLA and therefore relevant in the recognition of marriage-like relationships. The defendant and the deceased cohabited for six years and presented themselves as married to their family and friends,[578] despite being

[571] *Gostlin* 5-6.
[572] *Takacs* para 53.
[573] *Takacs* para 58.
[574] *Takacs* para 57 and Maclean Law "BC marriage-like relationship" https://macleanfamilylaw.ca/2015/12/02/bc-marriage-like-relationship/ (last accessed 5 October 2023).
[575] See 2.2 above.
[576] 2007 BCCA 586.
[577] S 1 definition of "common law spouse".
[578] *Austin* para 10.

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financially independent and maintaining separate bank accounts.[579] Frankel JA reaffirmed that financial dependence is not a present-day requirement for a marriage-like relationship, noting "today marriage is viewed as a partnership between equals and there is no principled reason why marital-equivalent relationships should be viewed differently".[580] The court concluded that a marriage-like relationship could exist without any financial support.[581] Frankel JA confirmed that a marriage does not consist of a list of definite characteristics present in all marriages and therefore the presence or absence of a particular factor cannot determine whether a relationship is marriage-like.[582] The court refers to *Yakiwchuk v Oaks* (*Yakiwchuk)*[583] which highlighted that each relationship is different, with variations in the sharing of finances, property and other aspects of life.[584] According to the court spousal relationships vary widely in their structure and dynamics. Some couples combine finances and property, while others keep them separate; some prioritise sexual relationships, others do not; and levels of shared activities and public affection differ.[585] These variations make it difficult to determine when a marriage-like relationship exists.[586] Unlike marriage, which has a clear public ceremony, marriage-like relationships often begin informally, leading to ambiguity about its start, intent and operation.[587] The court found the parties "were in a committed, marriage-like relationship for all purposes" even though there was a minimum of sharing of expenses and no sharing of assets.[588] The court warned that all the relevant factors must be examined holistically, rather than following a check-list approach.[589] Thus the court followed an approach similar to the first approach by the South African courts[590] by emphasising a holistic approach, and not a closed check-list.

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[579] *Austin* para 12.
[580] *Austin* para 55.
[581] *Austin* para 59. This was also confirmed more recently in *LTF v RBF* 2023 BCSC 834 para 194.
[582] *Austin* para 58.
[583] 2003 SKQB 124 para 10.
[584] *Austin* para 58.
[585] *Austin* para 58 quoting from *Yakiwchuk*.
[586] *Austin* para 58 quoting from *Yakiwchuk*.
[587] *Austin* para 58 quoting from *Yakiwchuk*.
[588] *Austin* para 62.
[589] *Austin* para 62. Referred to with approval in *Han v Dorje* 2021 BCSA 939 para 46.
[590] See 2.3 above.

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In *Weber v Leclerc* (*Weber*),[591] the appellant sought a declaratory order that the parties did not qualify as spouses under the Family Law Act because they did not live in a marriage-like relationship.[592] The court found that the relationship was "marriage-like", despite the couple separating their finances to such an extent that Ms Leclerc loaned Mr Weber money during their relationship and he repaid the loans.[593] The appellant argued that the court *a quo*'s application of the legal test for a marriage-like relationship failed to acknowledge the appellant's assertions sufficiently and that she did not have the intention to live in a marriage-like relationship.[594] The Appeal Court found the trial judge made no error in the findings,[595] that the couple cohabited with the intention to remain together for an indefinite period of time,[596] even though Ms Leclerc was opposed to marriage.[597] At some point Ms Leclerc's health deteriorated and she felt physically, financially and emotionally unsupported by Mr Weber who was absent in her time of need.[598] The judge noted that the expectation of emotional support during her illness indicated a marriage-like relationship.[599] The lack of support merely led to the relationship deteriorating and was not evidence that a marriage-like relationship did not exist.[600] The court reaffirmed that there is no checklist of characteristics that will be found in all marriages and that the intention of the parties play an important role.[601] According to the court -

> "the question of whether a relationship is 'marriage-like' will also typically depend on more than just their intentions. Objective evidence of the parties' lifestyle and interactions will also provide direct guidance on the question of whether the relationship was marriage-like".[602]

The Court of Appeal was of the opinion that although economic dependence or interdependence exists in many marriages, it would be unfair to imply that such

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[591] 2015 BCCA 492.
[592] *Weber* para 2.
[593] *Weber* para 27.
[594] *Weber* para 3.
[595] *Weber* para 31.
[596] *Weber* para 29.
[597] *Weber* para 4.
[598] *Weber* paras 5, 29 and 31.
[599] *Weber* paras 5, 29 and 31.
[600] *Weber* para 6 and 31.
[601] *Weber* paras 25.
[602] *Weber* para 24.

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dependency is an essential characteristic of marriage today.[603] Therefore, economic dependence or interdependence cannot be regarded as an essential factor for a relationship to be considered marriage-like.[604] Again the Canadian courts followed a similar approach to the first approach of the South African courts.[605]

Connor Estate[606] exemplified that parties living apart can still be regarded as spouses in a marriage-like relationship, if there is substantial evidence of a loving and intimate relationship over the years.[607] The case dealt with the definition of "spouse" under the Will, Estates and Succession Act SBC 2009 c13 (WESA), which is the same as the definition of "spouse" under the FLA. The court recognised the relationship as marriage-like despite the parties not living together due to one party's hoarding problem.[608]

In *Mother 1 v Solus Trust Company* (*Mother 1*), the British Columbia Supreme Court dealt with the definition of "spouse" under WESA.[609] The British Columbian courts rely on cases decided under WESA and FLA interchangeably with regard to the interpretation of the term "marriage-like".[610] The Supreme Court referenced an Ontario case, *Moldowich v Penttinen*,[611] where 22 factors under seven categories were outlined to determine whether a relationship is marriage-like.[612] These factors are:

> "**1. Shelter**:
> (a) Did the parties live under the same roof?
> (b) What were the sleeping arrangements?
> (c) Did anyone else occupy or share the available accommodation?
> **2. Sexual and Personal Behaviour:**
> (a) Did the parties have sexual relations? If not, why not?
> (b) Did they maintain an attitude of fidelity to each other?

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[603] *Weber* para 12.
[604] *Weber* para 12.
[605] See 2.3 above. It is interesting to note that the factual situation is analogous to *McDonald* (see 2.2.3.5 (a)) but the decision by the South African court is directly opposed to the decision by the Canadian court.
[606] 2017 BCSC 978.
[607] *Connor Estate* paras 50-51.
[608] *Connor Estate* paras 29 and 53.
[609] *Mother 1* para 132.
[610] *Mother 1* para 132.
[611] *Moldowich v Penttinen* (1980) 17 RFL (2d) 376 (Ont Dist Ct).
[612] *Mother 1* para 134.

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(c) What were their feelings toward each other?

(d) Did they communicate on a personal level?

(e) Did they eat their meals together?

(f) What, if anything, did they do to assist each other with problems or during illness?

(g) Did they buy gifts for each other on special occasions?

3. Services:

What was the conduct and habit of the parties in relation to:

(a) preparation of meals;

(b) washing and mending clothes;

(c) shopping;

(d) household maintenance; and

(e) any other domestic services?

4. Social:

(a) Did they participate together or separately in neighbourhood and community activities?

(b) What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties?

5. Societal:

What was the attitude and conduct of the community toward each of them and as a couple?

6. Support (economic):

(a) What were the financial arrangements between the parties regarding the provision of or contribution toward the necessaries of life (food, clothing, shelter, recreation, etc.)?

(b) What were the arrangements concerning the acquisition and ownership of property?

(c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

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7. Children:

What was the attitude and conduct of the parties concerning children?"[613]

Coad v Lariviere (*Coad*) [614] confirmed that financial dependence, sexual relationships, or the sharing of property and finances are not necessary to define a marriage-like relationship today under WESA. There is no specific checklist for confirming a marriage-like relationship.[615] As is evident from *Mother 1* the interpretation of marriage-like relationships under WESA is also applicable to the FLA.[616]

Carlson v Shay (*Carlson*)[617] established that determining whether parties are in a marriage-like relationship under the FLA requires consideration of both subjective intent and objective factors, which makes the determination a matter of fact and law.[618] According to the court the intention of the parties are subjective and the reliability must be tested by objective factors.[619] The factors must be considered holistically and not as a checklist.[620] The question whether parties are in a marriage-like relationship therefore in this court's view, depends on the facts of the matter and the circumstances of each case.[621] The court found that parties could live in a marriage-like relationship even if they do not live in the same household,[622] if there is substantial evidence demonstrating that the couple maintained a loving and intimate relationship over the years.[623]

In *Lemire v Von Hollen* (*Lemire*),[624] the court reiterated that there are no specific factors that must be present or absent to indicate a marriage-like relationship and that a checklist approach is not encouraged.[625] While the intention of the parties is

[613] *Maldowich v Penttinen* para 16. Emphasis by court.
[614] *Coad v Lariviere* 2022 BCCA 222 para 127.
[615] *Coad* para 127.
[616] *Mother 1* para 132.
[617] 2023 BCSC 2022.
[618] *Carlson* para 35.
[619] *Carlson* para 38.
[620] *Carlson* para 36.
[621] *Carlson* para 29.
[622] *Carlson* para 31.
[623] *Carlson* para 34.
[624] 2023 BCSC 1348.
[625] *Lemire* para 56.

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important, objective evidence of their lifestyle and interactions provide guidance on whether a marriage-like relationship existed.[626]

In the words of Forth J in *Carlson* whether a marriage-like relationship existed effectively "is whether the couple intended their relationship to be one of an indeterminate, lengthy duration, and whether the parties' evidence in this regard is consonant with the objective evidence of the parties' lifestyle and interactions".[627] Courts now use a holistic approach to determine when a relationship has reached a level of commitment and permanence that qualifies it as marriage-like and avoids a check-list approach.[628] The approach of the Canadian courts are similar to the first approach of the South African courts where an open list of factors are considered to determine whether a life partnership exists, by emphasising that the approach should be holistic. It is important to note that, while South African courts may recognise certain consequences of a life partnership, such recognition confers some spousal benefits to partners. In contrast, British Columbia affords life partnerships recognition and protection equivalent to that of a marriage.

4.2.2.2 Interpretation of the time requirement

Under section 3(1)(b)(i) of the FLA the date of commencement or termination of a marriage-like relationship plays a significant role in determining whether the relationship complies with the time requirement. The duration and marriage-like nature of the relationship determine whether the FLA recognises the marriage-like relationship and invokes the consequences including property division and spousal support provisions.[629] The only exception where the time requirement does not apply is when spousal support is claimed for couples with a child together.[630]

According to Grifffin J in *Parke v Veale*[631] the two-year threshold exists because the legislator recognises that new relationships may lack permanence and stability initially,

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[626] *Lemire* para 58 and Takacs para 53.
[627] *Carlson* para 50. See also *Weber* paras 17 and 24.
[628] *Austin* para 58 quoting from *Yakiwchuk*; *Carlson* paras 36 and 37.
[629] S 3(3) and Part 5, 6 and 7 of the FLA.
[630] S 3(1)(b)(ii).
[631] 2015 BCSC 2554 para 79.

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and “legal marital obligations” will only apply after at least two years of a marriage-like relationship to establish stability.

A marriage-like relationship does not necessarily begin on the date the parties start to cohabit. The primary determination is the parties’ intention.[632] For example in *Carlson*, the respondent stayed with the claimant because he had no other place to stay.[633] The marriage-like relationship could not have started on the day he moved in because the parties barely knew each other.[634] The parties were however interested in each other and started a sexual relationship.[635] Even though they cohabited and had a sexual relationship, their relationship did not have the characteristics of a marriage-like relationship right from the start.[636] Only when the claimant fell pregnant and the parties decided to bring a child into the world, did the parties consider a relationship of indefinite duration.[637] The court found the relationship became marriage-like shortly after the parties became aware of the pregnancy.[638]

For division of property and debt, the separation date is important, as spouses in a marriage-like relationship have rights to half of all family property obtained as spouses[639] and share in the family debts accrued to the spouses on the date of separation.[640] After separation some spouses may move out, others may stay in the same household. The FLA allows cohabitation after separation but requires a clear communication of the intent to separate permanently.[641] If spouses reconcile and live together again for one or more periods of at least 90 days in total, they are not considered separated for the purposes of division of property.[642]

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[632] *Carlson* para 38.
[633] *Carlson* para 51.
[634] *Carlson* para 51.
[635] *Carlson* para 53.
[636] *Carlson* para 53.
[637] *Carlson* para 60.
[638] *Carlson* para 61.
[639] “Family property” is defined in S 84 as “all real property and personal property… on the date the spouses separate” which is “owned by at least one spouse, or a beneficial interest of at least one spouse in property”.
[640] S 81.
[641] S 3(4).
[642] S 83(1).

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4.2.2.3 Consequences of a life partnership under the FLA

A partner in a marriage-like relationship is recognised as a spouse by the FLA and such a relationship has the same consequences as a marriage.[643] The court can make a support order on application, within two years after the date of separation.[644] While spousal support is a consequence of recognition, a spouse in a marriage-like relationship must establish entitlement, and the amount and duration of support.[645] This involves a two-step approach.[646]

The court considers several objectives to determine entitlement to spousal support:

(a) Economic advantages or disadvantages to the spouses arising from the relationship or its breakdown;
(b) apportionment of childcare consequences beyond child support;
(c) easing economic hardship caused by the breakdown of the relationship; and
(d) encourage economic self-sufficiency.[647]

The two most common grounds for entitlement are compensation and financial need.[648] A compensatory entitlement arise due to a financial disadvantage created by the relationship or by the breakdown of the relationship.[649] An entitlement based on financial need is established if one of the spouses in a marriage-like relationship cannot independently meet their needs without financial support.[650] Less commonly an entitlement can be established by a contractual agreement between the spouses in a marriage-like relationship for the one to pay spousal support to the other.[651]

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[643] S 3(1).
[644] S 198(2).
[645] S 160.
[646] MacFarlane and McConchie (eds) *Professional Legal Training Course 2024 Practice Material Family* (2024) 54.
[647] S 161.
[648] MacFarlane and McConchie (2024) 54.
[649] MacFarlane and McConchie (2024) 54.
[650] MacFarlane and McConchie (2024) 54.
[651] MacFarlane and McConchie (2024) 54.

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Once entitlement is established, evidence must justify the amount and duration of spousal support.[652] The court considers the conditions, means, needs and other circumstances of each spouse including:

(a) The length of the relationship;
(b) The age at separation;
(c) the roles during the relationship;
(d) the financial hardship or needs of the partners; or
(e) the existence of an order or cohabitation agreement.[653]

While the principles for entitlement are legislated, the amount and duration of support is calculated using the Spousal Support Advisory Guidelines (SSAG),[654] which, though not law, are used as a starting point for calculations.[655] Failure to use the SSAG as starting point is an appealable error.[656]

Spouses in a marriage-like relationship who cohabit for two years gain an equal share in all family property accumulated during the relationship upon separation,[657] including pensions and retirement savings plans[658] and are equally responsible for family debt.[659] Thus the duty of support in a marriage-like relationship, similar to a marriage, is established by the status of the parties as spouses and not a pre-requisite to establish a spousal relationship.

4.3 The Republic of Ireland (Ireland)

4.3.1 Introduction

The Irish legal system is a common law system based on the English model, but significantly amended by Irish customary law.[660] The Irish Constitution "recognises the Family as the natural primary and fundamental unit group of Society".[661] The Irish state

[652] S 162.
[653] S 161.
[654] Rogerson and Thompson *Spousal Support Advisory Guidelines: The Revised User's Guide* 2016 1. See also MacFarlane and McConchie (2024) 55.
[655] *Yemchuk v Yemchuk* 2005 BCCA 406.
[656] *Redpath v Redpath* 2006 BCCA 338.
[657] S 81.
[658] S 84(2)(e).
[659] S 82.
[660] CIA "The World Factbook".
[661] Art 41.1.1° of the *Bunreacht na hÉireann*, 1937 (Irish Constitution).

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"pledges itself to guard with special care the institution of Marriage, on which Family is founded and to protect it against attack".[662] Divorce was not allowed in Ireland until 1995, which marks to what extent family is protected by the Irish state.[663] From this perspective it seems that not much will change in Irish family law due to its conservative stance on family, yet surprisingly large strides have been made in the recognition of life partnerships in Irish law.[664] The approach of Ireland towards life partnerships can be of significance for South Africa as both jurisdictions have a rather conservative approach towards the protection of the institution of marriage.[665]

Irish law makes provision for civil partnerships, cohabitants, and qualified cohabitants in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 24 of 2010 (Cohabitants Act).[666] The Marriage Act 35 of 2015 (an amendment Act) amended the Civil Registrations Act 3 of 2004, which provides mechanisms to register marriages and to allow for same-sex marriages.[667] At the same time Part 7A of the Civil Registrations Act, which provided for the registration of civil partnerships, was abolished by section 8 of the Marriage Act. Therefore, after the amendments of the Civil Registrations Act on 16 November 2015 no new civil partnerships may be registered. The abolition of civil partnerships leaves marriage (under the Civil Registrations Act) and cohabitation (under the Cohabitants Act) as the only options for family forms in Ireland.[668]

4.3.2 Classification in terms of the Cohabitants Act

4.3.2.1 Cohabitants

Under section 172 of the Cohabitants Act, same-sex and opposite-sex couples living in "an intimate and committed relationship" are automatically granted cohabitant status

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[662] Art 41.3.2°.
[663] Fifteen Amendment of the Constitution Act 1995. See art 41.3.2° of the Irish Constitution.
[664] Sloan (2016) 128.
[665] The South African legislature did not want to amend the Marriage Act to include same-sex marriages but rather opted for sperate legislation, the CUA. In this regard see Smith and Robinson "An embarrassment of riches or a profusion of confusion? An evaluation of the continued existence of the Civil Union Act 17 of 2006 in the light of prospective domestic partnerships legislation in South Africa" 2010 *PELJ* 36.
[666] For background on the Cohabitants Act see Mee 2011 *CFLQ* 329; Fergus 2012 *IJ* 202; Sloan (2016) 137-139 and Harding 2016 *ISFL* 259, 266.
[667] Harding 2016 *ISFL* 266.
[668] For a discussion of the impact of these amendments see Harding 2016 *ISFL* 266 and 275.

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without registration. The Act does not define "an intimate and committed relationship".[669] To qualify as cohabitants the couple must not be married or in a civil partnership with each other and must not be within prohibited degrees of relationship.[670] To determine cohabitant status the court must consider all the circumstances of the relationship in general and certain listed factors in particular.[671] The following factors serve as a checklist to determine whether the couple qualify as cohabitants in an intimate and committed relationship:[672]

(a) "[T]he duration of the relationship;
(b) the basis on which the couple live together;
(c) the degree of financial dependence of either adult on the other and any agreement in respect of their finances;
(d) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property;
(e) whether there are one or more dependent children;
(f) whether one of the adults cares for and supports the children of the other; and
(g) the degree to which the adults present themselves to others as a couple".[673]

In *DC v DR*,[674] the court emphasised that the plaintiff cared for the deceased during her illness and that they discussed marriage which showed that the parties were committed.[675] Although the couple did not show affection for each other in public, friends perceived them as a couple or even married.[676] The court considered that the parties were above 60 years of age.[677] To qualify as an intimate relationship the court held that the relationship need not have been continuously sexual in nature, but it must

[669] Bergin "Co-habitation/civil partnership the 2010-Act" March 2011 https://oconnorbergin.ie/co-habitationcivil-partnership-the-2010-act/ (accessed on 22 July 2024).
[670] S 172(1).
[671] S 172(2).
[672] *DC v DR* 2015 IEHC 309 paras 78 and 80.
[673] S 172(2).
[674] 2015 IEHC 309.
[675] Para 97.
[676] *DC v DR* para 99.
[677] *DC v DR* para 98.

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have been sexual at some point during cohabitation to be considered intimate.[678] Not all factors need to be present for couples to qualify as cohabitants, and the weight attributed to each factor will vary depending on the circumstances of the case.[679]

Cohabitants can claim for wrongful death,[680] succeed in residential tenancy upon a cohabitant's death,[681] seek remedies for domestic violence,[682] qualify for family leave[683] and receive certain social grants.[684] However, "cohabitants" have limited rights compared to "qualified cohabitants" who have to comply with additional requirements.[685]

4.3.2.2 Qualified Cohabitants

"Qualified cohabitants" are long term "cohabitants"[686] with legal rights and obligations when their relationship ends, provided certain criteria are met.[687] Apart from qualifying as a "cohabitant",[688] further criteria must be complied with in terms of section 172(5) of the Cohabitants Act before life partners can attain the status of "qualified cohabitants". The criteria include cohabitation for two years with a dependent child born from the couple or five years without children, [689] and financial dependence by the applicant on the respondent.[690] Upon termination of the relationship qualified cohabitants have some rights similar to the rights of married spouses at divorce,[691] including maintenance,[692] pension adjustment,[693] and property adjustment orders.[694]

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[678] S 172(3) of the Cohabitants Act; *DC v DR* para 87 and Sloan (2016) 137.
[679] O'Sullivan "Cohabitant protection on relationship breakdown in Ireland: A lesson in illusory justice?" 2023 *IJLPF* 3 and Irish Law Reform Commission *Project 82: Rights and Duties of Cohabitants* (2006) 27.
[680] S 204 of the Cohabitants Act amending s 47 of the Civil Liability Act 41 of 1961.
[681] S 203 of the Cohabitants Act amending s 39 of the Residential Tenancies Act 27 of 2004.
[682] S 60 of the Civil Law (Miscellaneous Provisions) Act 23 of 2011.
[683] S 13 of the Parental Leave Act 30 of 1998.
[684] Ss 142(4)(a), 144(3), 217(3) of the Social Welfare Consolidation Act 26 of 2005. Further see Fergus 2012 *IJ* 243 and 244.
[685] Ss 173(5) and 194(10) of the Cohabitants Act; Fergus 2012 *IJ* 243 and 244.
[686] As defined in s 172(1)-(2) of the Cohabitants Act.
[687] They have satisfied the definition in s 172 of a cohabitant.
[688] See 4.3.2.2 above.
[689] S 172(5) of the Cohabitants Act.
[690] S 173(2).
[691] For a discussion why the consequences are similar to that of marriage see Mee 2011 *CFLQ* 333; Fergus 2012 *IJ* 244; Sloan (2016) 133.
[692] S 175.
[693] S 187.
[694] S 174.

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A property adjustment order will only be made if the claim for maintenance and pension adjustment is not sufficient.[695] Applications for relief must be made within two years of the relationship's termination.[696] "Qualified cohabitants" have more rights and duties than "cohabitants", but not as comprehensive as those applicable to civil partners[697] and spouses.[698]

Qualified cohabitants can opt-out of the statutory redress scheme by concluding a cohabitation agreement.[699] The court may however override any terms in the agreement that will cause a serious injustice.[700]

(a) Time period of cohabitation as requirement

When calculating the time period of cohabitation the time limits are strictly applied by the court, and intermittent periods of cohabitation cannot be combined.[701] However, physical cohabitation need not be continuous,[702] as long as separation is not due to a breakdown in the relationship.[703] Living apart is allowed for other reasons such as ill-health or work requirements.[704] The court has a discretion to decide on all relevant facts, whether the partners lived together in a committed and intimate relationship over a specified period of time.[705]

In *DC v DR*, the court recognised the parties lived together for more than five years even though the applicant lived elsewhere part-time to care for his mother.[706] The applicant spent almost half of each week at his old family home, sharing the care of his mother with his brother until her death.[707] This indicated the desire of the applicant and the deceased to live together prior to the death of the applicant's mother, which

[695] Ss 174-184 and 187-192.
[696] Ss 172(5), 173(2) and 195.
[697] Registered prior to 16 November 2016, when registration of civil partnerships was abolished by deleting Part 7A of the Civil Registrations Act 3 of 2004.
[698] Ss 175-184. Also see Fergus 2012 *IJ* 244.
[699] S 202(3) of the Cohabitants Act.
[700] S 202(4). See also Fergus 2012 *IJ* 246.
[701] *GR v Regan* 2020 IEHC 89 para 48 and O'Sullivan 2023 *IJLPF* 4.
[702] *MW v DC* 2017 IECA 255 para 29.
[703] *XY v ZW* 2019 IEHC 257 para 101.
[704] *XY v ZW* para 101.
[705] *MW v DC* para 29 and *GR v Regan* para 65.
[706] Para 82.
[707] Para 83.

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was delayed due to his caregiving responsibilities.[708] He did not make any other accommodation arrangements,[709] as he was in a committed long-term relationship with the deceased for ten years.[710] The applicant kept his clothes in drawers and left personal belongings in the bathroom.[711] The court accepted that they had permanently resided together for more than ten years.[712]

Parties married to someone else can only be qualified cohabitants if they were living apart from their spouses for four of the previous five years.[713] "Living apart" can include spouses who live in the same dwelling, but not in an intimate and committed relationship.[714] The fact that the relationship is no longer sexual in nature does not have an impact on the intimate nature thereof.[715] The rights of spouses prevail over those of qualified cohabitants and the court will not make any order in favour of a qualified cohabitant that will affect any right of a person to whom a cohabitant is or was married.[716] Irish law is strongly biased towards marriage due to the constitutional protection of the institution of marriage.[717]

(b) Dependency as requirement

For an economically dependent qualified cohabitant to succeed with a redress claim the cohabitant will have to prove financial dependency on the other cohabitant.[718] On termination of a qualified cohabitation relationship a party can seek relief similar to that of a divorce, provided that they were dependent on the previous qualified cohabitant and the party was unable to support themselves independently due to the relationship or the termination of the relationship.[719] A property adjustment order may only be made if the qualified cohabitant's claim for maintenance[720] and pension adjustment are

[708] Para 83.
[709] Para 82.
[710] Para 82.
[711] Para 82.
[712] Paras 81 and 82.
[713] S 172(6).
[714] S 172(6).
[715] S 172(6).
[716] S 173(5).
[717] Arts 41.1.1° and 41.1.2° of the Constitution of Ireland.
[718] S 173(2) of the Cohabitants Act.
[719] S 173(2) and 173(5). See also Mee (2011) 333 and Sloan (2016) 133.
[720] Ss 175-184.

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insufficient.[721] This system acts as a safety net, providing protection only for qualified cohabitants in need of support.[722] The court must find it just and equitable in all the circumstances to make an order,[723] considering the factors in section 173(3) that include:

(a) The current and future financial circumstances of the parties;
(b) needs and obligations of the parties;
(c) the rights, and entitlements of any current or former spouse or civil partner or dependent child from a previous relationship of the parties;
(d) duration of the relationship;
(e) contributions of the cohabitants;
(f) effect on the earning capacity of each of the cohabitants or the responsibilities of each of the cohabitants assumed during cohabitation;
(g) the basis on which they entered the relationship.[724]

The courts adopt a needs-based approach.[725] According to Mee there is a dissonance between the trigger for the remedy (need) and the criteria used for granting the remedy (what is just and equitable).[726] Mee observes that the factors determining whether the remedy is just and equitable are wider in scope than merely relating to the need.[727] Mee also indicates that the criteria in section 173(3) for granting the remedy are not linked to the financial dependency threshold.[728]

Due to a lack of cases dealing with financial dependency in the context of separating qualified cohabitants, there is uncertainty how financial dependency should be determined.[729] According to O'Sullivan the only judgment to date dealing with financial dependency is an unreported case, *MO's v EC.* [730] In this case financial dependency was established but the requirements to be eligible was not clearly explained by the

[721] Ss 187-192.
[722] O'Sullivan 2023 *IJLPF* 5.
[723] S 173(2).
[724] S 173(3).
[725] S 174(2). Also see O'Sullivan 2023 *IJLPF* 4.
[726] Mee "A critique of the cohabitation provisions of the Civil Partnership Bill" 2009 *IJFL* 87.
[727] Mee 2009 *IJFL* 87.
[728] Mee 2011 *CFLQ* 337-339.
[729] O'Sullivan 2023 *IJLPF* 8-9.
[730] Unreported Circuit Court 12 January 2015 and O'Sullivan 2023 *IJLPF* 9.

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court.[731] The female applicant had been in a 25-year relationship with the respondent.[732] She sought redress from her former cohabiting partner with assets valued at 26 million Euro.[733] The respondent gave up her successful career as a psychologist to care for their child and the two children of her partner who had been awarded sole care after the breakup of a previous relationship.[734] Two family homes were bought by the respondent in his name and the applicant received a small salary from one of the respondent's businesses. She was also lavishly maintained by the respondent apart from the salary.[735] After the breakdown, he continued to support her, occasionally providing her with money for fuel, health insurance and holidays.[736] Even though the applicant owned a property in her own name, the court found her financially dependent on the respondent and awarded relief accordingly.[737] According to O'Sullivan the case does not provide clear guidelines on establishing financial dependency for qualified cohabitants.[738] However, the respondent's continued maintenance of the applicant after the breakdown demonstrated, in O'Sullivan's view, her dependency, making it easier for the court to establish financial dependency.[739] The exact criteria for establishing financial dependency therefore in O'Sullivan's view, remains unclear.[740] In the *MO's* case, the redress ordered amounted to approximately 10% of the respondent's capital value at the end of the 25-year relationship.[741] According to O'Sullivan, the *MO's* case has established a 10% benchmark for cohabitation relief settlement cases in Ireland.[742]

Financial dependency is a prerequisite for a qualified cohabitant seeking redress upon separation.[743] However, this requirement does not apply if the couple remained together until one qualified cohabitant's death.[744] In such cases, the survivor can claim

[731] O'Sullivan 2023 *IJLPF* 9.
[732] O'Sullivan 2023 *IJLPF* 9.
[733] O'Sullivan 2023 *IJLPF* 9.
[734] O'Sullivan 2023 *IJLPF* 9.
[735] O'Sullivan 2023 *IJLPF* 9.
[736] O'Sullivan 2023 *IJLPF* 9.
[737] O'Sullivan 2023 *IJLPF* 9.
[738] O'Sullivan 2023 *IJLPF* 9.
[739] O'Sullivan 2023 *IJLPF* 9.
[740] O'Sullivan 2023 *IJLPF* 9.
[741] O'Sullivan 2023 *IJLPF* 10.
[742] O'Sullivan 2023 *IJLPF* 10.
[743] S 173(2) of the Cohabitants Act.
[744] Fergus 2012 *IJ* 245.

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against the deceased's net estate if they can show that the deceased failed to make proper provision for them through a will or otherwise.[745] A more generous approach is adopted to applications under section 194 of the Cohabitants Act for claims made after a qualified cohabitant's death compared to those mentioned in the *MO's* case. For instance, in *DC v DR* a surviving qualified cohabitant was granted approximately 45% of the deceased's estate. However, Baker J commented:

> "The percentage arose more from the value of the separate assets and because I consider it to be possible and proper to make provision by a distribution of real property *in specie*. A greater or less percentage might be appropriate in another case, and I do not regard that the legislation mandates or permits of a rule or even a rule of thumb that directs a particular percentage, or range".[746]

Any right to relief granted by the court is subject to the rights and entitlements of spouses, former spouses, civil partners, former civil partners, dependants, or other children from previous relationships.[747] As a result relief is more limited for a qualified cohabitant than for a spouse.[748] Upon the death of a qualified cohabitant, the surviving qualified cohabitant can only claim from the net estate of the deceased after provision has been made to satisfy the rights under the Succession Act 27 of 1965 for civil partners and spouses.[749]

In addition to *inter vivos* provisions available on relationship breakdown, section 194 of the Cohabitants Act allows a qualified cohabitant to apply for the provision of relief from the net estate of the deceased partner. The court can make an appropriate provision, considering the interests of any other person involved.[750] The court must be satisfied that proper provision was not made for the applicant during the deceased's life.[751] Although there is limited guidance on when the court will consider that no proper provision was made, section 194 makes it clear that the lack of provision must not

[745] S 194 of the Cohabitants Act. See also Fergus 2012 *IJ* 244.
[746] Para 155.
[747] S 173(3).
[748] Fergus 2012 *IJ* 145.
[749] S 194(1) and (11). See also Fergus 2012 *IJ* 145.
[750] S 194(3) of the Cohabitants Act.
[751] S 194(3).

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have been due to the improper conduct by the applicant. Disregarding this would be unjust.[752]

On making an order at the death of the first-dying partner, the court must consider all circumstances of the case,[753] including any order made *inter vivos* to the benefit of the applicant,[754] bequest or device made to the applicant by the deceased,[755] interest of the beneficiaries of the estate[756] and the same factors available for an order made *inter vivos*.[757] As explained above, there is no need to provide evidence of dependence on the deceased, but where there was dependence the court is more likely to find that proper provision was not made.[758] The degree of dependence is considered when determining if the couple met the definition of cohabitants.[759] An award made under section 194 may not exceed what the qualified cohabitant would have been entitled to, had the qualified cohabitant been party to a marriage or a civil partnership with the deceased.[760] It may also not affect the legal rights of any surviving spouse,[761] or the entitlements of spouses or civil partners under the Succession Act.[762]

4.4 Conclusion: A comparison between British Colombia, Ireland and South Africa

Both British Columbia and Ireland recognise life partnerships by means of formal legislation.[763] In British Columbian and Irish law, a duty of support is considered a consequence rather than a pre-requisite for proving the existence of life partnerships.[764] In South Africa, as indicated before, there is no formal legislation

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[752] S 194(3) states: The court may by order make the provision for the applicant that the court considers appropriate having regard to the rights of any other person having an interest in the matter, if the court is satisfied that proper provision in the circumstances was not made for the applicant during the lifetime of the deceased for any reason other than conduct by the applicant that, in the opinion of the court, *it would in all the circumstances be unjust to disregard*" (my emphasis).
[753] S 194(4).
[754] S 194(4)(a).
[755] S 194(4)(b).
[756] S 194(4)(c).
[757] S 194(4)(d), cross-referring to s 173(3).
[758] Sloan (2016) 142.
[759] S 172(2)(c).
[760] S 194(7).
[761] S 194(10).
[762] S 194 (11)(b)-(c).
[763] FLA (see para 4.2.1) and Cohabitants Act (see para 4.3.1).
[764] See paras 4.2.2 and 4.3.2.3.

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recognising life partnerships.[765] The Constitutional Court, MMSA, ISA, and the draft Single Marriage Statute require at least an undertaking of a duty of support as a prerequisite for recognising a life partnership.[766]

According to the SALRC, there are three legislative models when considering the recognition of life partnerships: The prescription model,[767] the ascription model and the judicial discretion model.[768] The prescription model requires life partnerships to be registered before any consequences of the relationship are recognised, and parties must opt-in for legislative protection.[769] The ascription model provides automatic recognition of life partnerships when certain requirements are met, and life partners must opt-out if they do not want to attract the prescribed consequences.[770] These consequences are applied to the relationship during its existence and not merely *ex post facto*.[771] The judicial discretion model provides for partners in a life partnership, where there is no formal recognition of the relationship, to approach the court for relief which can only be provided when the partners have proved that their relationship qualifies as a life partnership after the relationship has ended.[772] The judicial discretion model is what is currently followed by our courts as discussed in chapter 2, where life partnerships are not explicitly recognised by legislation.

British Columbia and Ireland use an ascription model, where life partners are automatically protected when cohabiting in a marriage-like relationship for a specific period of time.[773] In both jurisdictions, legislation ascribes consequences to the life partnerships during and after termination of the life partnership.[774] If life partners wish to opt-out, they must draft a partnership agreement explicitly excluding the

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[765] See para 2.1.
[766] *Bwanya* (CC) paras 85-87 (see para 2.2.3.3); Single Marriage Statute cl 1(xvi) (see para 3.3.3) requires cohabitation and a permanent responsibility for supporting each other; s 1A of ISA and s 1 of MSSA.
[767] The SALRC refer to the prescription model as the "registration model" or "registered partnership model" (SALRC *Domestic Partnerships Report* (2006) 318 paras 6.2.16 and 6.2.17).
[768] SALRC *Domestic Partnerships Report* (2006) 366 para 7.2.1, 367 para 7.2.2.
[769] SALRC *Domestic Partnerships Report* (2006) 77 para 2.4.139.
[770] SALRC *Domestic Partnerships Report* (2006) 366 para 7.2.1.
[771] SALRC *Domestic Partnerships Report* (2006) 369-370 para 7.2.12.
[772] SALRC *Domestic Partnerships Report* (2006) 369-370 para 7.2.12.
[773] British Columbia: s 3(1) of FLA (see para 4.2.2); Ireland: s 172(5)of Cohabitants Act (see para 4.3.2.2).
[774] See paras 4.2.2.3 and 4.3.2.

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consequences.[775] The consequences of the ascription model are applied differently in British Columbia and Ireland. In British Columbia life partners ("spouses in a marriage-like relationship") have similar rights and responsibilities to spouses in a marriage.[776] The Irish approach is more conservative, providing life partners ("cohabitants" and "qualified cohabitants") with fewer rights than spouses in a marriage, in line with the Irish Constitution's priority to protect the institution of marriage above all other relationships.[777] Consequently, life partners in Ireland are treated less favourably than their married counterparts.[778] In Irish law, the outcomes for life partners are less favourable and more uncertain than those of divorcing spouses, as the system is designed for redress rather than redistribution of property and finances upon breakdown of the life partnership.[779] Although recognition in Irish law focus on redress there are never the less still certain consequences similar to that of a marriage during the existence of the life partnership.[780] To qualify for redress, the requesting life partner must prove a need.[781] This is in contrast with British Columbia, where the life partner can base a support claim on entitlement, financial disadvantage created by the relationship, or contract, and not merely need.[782]

Currently, South Africa does not formally recognise life partnerships through legislation, so neither an ascription nor a prescription model exists. In terms of the Domestic Partnerships Bill and the Single Marriage Statute the parties must register their relationship.[783] A prescription model is therefore applied to registered life partnerships by proposed legislation. In the absence of registration, under the Domestic Partnerships Bill[784] and Single Marriage Statute, a life partner can prove the life partnership *ex post facto* under the judicial discretion model.[785] However, it will not

[775] British Columbia: ss 81 and 92 of the FLA (para 4.2.2); Ireland: s 202 of the Cohabitants Act (para 4.3.2.1).
[776] S 3(1) of the FLA.
[777] Article 41.3.1° of the Irish Constitution.
[778] O'Sullivan 2023 *IJLPF* 11.
[779] O'Sullivan 2023 *IJLPF* 10.
[780] See para 4.3.2. above.
[781] S 173 of the Cohabitants Act.
[782] S 161 of the FLA. See para 4.2.2.3.
[783] Domestic Partnerships Bill (para 3.2) and Single Marriage Statute (para 3.3).
[784] SALRC *Domestic Partnerships Report* (2006) 366, 367.
[785] Cls 5, 6 and 26 of the Domestic Partnerships Bill and cl 8 of the Single Marriage Statute.

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be sufficient to merely prove the relationship under the Single Marriage Statute, the partner must also prove cohabitation and a permanent commitment to support.[786]

The undertaking of a duty of support plays a significant role in the recognition of life partnerships in judicial precedent,[787] current legislation[788] and draft legislation in South Africa.[789] From the judicial precedent discussed in chapter 2 it is evident that the courts require the undertaking of a duty of support before a life partnership can be recognised and protected.[790] The draft legislation discussed in chapter 3 have different approaches with regard to the role that the duty of support plays in recognition and protection of life partnerships. The Domestic Partnerships Bill and Single Marriage Statute follow a combination of the prescription and judicial discretion models.[791] A life partnership can be registered in terms of the proposed Acts for full recognition and protection during the existence of the life partnership and at termination. Should the life partnership not be registered, parties may prove the existence of the life partnership to acquire protection.[792] The Domestic Partnerships Bill requires a duty of support as one of the many factors that the court can take into consideration to determine the existence of the life partnership. Even where the duty of support is not proved as a factor under the Domestic Partnerships Bill an enforceable duty of support will automatically flow from the relationship. In contrast the Single Marriage Statute requires the undertaking of a duty of support as a prerequisite for the recognition of a life partnership.[793] Effectively under the Single Marriage Statute a duty of support will be deemed an automatic consequence once the life partnership is recognised.[794]

In the next chapter a conclusion will be drawn on the role that the assumption of support plays in the recognition and protection of life partnerships in South Africa. Recommendations will be made on the best possible approach for South Africa drawn from the conclusions reached at the end of this chapter.

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[786] Cl 1(xvi)(cc).
[787] *Bwanya* (CC) paras 71 and 95.
[788] MSA and ISA.
[789] Single Marriage Statute.
[790] See para 2.3 above.
[791] See para 3.6 above.
[792] See para 3.6 above.
[793] See para 3.6 above.
[794] See para 3.6 above.

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Chapter 5: Conclusion and recommendations

5.1 Conclusion

As outlined in the introduction, the objective of this study was to determine the role of the assumption of support in the context of the current and anticipated future recognition and protection of life partnerships in South Africa. Developments in other comparable jurisdictions such as those of British Columbia and Ireland were investigated to inform the best possible approach for South Africa. The focus of this dissertation has been on life partnerships in the narrow sense.[795] Life partnerships in the narrow sense are relationships in which two adult partners, irrespective of gender, live together in a permanent intimate partnership without being legally married under the Marriage Act, the CUA, the RCMA or concluding a civil partnership under the CUA.[796]

The state must make provision for the protection of vulnerable parties in life partnerships.[797] The duty flows from the Constitution under which every person has a right to equal protection before the law, the right not to be discriminated against and the right to dignity.[798] Not all individuals entering a relationship are in an equal bargaining position.[799] Gender inequality and patriarchy may create limitations on women's ability to define the terms of their relationship. A vulnerable party, lacking the power to compel the stronger party to register the relationship or enter into a contract, should be entitled to legal protection.[800]

As indicated in chapter 1 South African family law does not recognise a "law of life partnerships" but accords piecemeal statutory and judicial recognition to life partnerships.[801] Courts have provided *ad hoc* recognition to life partnerships.[802] In dealing with life partnerships the judiciary has taken two distinct approaches regarding the role that the duty of support plays in the recognition of life partnerships. As

[795] See para 1.1 above.
[796] See para 1.1 above.
[797] *Volks* paras 65-67; *Bwanya* para 196.
[798] See para 1.1 above.
[799] See para 1.1 above.
[800] See para 1.1 above.
[801] See para 1.1 above.
[802] See para 1.1 above.

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discussed in chapter 2, it is evident from the first approach that merely a relationship akin to marriage needs to be proved by the many indicative factors set out by the court and a tacit contractual duty of support will be deemed to have existed based on the nature of this marriage-like relationship.[803] In terms of this approach an undertaking to support is therefore not deemed a prerequisite for recognition of the life partnership.[804] In *Langemaat*, the court stated: "Parties to a same-sex union, which has existed for years in a common home, must surely owe a duty of support, in all senses, to each other".[805] The court in *National Coalition* confirmed that mutual "financial support" was merely one of a host of factors to consider recognising a life partnership and that none of the factors were "indispensable for establishing a permanent partnership".[806] In *Satchwell* (T) the court *a quo* followed the approach in *Langemaat* and the final order in *Satchwell* (T) made no mention of an undertaking of a duty of support.[807]

The second approach requires both proof of a relationship akin to marriage and the undertaking of a duty of support for recognition and protection.[808] In the Constitutional Court *Satchwell* (CC), Madala J stated that one "cannot impose obligations towards partners where those partners themselves have failed to undertake such obligations".[809] The rationale behind this approach, as explained in chapter 2, is that only the conclusion of a marriage creates an *ex lege* duty of support between partners.[810] When a marriage terminates, such a duty can only exist if it is extended by agreement, court order or legislation.[811] To apply similar consequences to a life partnership, the relationship must therefore have been akin to marriage, in other words not only must a *consortium omnis vitae* have existed between the life partners but the parties must have undertaken a duty of support towards each other.[812] In terms of this approach, the courts must establish a contractual duty of support in addition to the life partnership in order to extend spousal benefits to a permanent life partnership.[813] *Du*

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[803] See para 2.3 above.
[804] See para 2.3 above.
[805] *Langemaat* 316(H). See para 2.3 above.
[806] *National Coalition* para 88. See para 2.2.2.3 above.
[807] *Satchwell* (T) para 16 and *Satchwell* (CC) para 34. See para 2.2.2.4 above.
[808] See para 2.3 above.
[809] *Satchwell* (CC) paras 23 and 24. See para 2.3 above.
[810] See para 2.3 above.
[811] See para 2.3 above.
[812] See para 2.3 above.
[813] See para 2.3 above.

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Plessis emphasised that the parties had undertaken a tacit contract to support each other by entering into an unofficial marriage ceremony.[814] It is further evident from the judgment in *Bwanya* (CC) that the parties will have to prove a reciprocal duty of support in addition to proving characteristics in their relationship similar to a *consortium omnis vitae* for purposes of qualifying for benefits under the ISA and the MSSA.[815]

The factors mentioned in chapter 2 could be used to determine whether the parties reached a stage of permanence similar to marriage, as applied in the first approach or to determine whether the parties have reached a stage of permanence similar to marriage and concluded a tacit contract of support, as applied in the second approach.[816] By requiring an undertaking of a duty of support it is clear that the duty of support has to flow from the agreement between the parties and not merely be inferred from the family relationship. The duty of support requirements thus offers less legal protection to life partners than other family members such as spouses, children, and parents.[817] As such it significantly differs from the initial stance adopted in *Langemaat* that emphasised that a tacit contractual duty of support is inferred from the existence of a permanent life partnership, thus from the permanent status of the relationship and not from additional proof that a contractual duty of support existed.[818]

From Chapter 2 it is apparent that the courts have adopted different approaches towards affording spousal benefits to life partners as far as the assumption of support between the life partners is concerned.[819] The undertaking of a duty of support is according to recent decisions a prerequisite for the recognition of life partnerships.[820]

Chapter 3 evaluated legislative proposals and their potential impact on the recognition of life partnerships and the duty of support, should the respective proposals and Bills be enacted. It has been established that although the Domestic Partnerships Bill and Single Marriage Statute provides for the registration of life/domestic partnerships, very few life partners will register their relationships, and the prescription model will

[814] *Du Plessis* para 15. See para 2.3 above.
[815] *Bwanya* (CC) para 95. See para 2.3 above.
[816] See para 2.3 above.
[817] See para 2.3 above.
[818] See para 2.3 above.
[819] See para 2.3 above.
[820] See para 2.3 above.

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therefore probably not improve the protection of unmarried life partners.[821] What is of importance is how the proposed statutes deal with unregistered life partnerships. Both Bills apply the judicial discretion model to unregistered life partnerships.[822] The Domestic Partnership Bill provided for an *ex lege* duty of support that flows from the existence of a registered domestic partnership.[823] If the domestic partnership was not registered the existence of the partnership could be determined by an open list of factors.[824] It was established that the assumption of a duty of support is merely one of a number of factors for the recognition of a life partnership and not considered a qualifying prerequisite.[825] The *ex post facto* recognition of life partnerships proposed by the Domestic Partnerships Bill could provide a level of protection for the most vulnerable of life partners when it is needed most at termination of the relationship.[826] It has been established that the Domestic Partnerships Bill has less onerous requirements for establishing a life partnership than the Single Marriage Statute.[827] Although the Single Marriage Statute provides for *ex post facto* recognition the Statute requires cohabitation and "a permanent responsibility for supporting each other" as threshold criteria for the recognition of life partnerships. It has been concluded that these requirements imply that a life partner will have to apply the listed factors used by the court to establish a permanent life partnership, and in addition to a permanent life partnership then establish cohabitation and the existence of a duty of support.[828]

It is evident from chapter 3 that under the Domestic Partnerships Bill the assumption of a duty of support was one of a number of factors for recognition of a life partnership and therefore not considered a qualifying prerequisite for recognition and protection.[829] Under the Single Marriage Statute, the parties must have cohabited in a life partnership and have assumed "a permanent responsibility for supporting each

[821] See para 3.6 above.
[822] See para 3.6 above.
[823] See para 3.6 above.
[824] See para 3.6 above.
[825] See para 3.6 above.
[826] See para 3.6 above.
[827] See para 3.6 above.
[828] See para 3.6 above.
[829] See para 3.6 above.

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other".[830] A permanent responsibility for supporting each other is made a prerequisite for recognition and protection of a life partnership.[831]

Although the above Bills provide for the recognition of life partnerships it was established that Parliament advanced the recognition of all forms of marriage under the new Marriage Bill, which recognises all marriages under a single Act but does not provide for life partnerships.[832] Life partners will have to rely on piecemeal recognition by the courts, as discussed in Chapter 2, for the foreseeable future.[833]

Chapter 3 illustrates that the Domestic Partnerships Bill remains the most comprehensive proposal for the recognition of life partnerships to date in South Africa due to the fact that the Single Marriage Statute deals with the recognition of protected relationships but not with the consequences. The consequences will be codified by other legislation.[834]

In Chapter 4 the legal position of life partnerships in British Columbia and Ireland and the role of the duty of support was investigated and compared to the South African position. It was indicated that British Columbia and Ireland recognise life partnerships by means of formal legislation.[835] Both jurisdictions follow an ascription model.[836] Chapter 3 established that acknowledging life partnerships by means of formal legislation enhances protection of vulnerable parties and creates a sense of judicial security.[837] The trigger for acknowledgement in British Columbia is a specific time period and a marriage-like relationship. In Ireland an intimate and committed relationship is required with a prescribed time period and financial dependence on the other partner.[838] However, in order to be able to claim maintenance in British Columbia evidence of compensatory entitlement must be proved, either brought on due to a financial disadvantage created by the relationship or by the breakdown of the relationship.[839] Also, if an entitlement based on financial need is established by one of

[830] See para 3.6 above.
[831] See para 3.6 above.
[832] See para 3.6 above.
[833] See para 3.6 above.
[834] See para 3.6 above.
[835] See para 4.4 above.
[836] See para 4.4 above.
[837] See para 3.6 above.
[838] See para 4.4 above.
[839] See para 4.4 above.

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the spouses in a marriage-like relationship and the spouse cannot independently meet their needs without financial assistance.[840] The Irish courts adopted a needs-based approach. To succeed as a qualified cohabitant the one cohabitant will have to prove that they are financially dependent on the other cohabitant.[841] It was illustrated that the Irish position is more conservative than the stance taken in British Columbia towards life partnerships.[842] In Irish law, cohabitation outcomes are less favourable and more uncertain than divorce outcomes, as the system is designed to redress and not to redistribute property or finances on breakdown of the cohabitation relationship.[843] The Irish Constitution prioritises protection of the institution of marriage, treating life partners less favourably.[844]

In conclusion, currently in South Africa the assumption of a duty of support is required by the judiciary and by some legislation (ISA and MSSA) as a pre-requisite for the recognition of a life partnership or at least for recognising certain consequences of a life partnership.[845] Proposed legislation adopt different approaches. In terms of the Domestic Partnerships Bill a duty of support is not required to recognise a life partnership or invoke its consequences, whereas the Single Marriage Statute requires a duty of support for the recognition of a life partnership, together with other prerequisites for the recognition of certain consequences.[846] In British Columbia and Ireland, the duty of support is not a prerequisite for the recognition of a life partnership.[847] As established above protection of life partnerships is more onerous for the vulnerable life partner if a contractual duty of support is a prerequisite for the recognition and protection of a life partnership.

5.2 Recommendation

There are three legislative models that can be followed in the recognition of life partnerships: The prescription model, the ascription model and the judicial discretion

[840] See para 4.4 above.
[841] See para 4.4 above.
[842] See para 4.4 above.
[843] See para 4.4 above.
[844] See para 4.4 above.
[845] See para 3.6 above.
[846] See para 3.3 above.
[847] See para 4.4 above.

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model.[848] The prescription model requires a life partnership to be registered before any consequences of the relationship are recognised.[849] The ascription model provides automatic recognition of life partnerships when certain requirements are met and life partners must opt-out of the consequences by contract to avoid the prescribed consequences.[850] The judicial discretion model does not provide for registration or automatic recognition but rather places the onus on a life partner after dissolution of the relationship to approach the court for relief and prove that the relationship qualifies as a life partnership.[851]

The judicial discretion model does not provide sufficient protection for life partners. The model only provides protection *ex post facto* and only if the claimant can prove that the life partnership existed.[852] The model forces the financially vulnerable party to approach the court which is not viable. The prescription model in itself does not provide for a viable solution either. Very few life partners will register their relationships.[853]

An ascription model seems to provide the most comprehensive protection for life partners. It provides automatic protection when certain requirements are met and allows for autonomy by allowing life partners to contract out of the consequences.[854] Consequently the ascription model seems to be the only sustainable solution for the recognition of life partnerships.

The DHA endeavoured to include all forms of marriage under the Marriage Bill to avoid the current dilemma of different Acts regulating different unions.[855] The DHA intended to include life partnerships, however the proposed Bill does not regulate life partnerships.[856] With the current approach of the DHA in mind it might simplify the process to include the recognition of life partnerships that are marriage-like and where the parties have cohabited for at least two years as worthy of protection in the Marriage Bill.[857] Since life partnerships have similar consequences to a marriage including them

[848] See para 4.4 above.
[849] See para 4.4 above.
[850] See para 4.4 above.
[851] See para 4.4 above.
[852] See para 4.4 above.
[853] See para 3.6 above.
[854] See para 4.4 above.
[855] See para 3.5 above.
[856] See para 3.5 above.
[857] See para 3.5 above.

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in the Marriage Bill, would ensure a unified legal approach, reducing legal uncertainty. This would prevent laws from being duplicated and significantly streamline the legislative process. Including life partnerships in the Marriage Bill would further reflect social reality as seen in successfully concluded public participation processes recently held in Gauteng on the Marriage Bill where participants requested inclusion of cohabitating arrangements in the Marriage Bill. Many couples prefer to live in a life partnership rather than a formal marriage. By recognising life partnerships in the Marriage Bill, the DHA would acknowledge the evolving nature of relationships and ensure that legal protection align with social reality.[858] This approach will also align with the original intent of the DHA to include life partnerships in the Marriage Bill.[859] For these reasons it would be logical to include life partnerships in the Act, providing protection on the same level as a marriage rather than drafting a separate Act.

It is however doubtful that life partnerships will be included in the Marriage Bill, as the intention to include life partnerships was only mentioned in the policy paper preceding the Marriage Bill, and abruptly ignored in the Marriage Bill itself.[860] The alternative would be to enact a life partnership Act.

An ascription model similar to British Columbia could be adopted, granting life partnerships the same status and legal consequences as a marriage.[861] This could be achieved by including a definition for life partnership in the Marriage Bill and amending the definition of “spouse” to include life partnerships.

The appropriate Act could then allow life partners to qualify as spouses when they have entered a marriage-like relationship lasting at least two years, or when the life partners have a child together. Marriage-like characteristics can be determined by the non-exhaustive list of factors currently used by the South African courts to assess the marriage-like nature of such a relationship.[862] Accordingly, life partners in such

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[858] Parliament of the Republic of South Africa 20 November 2024“ Media statement: Participants urge Home Affairs Committee to consider increasing permissible legal age for Marriage Bill” 20 November 2024 https://www.parliament.gov.za/press-releases/media-statement-participants-urge-home-affairs-committeeconsider-increasing-permissible-legal-age-marriage-bill (accessed on 3 February 2025).
[859] See para 3.5 above.
[860] See para 3.5 above.
[861] See para 4.2 above.
[862] See para 2.2.2.3 above.

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relationships can automatically receive protection after a specific period. To respect personal autonomy, life partners who wish to opt-out should be permitted to draft a partnership agreement explicitly excluding these consequences. The opt-out approach is preferable to an opt-in approach, as the latter would leave vulnerable partners unprotected, given their limited ability to insist on formal registration.[863] By contrast, an opt-out approach places the responsibility on partners who seek to assert their autonomy and are more likely to take proactive steps to safeguard their rights.[864]

It is evident from judicial precedent that it is not sufficient for parties to prove the existence of a permanent life partnership, akin to marriage but an additional requirement that of an express or tacit contractual duty of support is required for recognition.[865] A duty of support cannot be simply inferred from the permanent nature of the life partnership and must be pleaded and proved in addition to the nature of the life partnership.[866] A duty of support is therefore a prerequisite for proving the existence of a life partnership and not merely a tacit contractual duty that can be inferred from the permanence of the relationship. It is submitted that a duty of support should rather be considered a consequence than a prerequisite for proving the existence of a life partnership. When a life partnership exists, the parties must be able to base a support claim on entitlement, financial disadvantage created by the relationship or the breakdown of the relationship, or contract, similar to British Columbia.[867] Following this approach would align with the assumption that life partnerships resemble marriage in many aspects, barring the informal establishment thereof. Based on this life partners should have a duty of support flowing from the relationship if the permanence thereof is established, regardless of the nature of such a duty of support. If the purpose of recognising life partnerships is to afford similar protection to that of marriage, then the duty of support should be seen as a consequence of the relationship rather than a prerequisite. The approach of the Constitutional Court in *Bwanya* (CC) that requires an undertaking of support in addition to permanence of the life partnership places an undue burden on the economically dependent partner.[868] The inference of a tacit

[863] See para 3.6 above.
[864] See para 3.6 above.
[865] See para 2.3 above.
[866] See para 2.3 above.
[867] See para 4.4 above.
[868] See para 5.1 above.

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contractual duty of support from the permanent nature of the life partnership, rather than explicit proof, is a more just and practical approach. By recognising the duty of support as a consequence of a life partnership rather than a prerequisite, the law would better reflect the lived realities of life partners and uphold the constitutional values of dignity and equality.

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