

Customary Marriages Act - a will to protect your relationship



By [Geraldine Macpherson](#)

4 Mar 2014

Times have changed and so have the ways in which people choose to spend their lives together. While the big white wedding might be a little girl's dream, some men and women today are choosing to forego marriage and simply live together as partners.



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While this modern view has become more acceptable, these living arrangements can often present their own challenges. Co-habiting, cultural arrangements and same sex marriages don't necessarily enjoy the same legal privileges as the civil marriage union.

In this final piece on marital regimes, the focus is on those people who are in relationships that are not directly governed by the Matrimonial Property Act of 1984, for example those who are 'married' in terms of the views of their religion or who are simply co-habiting as permanent life partners. Some of these unions are subject to the Recognition of Customary Marriages Act or the Civil Unions Act, and others fall outside of any legal framework.

Effective estate planning

Whether the relationships are recognised under the acts or not, the assets in these relationships will be hugely affected by the death of a partner, and therefore effective estate planning and both partners having a well drafted will is essential.

People who have formalised their customary unions in terms of the Recognition of Customary Marriages Act will be treated as if they were married in community of property unless they have entered into an ante-nuptial agreement, in which case the marriage will be treated as ante-nuptial contract (ANC) with accrual- unless the accrual is specifically excluded in the relevant contract.

The same applies to those who have formalised their relationships under the Civil Unions Act. The act is open to anyone to use, and has predominantly been used to formalise same sex relationships.

In either of these circumstances, partners need to consider the following:

- Has the relationship been formalised in terms of either of the abovementioned Acts?
- Ensure that they have an ANC in place - otherwise the estate planning must be done on the basis that the parties are 'married' in community of property.
- Both partners should have an updated will that accurately reflects their specific wishes in the event of death.

Should partners elect not to formalise their relationships in terms of the legislation available, the Constitutional Court has, in many instances, laid down the guidelines as to who qualifies as a spouse and so stands to inherit through intestate succession and who does not. To avoid any uncertainty or hardship, all partners in such relationships should ensure that they have a valid will detailing who should inherit and to what extent. For example, if partners are cohabiting in a same sex relationship and have elected not to formalise that relationship under the Civil Unions Act, they are not seen to be 'spouses' and neither would inherit from the other in terms of intestate succession. The financial consequences of not having a will in place in this situation would potentially be disastrous for the survivor.

In addition, there is no legislative mechanism for people who are married in terms of religious rites to formalise their relationships. If they want to give effect to their intent in terms of their religious beliefs they need to make certain that their wills reflect this intention.

The last category to consider are those who are simply co-habiting, who could formalise their relationships under any of the relevant Acts mentioned above, but choose not to do so.

While these people will potentially qualify as 'spouses' for the purposes of the Income Tax (including CGT and donations tax) and Estate Duty Act - they are not recognised as spouses for the purposes of the Intestate Succession Act. Therefore, in this instance:

- It is vital to ensure that each party has a valid will with specific wishes for the distribution of their estate.
- If the parties have entered into a Domestic Partnership Agreement, they need to refer to this agreement and make sure their planning is compatible.

It is very important to consider your limitations and concerns when in a relationship that falls outside of the everyday civil marriage. Appropriate consultation with your financial advisor will assist you with your estate planning and ensure that your assets are bequeathed in the manner that you want, irrespective of how you are 'married'.

ABOUT GERALDINE MACPHERSON

Geraldine has over eleven years experience in the financial services industry, consulting in all aspects of financial planning. She is currently the legal marketing specialist at Liberty Retail SA. Her responsibilities include providing expert planning and legal advice to tied financial advisers, as well as facilitating their development through training interventions, market analysis and industry awareness.

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