

REFORMS NEEDED ON PROPERTY LAWS ON COHABITATION.

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By

Wanjiru Joan Veronicah

077443

Prepared under the supervision of

Dr.Santiago Legarre

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Declaration

I, WANJIRU JOAN VERONICAH, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Professor Santiago Legarre

Disclaimer

The paper does not in any way seek to equate cohabitation to marriage. The sole objective of the paper is to seek a solution for problems that may arise with property acquired during a cohabitation union.

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ABSTRACT

The Marriage Act¹ does not tackle the issue of cohabitation; however, it defines what to cohabit is. The definition of to cohabit given is; this is an arrangement where an unmarried couple lives together in a long-term relationship that resembles a marriage.² This will be the working definition that is used in relation to cohabitation.

The statement of the problem of the paper is that there are no laws that cater to couples in cohabitation relationships. This lack of laws can be viewed in areas as with regards to property matters and succession matters. The Judicature Act³ recognizes common law as a source of law. The study needed to be carried out as the parties involved in cohabitation unions need to have laws that would address the issues as with regards to property and succession matters.

The assumption used is that is that parties in cohabitation unions have rights that are required to be granted to them. It is also an assumption that the parties in cohabitation unions are aware of the rights. The courts have taken into account common law as a source of law which recognizes the common law marriage or the presumption of marriage. That has resulted in the recognition of cohabitation in Kenya by the courts under the presumption of marriage as seen in *Hottensiah Yawe vs. Public trustee*.⁴

¹ Sec 2 ,Marriage Act, (2014)

² Sec 2 ,Marriage Act, (2014)

³ Judicature Act, (2016)

⁴ *Hottensiah Wanjiku Yawe Vs Public Trustee*(1976)

CHAPTER ONE

1.1 Background to the Problem

The law concerning cohabitation has been limited to the common law principle of presumption of marriage and case law which relies on this principle. This is due to the lack of statutory law addressing cohabitation. In 2015, the courts established that the non-recognition of the presumption of marriage as a form of marriage under the Act does not prevent the court from using the common law presumption of marriage as it is still valid due to the fact that the Judicature Act⁵ recognizes common law as a source of law in Kenya.⁶

The lack of statutory law to define the scope of what cohabitation relationships are is a problem for couples who would want to seek redress in such situations are not fully aware of what rights they have if any.

The courts have relied on *Hottensiah Wanjiku Yawe vs. Public Trustee*⁷ where the Court held that long cohabitation as man and wife give rise to a presumption of marriage and only cogent evidence to the contrary could rebut such a presumption.

The courts have however not defined what would amount to long cohabitation. Would a couple living together for a period of a year be regarded as to be in a cohabitation relationship if they

⁵ Section 3, Judicature Act (2016)

⁶ *Rosemary Aoko Munjal Vs Noel Namenya Munja* (2015) eKlr

⁷ *Hottensiah Wanjiku Yawe Vs Public Trustee* (1976)

conduct themselves as though they were a married couple or would it have to be longer than that for it to be regarded as a cohabitation relationship under the law?

Other issues that arise from the lack of definite law would be with regards to the property rights that the parties in cohabitation unions have. Unlike parties in married unions, parties in cohabitation unions do not have any rights that arise from them owning property together.

This gives rise to the question of how to divide the property acquired during the relationship in the event of separation. Couples in married relationships are protected under the law as the wife or the husband can go to court and ask for what is due to them even if he or she did not contribute any monies in the acquisition of the property.⁸

The Law of Succession Act⁹ does not also list parties in cohabitation relationships as being able to inherit the property of their partners. This is seen where the law of succession only takes into account parties who have been married especially with regards to matters of intestacy.

This then makes it impossible for women who were dependents of the men in such relationships or the men who were dependants on the women to inherit from them. The relatives of the parties may argue that they were not married and as such they are not entitled to the inheritance.

⁸ Matrimonial Property Act, (2013)

⁹ Law of Succession Act, (2015)

1.2 Theoretical Framework

The use of theories in this section is to help explain the need for property rights to be granted to parties in cohabitation unions. The rights that are advocated for are for the property that is acquired during the term of the relationship.

The theories also seek to explain the occurrence of cohabitation unions in society. In so doing it justifies the need to carry out this research. The theoretical framework would have two theories; John Locke's labor theory and the Postmodernist theory.

1.2.1 John Locke's labour theory

John Locke had developed a theory of property which gave the relation between labor and economic value.¹⁰ He argued that if one put in labor on a particular property he had the right over that property.¹¹

He also argued that this was only fair that if one worked on a particular property he should be able to derive benefits from the said property.¹² This would mean that even if one does not own property but he did something to improve the property he should be able to get some benefits from it.

¹⁰ Locken JTwo Treatises on Civil Government,Awnsham Churchill ,1884,pg211

¹¹ Vaughn Karen , John Locke and the labor theory of value, Department of Economics, George Mason University

¹² LockeJohn , *Locke's Two Theories of Civil Government*, Peter Laslett ed., 2nd ed.Cambridge, Cambridge University Press, 1967,pg 283-446.

1.2.2 Post modernism theory

Post modernism a theory that seeks to portray that reality is inaccessible by human investigation.

¹³Post modernists argue that the current society is not one with predictable orderly structures.¹⁴

An example of an orderly structure would be a nuclear family. They argue that the society has entered a new, chaotic postmodern stage.

In a postmodern society, the family structures are viewed as to be varied and individuals have much more freedom of choice in aspects of their lives which would have been relatively constrained in the past. This would be seen in their lifestyles, personal relationships, and family arrangements.¹⁵

The society has two key characteristics, it is diverse and fragmented. Postmodernists argue that society has become increasingly fragmented. This has led to a broad diversity of subcultures rather than one shared culture.¹⁶

¹³ Hassard John and Parker Martin, Postmodernism and Organizations, Sage Publishers, 1993 pg 84

¹⁴ Hebdige, Dick "Postmodernism and 'The Other Side,'" Journal of Communication Inquiry, Vol. 10, 1986 , pg78-98

¹⁵ Dickens, David and Fontana, Andrea, Postmodernism and Social Inquiry, forthcoming ,University of Chicago Press, 1994

¹⁶ Hall, Stuart "On Postmodernism and Articulation: An Interview," Journal of Communication Inquiry, Vol. 10, 1986,pg: 45-60.

It is seen as so because individuals create their identity from a wide range of choices. These choices would be youth subcultures, sexual preferences and social movements.¹⁷

Rapid social change was considered as another contributing factor. New technologies, such as the Internet, have transformed our lives by dissolving barriers of time and space, transforming patterns of work and leisure and accelerated the pace of change making life less predictable.¹⁸

The social changes have resulted to a diverse family life. Families are no longer viewed to be one dominant family type as it is in the nuclear family structure.¹⁹ As a result it is no longer possible to make general assumptions on what society is as modernist theorists such as Parsons or Marx did in the past.²⁰

1.3 Literature Review

1.3.1 Understanding Property Law

The author of the book discusses the property rights that unmarried couples have. It states that traditionally unmarried cohabitants could not derive any property rights from their status as of

¹⁷ Best, Steven "The Commoditization of Reality and the Reality of Commoditization: Baudrillard and Postmodernism," *Critical Perspectives in Social Theory*, Vol. IX, 1989

¹⁸ Kellner Douglas "Postmodernism as Social Theory: Some Problems and Challenges," *Theory, Culture & Society* 5, 1988, pg 239-270

¹⁹ Dews Peter "The 'New Philosophers' and the End of Leftism," in *Radical Philosophy Reader*, New Left Books, 1985, pg 361-384

²⁰ Kellner, Douglas *Critical Theory, Marxism, and Modernity* Cambridge and Baltimore: Polity Press and John Hopkins University Press, 1989

being a couple.²¹

The book also discusses the decision in a case *Marvin vs. Marvin*²², which established that parties in cohabitation unions are able to have property rights as the parties in cohabitation unions expect the courts to fairly appropriate the property that accumulated through mutual efforts.

In the book, the author also states that after the decision made in *Marvin vs. Marvin*²³ there has led to other case law in the United States that carry the belief that parties in cohabitation union have property rights and that these rights arise from them being a couple.

1.3.2 Customary Law and Women's Rights in Kenya

In the article, the author discusses how the courts have applied the presumption of marriage in order to hold that a woman in a cohabitation relationship was married to the deceased.²⁴ This enables the woman to have a share of the deceased's estate.

It also indicates that, "while the court's change in attitude is laudable", the lack of clear legal provisions on the application of the presumption of marriage results to women having to rely on judicial discretion, which is changeable and hence unreliable.

²¹ Sprankling John G., Understanding property law third edition, LexisNexis, 2012,pg 163.

²² Marvin v. Marvin, 1976

²³ Marvin v. Marvin,1976

²⁴ Dr. Kamau Winifred, Customary Law and Women's Rights in Kenya, PhD, University of Nairobi press, pg

The article advises for there to be statutory provisions put in place for the application of the presumption of marriage after a prescribed period. An example would be two years, this would ensure that there is minimal uncertainty as to whether a person is married or not.

The reforms had been proposed in the Marriage Bill of 2007; however, they were not reflected in the 2014 Marriage Act.

1.3.3 The law of succession in Kenya: Gender perspectives in property management and control

The paper discusses the recognition of the presumption of marriage in Kenya.²⁵ It states that in many situations cohabitants may acquire property together or accumulate property that was acquired before the relationship. It also recognizes that the management and control of the property are closely related to that of the system in a marriage union.

The paper states that regardless of the recognition of the presumption of marriage in Kenya the other party mostly women would most likely lose the property to the husband's relatives in the case of intestate succession as they would argue that there was no valid marriage.

1.3.4 Common law marriage and Cohabitation

The article provides for the different laws regarding cohabitation in the UK.²⁶ The paper

²⁵ Professor Patricia Kameri-Mbote, The law of succession in Kenya: Gender perspectives in property management and control

²⁶ Common law marriage and cohabitation, Catherine Fairbairn

discusses the reforms that the law commission in England proposed as reforms with regards to matters affecting cohabitation. The commission identifies that parties in cohabitation unions have some rights.

The 2011 draft Inheritance (Cohabitants) Bill, contained provisions intended to give some unmarried partners, the right to inherit on each other's death under the intestacy rules. They could do so without the need of going to court. The partners had to be having living together for a period of five years or more.²⁷

Where the couple had a child together, this entitlement would accrue after two years' cohabitation. This was as long as the child was living with the couple when the deceased died. The recognition of these rights is a starting point in the UK.²⁸

1.3.5 Family matters living together in Scotland²⁹

The paper discusses the Family Law Act of 2006 which brought various changes to the law as on the matter of matters relating to cohabitation in Scotland.

Some of the rights that couples in cohabitation unions have are the right to apply to the court for an award from the estate (property) if their partner dies without leaving a will and the right to the

²⁷ draft Inheritance (Cohabitants) Bill, 2011

²⁸ <https://www.nidirect.gov.uk/articles/guidance-civil-partnerships-northern-ireland>. [accessed 22 February 2016]

²⁹ Guthrie T. and Hiram, H. , *Property and cohabitation: understanding the Family Law (Scotland) Act* *Edinburgh Law Review*, Vol 11 (2), 2006, pg. 208

sharing of household goods, bought during the time the couple lived together.

This means that if you cannot agree about who owns any household goods; the law will assume that you both own it jointly and must share it or share what it is worth.

1.3.6 Marriage, civil partnerships and cohabitation³⁰

The article discusses the rights that cohabiting parties in Northern Ireland have in the law. However, these rights are few and limited. The availability of the rights does not limit anyone from taking extra steps.

Some of the rights that are recognized by law is the recognition that regarding property there may be a significant contribution towards the property e.g. improvements, renovations or upkeep in general, if so then one may acquire an interest in the property - referred to as proprietary interest.

The article recognized that this may not give you an equal share in the property but one will be able to acquire some interest in it.

1.4 Methodology

³⁰ <https://www.nidirect.gov.uk/articles/guidance-civil-partnerships-northern-ireland>. [accessed 22 February 2016]

This research was qualitative in nature. The primary sources of data used were statute and case law. They were important sources as the research was aimed in finding the existence or lack of law concerning cohabitation.

The secondary sources of data used were journals and articles that were concerned with an in-depth analysis of the matter. This helped in seeing the different views that have been taken on the matter and also help in the writing of an informed paper.

Chapter Two

2. The History of Kenyan Laws

As a way of understanding the marriage laws in Kenya there is a need to look at the way the laws were formed since colonization. This would help in understanding why the law is as it is. The laws that were made during the colonial period influenced how Africans in general made their laws.

2.1 History of the Law of Succession in Kenya

Article 52 of the 1897 Order-in-Council provided that African customary law was to apply to Africans as long as it was not repugnant to justice or morality. This then meant that where a matter arose dealing with succession it was to be governed by African customary law.³¹

Native Christian Marriage and Divorce Act Order, it listed the provision of all succession matters be governed by the customary law. The law applied to all regardless of their religion. The reason for this was that the land tenure system was still viewed as communal.

It also looked into the fact that the Act had stated that individual land ownership could not apply in such cases³²

In the case of *Benjawa Jembe vs. Priscilla Nyondo*³³ the court looked into the succession case of

³¹ Art52,East African Order-in-Council, 1897

³² Native Christian Marriage and Divorce Act Order

³³ *BenjawaJembe vs. Priscilla Nyondo* , 1912, 4 EALR 160

the estate of a native Christian. The native followed the law of the tribe to which the Christian native belonged.

It was stated that “The fact that the deceased married a wife according to the rules of the Anglican Church does not affect the succession to his property. The succession must be regulated by native law or custom”

This was the position which the court held until 1961. It was when the African Wills Ordinance was passed to enable the Africans to make written wills.³⁴

Testate succession was then governed by the statute while intestate succession continued to be governed by the respective customary law of the deceased.

Intestate succession was left to be governed by African customary law. However that was on condition that it was not inconsistent with justice, morality, and the statutes of general application. The High Court also supported this where it held that where an African died intestate, customary law could be avoided if it was inconsistent with justice and morality.

In *Re Kibiego*³⁵ there was a contest of the deceased estate between deceased’s widows and his brothers. The brothers stated that women had no right in administration of estate. It was held that customary law denying women rights to administer the property of the deceased husband was repugnant to justice and morality and found that the Probate and Administration Act was to apply.³⁶

³⁴ African Wills Ordinance, 1961

³⁵ *Re Kibiego* (1977) E.A 129

³⁶ Wakoko Valentine, Evolution of land laws in Kenya,

In 1 July 1981 the Law of Succession Act³⁷ was passed with the intention of merging all the different socio-ethnic groups in the country. Section 2(1) of the Act states “that the Act constitutes the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act”.³⁸ It however also allows for application of other laws.

Section 29 of the Law of Succession Act provides for the definition of a dependant. The definition is provided to include a former wife or former wives. However it does not include a cohabitant Intestacy covers a wife recognized under S 3(5) of the Act but not a cohabite or a person claiming to be a wife under a presumption of marriage. This then poses a problem in cohabitation unions.

Though the law provides that in intestate matters the customary laws apply it does not provide a solution in situations where there is cohabitation and the parties are not recognized by the community. The act however provides a solution as it lists the writing of a will as a way of inheriting or disposing of one’s property upon death. This helps as the cohabiting parties can list each other as dependents. The law however does not cover instances where the parties are separated.

Kenyan succession laws are aimed at protecting married parties. However they also aim at providing avenues for children born in cohabitation unions to claim from the death of a parent. They can do this by claiming dependence.

³⁷ Law of Succession Act, Cap 160

³⁸ Law of Succession Act, Cap 160

2.2 History of Land Laws in Kenya

The history of land laws in Kenya is important as land is the most common form of property that is owned. It also is considered the most valuable. The reason would be because of its economic value and the emotional attachment that has been placed on it.

2.2.1 Pre colonial regime

During this period, the Africans in the region lived in their traditional communities and they owned land communally. It was a period where all property was used to help the people of the community. There was no individual ownership of land.³⁹ Land belonged to the community and was held for the benefit of all the people.

Everybody had equal rights to use the land in a manner prescribed by their culture. There was allocation of land according to specific needs of individuals and families. The pre-colonial land laws were different from one community to the other because they were purely based on culture and specific social organizations.⁴⁰

2.2.2 Colonial regime

During this period all the land was vested in the crown. This meant that natives did not have any

³⁹ Rutten, M.M.E.M, & Ombongi, K(2005) *Kenya : Pre-colonial, Nineteenth Century* New York :Fitzroy Dearborn pp4

⁴⁰ Toulmin, C. and Julian Quan (Eds) *Evolving Land Rights, Policy and Tenure in Africa , 2000*

right to the land. The only rights they had been limited to the reserves. However due to much resistance from African communities, the era ended and land was vested back to communities, the state and private individuals. That led to the new form of ownership in Kenya.

2.2.3 Present regime

Article 40 of the constitution provides for the virtue of property rights. It acknowledges individual rights as well as rights in association with others to acquire and own property.

⁴¹Limitations are drawn against the state to ensure no legislation or state action deprives a person of any rights over or interests in land. The final provision of this Article is that the state enacts legislation to ensure protection of the right to property.⁴²

The current law on the ownership and administration of land does not necessarily support any particular form of marriage however. All the law states are that everyone has the right to own property. It is this right to ownership of property that the opinion of parties in cohabitation union unions is able to acquire property that was gathered upon their union. This could be either upon the death of one party or upon separation.

⁴¹ Art 40, Constitution of Kenya 2010

⁴² Art 40, Constitution of Kenya 2010

2.3 History of Matrimonial Property Laws in Kenya

Married Women's Property Act 1882⁴³ Section 17 of the Act provides for property of married women. It provides that the court can determine her interest in the property and in that case the court would have to assess the value to be put in the wife's nonmonetary contribution.

*Kivuitu v. Kivuitu*⁴⁴ provided that the fact of contribution could be presumed by virtue of a wife's participation in managing the family's affairs. Consequently where there is a dispute over property registered only in the name of the husband, the starting point would be the extent of the Wife's contribution and what value to attach to it, not whether she contributed at all.

Article 45(3) of the Constitution of Kenya,⁴⁵ provides that; Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of marriage. The rights that are been advocated for by the constitution are the same rights that parties in cohabitation unions should be granted in relation to the division of property.

Article 68(c) (iii)⁴⁶ provides that Parliament shall enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of the marriage.

⁴³ Married Women's Property Act 1882

⁴⁴ *Kivuitu v. Kivuitu* (1991) eKLR 241

⁴⁵ Art 45, Constitution of Kenya 2010

⁴⁶ Art 68, Constitution of Kenya 2010

With these in mind it is important to note that the parties in a marriage have rights that are accorded to them upon separation or death. The rights accorded to them are important. Parties in a cohabitation union though not formal as a marriage also needs to have rights be accorded to them. The reason for this is that during the relationship property has been acquired together as a couple. Also the input of either party should be considered.

Chapter Three

3. Comparative Study

The countries that feature in this comparative study do so mainly due to their advancement in the law. The working definition for advancement would be the progression to a higher stage of development. It would be in line with how different states have changed their laws to accommodate parties in cohabitation unions.

The United States is part of the study due to its dual approach on the matter and the diversity on the law. South Africa features as the only African state. The reason for this is due to growth of its family laws. It also provides a perspective that is unique in most African states.

3.1 The United States of America

The doctrine of common law marriage functioned primarily to protect women at the end of long relationships of dependence; if they qualified, courts would grant them all the rights of a wife or widow.⁴⁷

The United States has a dual approach. This is because some of the states agree with the occurrence of cohabitation, while others are against it. The states that recognize cohabitation provide for the protection of parties' property rights.

⁴⁷ Bowman, Cynthia Grant, "Legal Treatment of Cohabitation in the United States" (2004) Cornell Law Faculty Publications Paper 148.

*Re Estate of Vargas*⁴⁸ is the case that was used to show the common law doctrine. The case was on Mr. Vargas, who had a wife and children in one location and then went through a marriage ceremony with another woman. He also set up a separate household with her in another town; children were also born to this marriage.

The court which decided the matter held that the second wife was a presumed spouse and split the estate between the two women. She was treated as Mr. Vargas' widow although he was not her legal husband due to bigamy. The supposed spouse was viewed as such as a remedial doctrine employed by courts. This was to address instances where innocent parties were harmed from their reliance upon a long-term cohabitant.

The protection of parties in cohabitation unions is however not absolute in the United States. The reason for this is that the states decide what laws would apply in the particular state. Therefore protection would depend in the state that one is in.

In *Hewitt v. Hewitt*⁴⁹ two unmarried cohabitants lived together for over fifteen years. The woman was in reliance on the man's representations. She had sacrificed a lot so the man could establish his career. The man promised he would "share his life, his future, his earnings and his property" with the woman.

It was held that the plaintiff's claims that she be entitled to half of the property amassed by the couple during their cohabitation are unenforceable for the reason that they contravene the public policy. This was implicit in the statutory laws of the Illinois Marriage and Dissolution of

⁴⁸ *Re Estate of Vargas* 1974

⁴⁹ *Hewitt v. Hewitt* (1979)

Marriage Act. It disfavored the grant of mutually enforceable property rights to knowingly unmarried cohabitants.⁵⁰

Cohabitation agreements are the new form of ensuring that the property acquired during the relationship is divided in a fair manner. With the exception of Illinois, Georgia and Louisiana, almost every state will now recognize express contracts between cohabitants, especially if they are written.

A cohabitation agreement is a form of legal agreement reached between couples who have chosen to live together. The couple could either be heterosexual or homosexual. The couple may be treated like a married couple in some ways. This could either be when applying for a mortgage or working out child support.

Prior to *Marvin v Marvin*⁵¹, cohabitation agreements/ contracts were viewed null because they were viewed to rest upon the exchange of sex.

In the case the court held that “cohabitants could enter into contracts with one another just as other individuals could.” it also stated that courts would also enforce both written and oral express contracts it was also viewed by the court that recovery might be based upon contracts implied from the conduct of the parties and a variety of equitable grounds as well.⁵²

⁵⁰ *Hewitt v. Hewitt* (1979)

⁵¹ *Marvin v. Marvin* (1981)

⁵² *Marvin v. Marvin* (1981)

3.2 South Africa

Unlike marriage, where there are specific laws that aim to protect spouses, cohabitation relationships have no laws. One would be able to see this where a party dies without a valid will, their partner has no right to inherit under the Intestate Succession Act.⁵³

South African law does not permit a cohabitant to have the right to rely on maintenance upon the death of a partner. The reason would be that they are not regarded as a spouse. Another reason that does not favor cohabitation is that South African law does not allow for cohabitants to own joint accounts.⁵⁴

That can only occur where an account will usually be opened in one partner's name. The other will only have co-signing rights. This would mean that liabilities of the account and its earnings shall be taken care of by the owner. It is their responsibility.

The South African law on cohabitation will be updated by the draft Domestic Partnerships Bill that was published in January 2008.⁵⁵ The bill provides for what would amount to a contribution in the cohabitation relationship.⁵⁶ It also gives options on how the property would be divided upon separation. The bill also touches on the issue of a partner inheriting from the other partner

⁵³ Intestate Succession Act 81 OF 1987

⁵⁴ Socio-Economic Rights in South Africa: Symbols or Substance? Edited by Malcolm Langford, Ben Cousins, Jackie Dugard, Tshepo Madlingozi

⁵⁵ draft Domestic Partnerships Bill 2008

⁵⁶ Sec1, draft Domestic Partnerships Bill 2008

upon the said partner's death.⁵⁷

The status of cohabitants in South Africa will remain different from parties in a marriage and partners in a civil union. This would be regardless of whether the bill passes or not.⁵⁸ Parties in cohabitation unions have no equal rights as their counterparts in a marriage union legally. Courts have assisted some of the couples by stating the existence an express or implied universal partnership exists between them.⁵⁹

A universal partnership is an express or tacit agreement between two parties, who choose to live together in a permanent relationship without marrying.⁶⁰ The partners share the same responsibilities and obligations of a married couple. These would include their present and future assets. It would then mean that all of their property would be owned jointly during the relationship.⁶¹

They do not have to enter into a partnership agreement. In such instances, where the relationship breaks down, the court awards a share of the assets acquired during the relationship to each party. The requirements to prove a universal partnership are that the partnership must be formed with the aim to make a profit. It also requires that both the parties must contribute to the venture.

⁵⁷ Sec 2, draft Domestic Partnerships Bill 2008

⁵⁸ Religion and Equality: Law in Conflict edited by W Cole Durham Jr, Professor, W. Cole Durham, Jr., Donlu D Thaye

⁵⁹ Living Together: A Legal Guide for Unmarried Couples by Ralph Wame

⁶⁰ The Law and Economics of Marriage and Divorce edited by Antony W. Dnes, Bob Rowthorn

⁶¹ The Law of Divorce and Dissolution of Life Partnerships in South Africa Jacqueline Heaton Juta, Limited, 2014 page

There must be a legitimate contact and it must be for the benefit of both parties.⁶² These requirements were listed in the case of *Pezzuto v Dreyer*.⁶³

For one to be able to prove a universal partnership claim, they must prove that: both partners played a specific part in the joint venture in one form or another. The contribution could be either with labour, capital or skill. They must also prove that the venture was conducted for the benefit of both partners. In a nut shell partnership was conducted for profit and that a universal partnership came into existence.⁶⁴

In *Butters v Minorca* a Supreme Court of Appeal case, it was held that where a man and a woman had lived together as husband and wife, (as was the case where it was so for nearly twenty years), and the said couple have entered into a universal partnership, the court would rule in favor of the terms of the universal partnership.

In the case they had entered into such a partnership in which the female partner had a 30 per cent interest. She was thus awarded an amount equal to 30 per cent of her partner's net asset value as at the date when the partnership came to an end.⁶⁵

Apart from universal partnerships, there are some laws that place cohabitation and marriage on an equal basis. Some of the laws would include the Domestic Violence Act⁶⁶ which recognizes

⁶² accessed on 29 December 2016

⁶³ *Pezzuto v Dreyer and Others* 1992(3) SA 379

⁶⁴ accessed on 29 December 2016

⁶⁵ *Butters v Minorca* (181/2011) [2012] ZASCA 29

⁶⁶ Domestic Violence Act 116 OF 1998

cohabitation. This means that in domestic violence situations the parties are treated as similar to the ones in a marriage. The Medical Schemes Act⁶⁷ 131 of 1998 defines a dependant to include a 'partner'.

This means that a cohabitant can be viewed as a dependant on one's insurance. Any partner may name the other as the beneficiary. However the nomination has to be clear so as to avoid problems.

In terms of the Income Tax Act⁶⁸ and the Estate Duty Act⁶⁹, for tax purposes cohabitants are viewed as spouses. The word 'spouse' is defined to include a permanent same-sex or heterosexual relationship.

The law also does not discriminate between married and unmarried parents regarding the obligation to maintain children. The decisions made regarding care and contact is based on what would be what would be best for the child. Children are also protected whether the couple is married or not.

The reason for this is that both biological parents are responsible for the maintenance of their children. The father and mother are both still liable for maintenance if the couple splits up. A domestic partner may receive pension fund benefits. The partner may also receive pension benefits as a factual dependant. This is only when they qualify as dependant in the regulations or conditions of that particular fund. A domestic partner is not entitled to the partner's pension

⁶⁷ The Medical Schemes Act 131 of 1998

⁶⁸ Income Tax Act No. 58 of 1962

⁶⁹ Estate Duty Act, 1955

interest on the end of the relationship.⁷⁰

The South African Compensation for Occupational Diseases Act, 1997, states that a surviving domestic partner may claim for compensation if their partner. However that would happen if they died as a result of injuries received during the course of work, if at the time of the employee's death they were living as 'husband and wife'.⁷¹

⁷⁰ Religion and Equality: Law in Conflict edited by W Cole Durham Jr, Professor, W. Cole Durham, Jr., Donlu D Thaye

⁷¹ South African Compensation for Occupational Diseases Act, 1997,

Chapter Four

4. Findings

4.1 Cohabitation Agreements

A cohabitation agreement is a legal agreement reached between couples. The couple would have chosen to live together. The couple may be treated like a married couple; however this would be under special circumstances. Such circumstances may be when the couple wants to apply for a mortgage or working while they are out child support.⁷²

The agreement is similar to a prenuptial contract. A prenuptial contract is used to regulate the couple's respective obligations during the existence of their union and the consequences upon the end of the union.⁷³

The occurrence of such contracts being drawn up by partners in a cohabitation relationship is becoming common. This is mostly seen in the developed countries such as the United States and most European countries.⁷⁴

The agreement will usually contain regulations; the regulations will be on the money during the existence of the cohabitation relationship. It also is used to deal with the division of property upon its termination.⁷⁵

⁷² Family Law: The Essentials by William P. Statsk page 23 Delmar Cengage learning

⁷³ Precedents for cohabitation contributor Resolution Publisher Resolution 2006

⁷⁴ Do We Need a Cohabitation Agreement by Michael G. Cochrane

⁷⁵ Family Law: The Essentials by William P. Statsk Delmar Cengage learning

There may be the inclusion of an express provision for the payment of maintenance upon termination by the parties. Where there is a disagreement and one partner refuses to follow the terms set out in the agreement, the offended partner can approach a court for help. In most cases, a court will enforce the agreement.⁷⁶

The nature of any cohabitation agreement is dependent on the needs of the parties. Any provision that is not illegal may be included in the agreement. The provisions should not be viewed to be against the morals of society or contrary to public policy.⁷⁷

4.2 Universal Partnerships

It is an express agreement between two parties, who choose to live together in a permanent relationship without marrying.⁷⁸ The parties share the same responsibilities and obligations of a married couple, including their present and future assets. This means that all of their property is owned jointly during the relationship.⁷⁹

For one to be protected under Universal partnership, a written contract should be drawn up governing the terms of the relationship and calling upon the courts to enforce the terms of the agreement. The reason for this is to provide legal remedies. However the exercise is expensive

⁷⁶ Cohabitation: The Financial Consequences of Relationship Breakdown by Great Britain: Law Commission

⁷⁷ Family Law: The Essentials by William P. Statsk Delmar Cengage learning

⁷⁸ Family Law: Processes, Practices, Pressures: Proceedings of the Tenth World Conference of the International Society on Family Law Hart publishing

⁷⁹ Family Law: Text, Cases, and Materials by Sonia Harris-Short, Joanna Miles, Rob George page 490

and cumbersome.⁸⁰

Universal partnerships are most common in South Africa and some states in the United States of America.

4.3 Recommendations

The most important recommendation to be made would be to provide for provisions in the law that would work to help protect the interests of parties in a cohabitation union. The interests in mind would be those relating to the property that has been amassed during the term of the relationship.

There also is a need to specify what would amount to a cohabitation union so as to be able to ensure that when applying the law that would help avoid any problems that may arise. This may be viewed mostly in determining how the property would be distributed.

Another recommendation would be for cohabiting couples to enter into cohabitation agreements. The reason for this would be to protect their interests. It also serves as a way to cure the lack of any legislation to solve the matter. With the agreements being contracts, courts would be able to enforce them. It would also help secure the interests of the parties in the cohabitation union.

⁸⁰ Routledge Handbook of Family Law and Policy edited by John Eckelaar, Rob George

Chapter Five

5. Conclusion

In conclusion it is my opinion that there is indeed need for there to be provisions made on property generated in a cohabitation union. The provisions should be on the protection of the property. The provisions however would not or should not be used to try and equate marriages and cohabitation unions.

The need of the reforms is not so as to favor those who decide to enter into cohabitation relationships. They should however be aimed at the protection of every individual's right to own and acquire property.

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