

## Not all is fair in love and... wills

**Cape Town: 10 February 2021:** Known as the month of love, February is often associated with flowers, chocolates, and other romantic gestures to celebrate the ones we love and the important role they play in our lives. For the [3.5 million South African couples who are living together](#) but are not married, it is important to be aware that when it comes to legal affairs, not all is fair in love and wills.

While unmarried couples, same-sex or heterosexual, who live together are classified as a “common-law spouse” in many countries, Moremadi Mabule, Head of Wills at Sanlam Trust, says that in South Africa, this popular term is not legally recognised. “While life partners may have the characteristics of a marriage, it is not a marriage and not formalised or registered in terms of the Civil Union Act or the Recognition of Customary Marriages act. Unmarried couples who live together often refer to themselves as life partners but need to be aware of the misconception that if you live together for a period of time, the law will recognise your union as a marriage,” explains Mabule.

If you are in a stable monogamous relationship, Mabule explains that there are a few things to consider when drafting your will.

1. If as a couple, you are accumulating assets together or individually, make sure that you have your intentions documented in your will in terms of how and who you want your assets distributed to.
2. Have some form of agreement, for example, a contract of domestic partnership to regulate your financial affairs.
3. Record your wishes and intentions regarding your assets as far as your life partner is concerned. In this way, you are protecting each other from family members who may have a different view as to how your assets are distributed.

However, it should be noted that the Law of Intestate Succession does not apply to life partners, but automatically kicks in when someone passes away without leaving a valid will. Mabule explains that to determine who will inherit the deceased estate, the intestate succession formula works as follows:

- If a person dies leaving only a married spouse behind, the spouse will be the sole heir.
- If there is no married spouse, but children, then those children will inherit equal portions.
- If there is a married spouse and children, both will get a share to the deceased estate.

- If there are only parents, then the parents will inherit and if there are only siblings then they will inherit the deceased estate.

“Based on this formula, if you are not married, but in a stable monogamous relationship and your partner passes away without documenting what he/she wishes to leave you in terms of assets, you will not be able to inherit from their estate,” notes Mabule. “I would strongly recommend that spouses in life-partner relationships speak to their financial advisor who will guide them in protecting each other’s assets.”

However, there is hope that the rights of life partners to inherit will soon be recognised in South Africa. In September 2020, the Western Cape High court made a ground-breaking judgement which is getting the attention of the Constitutional Court. The case of Jane Bwanya vs, the Executor of Estate Late Ruch and Others, challenged the constitutionality of excluding heterosexual couples from inheriting from each other in terms of the Intestate Succession Act. However, before the court could deal with constitutional validity, it had to establish if the couple were permanent life partners or not. This is where it gets tricky because you might have family members and other potential beneficiaries disputing the permanency of the relationship.

In this case, the court relied on facts presented by the applicant, witness accounts by people who spent time with the couple, the deceased relationship with his "in-laws", their plans to get married, etc. Based on this, the court was satisfied that this relationship was indeed permanent. The court further decided that the Intestate Succession Act was unconstitutional by excluding spouses in heterosexual unions, however, this matter still needs to be confirmed by the Constitutional Court.

“Until then it is advisable that partners in these relationships must protect their interests by entering into a contract with one another, for example, protection of property interest, or right to maintenance and support, depending on their circumstances. Naturally, it is also essential that life partners execute a last will and testament as well should they intend to leave assets to their unmarried partner,” concludes Mabule.

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