

RETHINKING VOLKS V ROBINSON: THE IMPLICATIONS OF APPLYING A "CONTEXTUALISED CHOICE MODEL" TO PROSPECTIVE SOUTH AFRICAN DOMESTIC PARTNERSHIPS LEGISLATION

B Smith*

1 Introduction

By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage; a person cannot complain if she [or he] is denied the legal benefits she [or he] would have had if she [or he] had married. Having chosen cohabitation rather than marriage, she [or he] must bear the consequences.¹

This line of reasoning – which will for the purposes of this article be described as the "choice argument" – underlies the decision of the majority of the Constitutional Court in *Volks v Robinson*,² a decision that effectively put paid to the judicial extension of matrimonial law to unmarried opposite-sex cohabitating life partners. At the time of this judgment (in February 2005), "opposite-sex marriage³ was the only legally recognised family form, and it carried with it a plethora of legal rights and obligations".⁴ The fact that only heterosexual persons were permitted to marry explains, at least at face value, why the courts were prepared to extend many of the rights and obligations attached to marriage to same-sex life partners⁵ while refusing to do the same for their heterosexual counterparts. However, the article will contend that closer analysis reveals that this reasoning is flawed. Nevertheless, the upshot of

* Bradley Smith. BCom LLB LLM LLD. Senior lecturer, Department of Private Law, University of the Free State, Bloemfontein, South Africa (smithbs@ufs.ac.za). This article forms part of an LLD thesis entitled "The development of South African matrimonial law with specific reference to the need for and application of a domestic partnership rubric".

1 *Volks v Robinson* 2005 5 BCLR 446 (CC) para 154 (per Sachs J).

2 Hereafter *Volks*.

3 That is to say the civil marriage in terms of the *Marriage Act* 25 of 1961 and the customary marriage in terms of the *Recognition of Customary Marriages Act* 120 of 1998.

4 SALRC 2006 <http://bit.ly/gp7ni> 63.

5 See for example *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) – hereafter *National Coalition*; *Farr v Mutual & Federal Insurance Co Ltd* 2000 3 SA 684 (C); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC) – hereafter *Satchwell*; *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *Satchwell v President of the Republic of South Africa* 2003 4 SA 266 (CC); *J v Director General, Department of Home Affairs* 2003 5 SA 621 (CC) – hereafter *J-case*; *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) – hereafter *Du Plessis*; and *Gory v Kolver* 2007 4 SA 97 (CC) – hereafter *Gory*.

its application by the courts is an inconsistent and complex legal position in terms of which same-sex life partners currently enjoy more comprehensive legal protection than heterosexual life partners.⁶ In an attempt to rectify this state of affairs, a draft *Domestic Partnerships Bill* was published in January 2008. This Bill envisions a legal position that distinguishes between registered and unregistered domestic partnerships. The former category requires a public commitment (that is, a formal registration process) as a result of which certain rights and obligations (many of them closely resembling those attached to marriage) are extended to such partners. The latter category potentially includes all domestic partners who have not registered their relationship, with the exception of relationships in cases in which either of the partners was involved in a civil marriage, a civil union or a registered domestic partnership with a third party that co-existed with the domestic partnership.⁷ In opting for a "judicial discretion model"⁸ as far as this category of domestic partnership is concerned, the provisions of the draft Bill will not automatically apply to unregistered domestic partnerships during the subsistence of the partnership, but will instead allow either or both partners to apply to a competent court *after the termination* of their relationship for an order relating to property division, intestate succession or maintenance.⁹ The article will attempt to draw a number of conclusions from existing case law with the aim of streamlining the draft Bill. To this end, the "choice argument" and the relevance of a contractual reciprocal duty of support will be considered with a view to formulating a "contextualised choice model" that, it is submitted, will ensure a more consistent and principled legal position once the Bill is enacted.

6 De Vos 2007 *SAJHR* 432, 462; De Vos and Barnard 2007 *SALJ* 795, 823–824; Smith and Robinson 2008 *BYUJPL* 419, 439.

7 Draft *Domestic Partnerships Bill* Clause 26(4).

8 SALRC 2006 <http://bit.ly/gp7ni6> 367.

9 Draft *Domestic Partnerships Bill* Clause 26(1).

2 The point of departure: Rethinking the Constitutional Court's decision in *Volks v Robinson*

2.1 Introduction

In this case, (S) was a male attorney based in Cape Town who had been predeceased by his wife in 1981 and had entered into a "permanent life partnership" with a woman (R) four years later; a union that existed for a period of sixteen years until S's death in 2001. S and R's relationship was a typical example of the classic cohabitation relationship, which is often described as "living together as man and wife". S and R had jointly occupied a flat until the deceased's death, after which R had continued to reside there for another year. R had never been employed permanently and had never received a substantial or regular income, but S had supported her financially by paying for household necessities, by "depositing money into her account whenever she needed it",¹⁰ by registering her as his dependant with his medical aid scheme and by providing for her as a beneficiary in his will.¹¹ R had reciprocated by contributing towards general expenses and by nursing and caring for S who was bi-polar and manic-depressive.¹² The parties were regarded as a couple by their numerous mutual acquaintances and often attended work functions together. By the same token, S's three children born of his marriage also appeared to have accepted R, as she had accompanied him on a prior occasion on one of his annual visits to the USA, where all three of S's children resided with their respective families.¹³

After S's death, R attempted to institute a claim for maintenance from S's deceased estate in terms of the *Maintenance of Surviving Spouses Act*.¹⁴ As an extension of the reciprocal duty of support that exists between the spouses to a valid marriage,¹⁵ the *Maintenance of Surviving Spouses Act* entitles the "survivor" to a "marriage" that is terminated by the death of one of the spouses after 1 July 1990 to institute a claim

10 *Volks* para 5.

11 *Volks* para 7.

12 *Volks* para 5 read with para 6.

13 *Volks* para 6.

14 27 of 1990.

15 *Volks* para 39 of Skweyiya J's judgment.

for maintenance against the deceased estate to the extent to which the survivor's "own means and earnings" are insufficient. The claim so instituted is, however, limited to the survivor's "reasonable maintenance needs" for the remainder of his/her life or until he/she remarries.¹⁶ The Act defines the concept "own means"¹⁷ and provides a fairly comprehensive method for determining the survivor's "reasonable maintenance needs".¹⁸

The problem faced by R as far as the Act was concerned, was its definition of "survivor", which is defined as a "surviving spouse in a *marriage* dissolved by death".¹⁹ Consequently, when R instituted this claim, it was – quite correctly on a literal reading of the Act – rejected by the executor of the estate on the basis that R was never married to S and therefore could not qualify as a "spouse" for the purpose of the Act.²⁰ R launched an application in the Cape High Court declaring her to be a "survivor" for the purpose of the Act or, in the alternative, challenging the constitutionality thereof in that the Act's references to "marriage", "spouse" and "survivor" did not provide for surviving life partners and hence did not entitle such persons to benefit in terms of the Act; a situation that allegedly violated the rights to equality and dignity as contained in the Constitution of the Republic of South Africa, 1996.²¹

The Cape High Court²² held that the *Maintenance of Surviving Spouses Act* discriminated unfairly on the basis of equality and human dignity. The High Court ordered, in broad terms that: (i) the definition of "survivor" was to be read as if it

16 S 2(1) of the Act states the following: "If a *marriage* is dissolved by death after the commencement of this Act the *survivor* shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings". Emphasis added.

17 According to S 1 of the Act, this "includes any money or property or other financial benefit accruing to the survivor in terms of the matrimonial property law or the law of succession or otherwise at the death of the deceased spouse".

18 S 3 of the Act states that: "In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account: (a) The amount in the estate of the deceased spouse available for distribution to heirs and legatees; (b) the existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage; and (c) the standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse."

19 Emphasis added.

20 *Maintenance of Surviving Spouses Act* para 9.

21 Hereafter Constitution.

22 *Robinson v Volks* 2004 6 SA 288 (C) – hereafter *Robinson*.

included the words "and includes the surviving partner of a life partnership"; and (ii) that two new definitions, namely "spouse" and "marriage" were henceforth to be read into the Act, both of which were to be defined as including "a permanent life partnership."²³ In accordance with apposite constitutional principles, the High Court's finding was referred to the Constitutional Court for confirmation.

It is interesting and highly relevant to note that in oral arguments placed before the Constitutional Court, counsel for both the first and second respondents (R and the Women's Legal Centre Trust, respectively) were prepared to limit the scope of words to be read into the statute to life partnerships in which a mutual duty of support existed between the life partners.²⁴

Considering the question as to whether the Act violated the equality rights of permanent life partners, Skweyiya J (writing for the majority) was prepared to accept that it discriminated on the basis of marital status. As a listed ground, it followed that such discrimination was presumed to be unfair until the contrary could be established.²⁵ In this regard, the crux of Skweyiya J's finding was that, as marriage was recognised as an "important social institution" constitutionally and internationally, it was not unfair for the law to distinguish between those who were married and those who were not and, in cases in which this was apposite, to benefit the former group.²⁶ Moreover, the position of unmarried couples could not be equated with spouses to a marriage as, *inter alia*, the institution of marriage immediately occasioned *ex lege* rights and obligations that were imposed irrespective of the wishes of the parties, while the same was not true in the case of unmarried cohabitants. In point of fact, Skweyiya J held, the maintenance obligation imposed by the Act was a component (and indeed an extension) of one of these consequences, namely the reciprocal duty of support.²⁷ As such, the Act also limited the right of a testator to dispose of his estate freely.²⁸

23 *Robinson* 302 (E)–(I).

24 *Volks* para 28.

25 *Volks* para 50.

26 *Volks* paras 51–54.

27 *Volks* paras 55 and 56.

28 *Volks* para 57.

The court was not prepared to hold that cohabitants who expressly or by implication had undertaken to support one another could be equated to married couples, and that the only difference between them was the existence of a marriage certificate. Whereas marriage created instantaneous obligations that at times endured beyond the death of one of the spouses, any obligation that was created between cohabitants arose "by agreement and only to the extent of that agreement".²⁹ It followed that it was not unfair for the law to distinguish between surviving spouses and surviving cohabitants as far as maintenance was concerned, as it would be inappropriate to impose such a duty on a deceased estate in a case in which no such duty was imposed by operation of law during the lifetime of the deceased.³⁰

2.2 *A critique of the Constitutional Court's findings in Volks v Robinson*

It is submitted that this case was incorrectly decided. In addition, although the point will be made that the dissenting judgment of Sachs J is for the most part to be supported,³¹ it is further submitted that certain points of criticism can unfortunately be levelled at this judgment as well. To illustrate what is submitted to be the more correct approach, two aspects will be dealt with in the discussion that follows: (i) the so-called "choice argument"; and (ii) the court's lack of appreciation of the value of a factual reciprocal duty of support.

2.2.1 *Critical aspect one: The "choice argument"*

A consideration of the aforementioned summary makes it clear that Sachs J was correct when he concluded that both the judgments of Skweyiya J (the majority judgment) and that of Ngcobo J (in a separate judgment concurring with the majority) are, as stated in the introduction to this article, effectively founded on the "choice argument".

29 *Volks* para 58.

30 *Volks* para 60.

31 Also see Lind 2005 AJ 108, 129.

Many arguments can be raised for and against this line of reasoning³² but, advantages and disadvantages aside, the major difficulty faced by heterosexual life partners in the position of R is that – objectively speaking – it remains an indubitable fact that the law has always provided them with the option of marrying one another (and still does so). This much is trite. However, in his minority judgment, Sachs J stated that this fact alone was not necessarily sufficient to serve as a basis for concluding that a surviving life partner in the position of R should not be entitled to maintenance solely because the option to marry was never exercised. Indeed, as Sachs J convincingly pointed out, the option of marrying often exists only in theory.³³ Furthermore, Sachs J continued, a valuable lesson could be learnt from Canadian jurisprudence, where the courts have held that a distinction needs to be drawn between matters that involve the (re-) regulation or division of property between life partners and those that involve matters of (spousal) support. In *Nova Scotia (Attorney General) v Walsh*,³⁴ Gonthier J explained that this distinction was essential as "[w]hile spousal support is based on need and dependency, the division of matrimonial assets distributes assets acquired during marriage without regard to need".

On the basis of this distinction, that the parties had not specifically elected to marry one another could not deprive one of them of a right to support, as "a request for support must always be based on the particular needs of the applicant and the respondent and their capacity to provide for themselves and each other".³⁵ Consequently, the "choice argument" would only be valid in the cases of property dispute and not in the cases in which the extension sought was based on need (as is obviously the case with maintenance). The rationale behind this distinction, according to Gonthier J, is found in the different objectives served in these two cases: While the former seeks to divide property in accordance with a matrimonial

32 Schäfer 2006 SALJ 626, 640–644.

33 Volks paras 155–162. Also see Schäfer 2006 SALJ 626, 641.

34 2002 SCC 83 (CanLII) para 203 (hereafter *Walsh*).

35 *Walsh* para 203 ; where Gonthier J based this conclusion on the criteria posed by S 33 of Ontario's *Family Law Act* RSO 1990, c F3, for determining the "amount and duration" of support for a "spouse, same-sex partner or parent in relation to need". The reference to "same-sex partner" has since been deleted, and the definition of "spouse" now means: "a spouse as defined in S 1(1), and in addition includes either of two persons who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child. ('conjoint') RSO 1990, c F3, s 29; 1999, c 6, s 25 (2); 2005, c 5, s 27 (4–6)."

property system, a need-based claim serves the "social objective" of providing for the needs of a spouse and his/her offspring.³⁶

Sachs J appeared to favour this contextualised approach towards the "choice argument" over the one adopted by the majority of the court. In this regard, it is submitted that Sachs J was correct, as the majority judgment, while theoretically sound, fails to appreciate the social context and practical realities related to choice (such as unequal and gendered power relations and ignorance of the consequences of non-formalisation).³⁷ As such, the majority judgment represents little more than a clinical adherence to matrimonial law in circumstances in which it is clear that the "choice" to marry is often merely illusory. Goldblatt³⁸ neatly encapsulates the latter reality in the following terms:

The libertarian presumption of free choice is incorrect. It is itself premised on the idea that all people entering into family arrangements are equally placed. This is not so. Men and women approach intimate relationships from different social positions with different measures of bargaining power. Gender inequality and patriarchy result in women lacking the choice freely and equally to set the terms of their relationships. It is precisely because weaker parties (usually women) are unable to compel the other partner to enter into a [marriage or] contract or register their relationship that they need protection ... The research [conducted for the purposes of Goldblatt's contribution] showed that it usually suits men to neither marry nor formalise the partnership in any way, so that they might have the freedom to take what they want from the relationship free of any concomitant obligations. The illiteracy, ignorance and lack of access to the law and other resources compound the already difficult position facing many women.³⁹

As support for this contention, it is further submitted that if it is borne in mind that a "first-world" society such as Canada deems it necessary to adopt a context-specific approach, the adoption of a similar approach is even more imperative in a less

36 *Walsh* para 204. This finding was referred to with approval by the Supreme Court of British Columbia (*per Neilson J*) in *MAS v FKM* 2003 BCSC 849 (CanLII) para 62 (hereafter *MAS*).

37 See, *inter alia*, Lind 2005 AJ 108, 109–113; Goldblatt 2003 SALJ 610, 614 and 616; De Vos 2004 SAJHR 179, 183; and SALRC 2006 <http://bit.ly/gp7ni6> 29 *et seq* for an explanation of these and other realities.

38 2003 SALJ 610, 616.

39 In the light of the legalisation of same-sex marriage, it is submitted that many of these arguments could also apply to the "choice" of persons involved in such relationships to enter into marriages or civil partnerships, particularly as far as unequal power relations and ignorance of the law are concerned. In addition, as will be seen below, the impact of factors such as homophobia on the presumption of free choice also plays a significant role within the context of same-sex relationships.

sophisticated and less homogenous society such as South Africa, which, in the eloquent phraseology quoted by Sinclair and Heaton,⁴⁰ is "fissured by differences of language, religion, race, cultural habit, historical experience and self-definition". An even greater awareness of the realities encountered in such a multifarious society would certainly be required in the latter instance. However, by effectively giving pre-eminence to the "choice argument", despite the claim *in casu* being based on need, the majority decision in *Volks* unfortunately took the diametrically opposite route and, in the words of Lind⁴¹ "ignores the society we have become". In this regard, the decision of the majority and the rationale on which it was based clearly underscores the need for domestic partnership legislation that provides a legal institution that co-exists with marriage and that accommodates the lived reality faced by life partners for whom the choice of formalisation exists merely in theory.

Sachs J proceeded to conclude that the legal question *in casu* was whether the Act discriminated unfairly on the basis of "marital status";⁴² a ground listed in the equality clause in order to protect persons who were vulnerable because they were unmarried.⁴³ While it was apparent that society generally condoned cohabitation more readily than it had done in the past, societal prejudices against such relationships had not been completely eradicated.⁴⁴ Nevertheless, the institution of marriage had to be protected due to the vital role it played in both public and private life. However, the fundamental question in Sachs J's opinion was whether this entitled marriage to exclusivity, and therefore whether the exclusivity occasioned by the Act was unfair.⁴⁵ In deciding this crucial issue, Sachs J commenced by emphasising the role played by the Constitutional Court in broadening the scope of recognised family formations in South African society, but also pointed out that it had to be borne in mind that no single case had heretofore dealt with the issue of life partnerships that existed between two unmarried persons of the opposite sex.⁴⁶ What needed, however, to be determined was whether there was "a *familial nexus* of

40 *Law of Marriage* 7, who acknowledge this quote as appearing in an article written by Ken Owen that appeared in the *Business Day* of 26 June 1990.

41 2005 AJ 108, 111.

42 *Volks* paras 186–187.

43 *Volks* para 200.

44 *Volks* paras 200–203.

45 *Volks* para 208.

46 *Volks* paras 210–211.

such proximity and intensity between the survivor and the deceased as to render it manifestly unfair to deny her the right to claim maintenance from the estate on the same basis as she would have had if she and the deceased were married ".⁴⁷

Sachs J proceeded to provide two scenarios in which the denial of such a claim would, in his opinion, be unfair. As these scenarios are discussed as part of the second critical aspect identified earlier dealing with the factual duty of support, the discussion of Sachs J's conclusion regarding the familial nexus will be addressed in the paragraph that follows. Before doing so, it must be noted that Sachs J's minority judgment culminated in the finding that the exclusion of the benefits of the Act to married survivors only constituted unfair discrimination.⁴⁸

2.2.2 *Critical aspect two: The value of the existence of a factual duty of support*

It is submitted that Sachs J's finding regarding the unfairness of the Act and the lack of justification for the exclusion of persons other than surviving spouses was correct. Nevertheless, an important *lacuna* in this otherwise well-reasoned minority judgment must be unveiled. In order to understand this submission, the two scenarios mentioned in the preceding paragraph (that is those described by Sachs J in which denying a maintenance claim would be unfair in view of the existence of a significant familial nexus) need to be dealt with in some detail.

2.2.2.1 Category 1: The existence of an express or tacit duty of support

The first category mentioned by Sachs J involved parties who had expressly or tacitly bound themselves to "provide each other with emotional and material support".⁴⁹ While it would ease matters if proof of such an undertaking could be provided by way of a "legal document", Sachs J also emphasised that such an undertaking could be inferred on the facts of a specific case (as indeed the Constitutional Court had also found in *Satchwell*). Moreover, while the finding in *Satchwell* had been restricted to homosexual life partners, Sachs J was of the

47 *Volks* para 213. Emphasis added.

48 *Volks* para 227.

49 *Volks* para 214.

opinion that the same inference could be drawn in the case of heterosexual couples.⁵⁰ On this basis, Sachs J found that the duty could extend beyond the death of one of the life partners and thus permit a claim in terms of the Act.⁵¹

It is submitted that Sachs J's reasoning regarding this group of persons is correct. Nevertheless, as will be seen below, Sachs J stopped short of taking this aspect of his judgment to its logical and decisive conclusion.

2.2.2.2 Category 2: Maintenance in the absence of an express or tacit undertaking

The second category in which Sachs J opined that the denial of a maintenance claim would be unfair seems less convincing. This category is described as one in which a maintenance obligation arises not from any agreement to that effect but instead owing to "the nature of the particular life partnership itself".⁵² Sachs J appeared to view this group as comprising a family unit in a case in which the survivor was not able to contribute to maintenance in material terms but rather by way of "care and concern" and "sweat equity".⁵³

The main reason for submitting that this category is less convincing than the first is that there is no real distinction between the first and the second category of persons mentioned by Sachs J. In other words, it is suggested that a contractual duty of support is present in both scenarios envisaged by Sachs J. This is so because although the existence of a reciprocal duty of support is based on the need of one party and the corresponding ability of the other to provide,⁵⁴ it is acknowledged by authors such as Sinclair and Heaton⁵⁵ that in such a situation, the duty of support rests on the sole breadwinner.⁵⁶ It therefore does not follow that because only one

50 *Volks* para 215. Also see Mokgoro and O'Regan JJ's dissenting judgment in which they also agree that a reciprocal duty of support could be inferred from the facts of the case (para 104).

51 *Volks* para 216.

52 *Volks* para 218.

53 *Volks* para 219.

54 See for example Van Zyl *Handbook* 3; Cronjé and Heaton *Family Law* 52; Visser and Potgieter *Introduction* 76.

55 *Law of Marriage* 442 (n 90).

56 In *Bezuidenhout v ABSA Versekeringsmaatskappy Bpk* Case 40688/2008 26 February 2008 (unreported; hereafter *Bezuidenhout*) para 7.3, the court accepted, on the evidence of only one

party is earning an income, no reciprocal duty of support exists, for as Van Zyl⁵⁷ states, the duty of support in South Africa "is always a reciprocal one". Nevertheless, contemporary socio-economic conditions make it difficult to imagine a scenario in which only one party contributes to the maintenance of the other party for the entire duration of the relationship without the slightest reciprocal contribution from the one who is generally being maintained. For Sachs J to attempt to explicitly identify and differentiate such a category of relationship therefore appears to be somewhat artificial. Indeed, the learned Judge appears (perhaps inadvertently) to conflate the first and second scenarios himself when he states that "[i]n the words of the [Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000], what matters is whether in the relationship there was a *commitment to reciprocal support*".⁵⁸

From this statement, it can be deduced that it is not necessarily required that *both* partners actually and continuously contribute towards reciprocal maintenance, but rather that there is a *commitment* in this respect that gives rise to a (contract-based) reciprocal duty.

Furthermore, although none of the cases that Sachs J cited in support of his contention that a broader approach had been entrenched by the Constitutional Court in order to "recognise diversity of family formations" dealt with heterosexual life partners, it is important to note that in all of these cases, it was found that it was possible to *infer* that a reciprocal duty of support existed on the facts of each case. Furthermore, if the criticism against the second category identified by Sachs J is borne in mind, it becomes clear that a reciprocal duty of support exists in those circumstances, as well as in those of the first category.

The inevitable conclusion therefore is that the existence of a reciprocal duty of support is the decisive factor in determining whether the claim of a person in the

party, that that party maintained the other one "almost like a child", as the latter was unemployed and did not contribute towards household expenses. The court therefore appears to have accepted that the former party was the sole breadwinner – see para 13.

57 *Handbook 3.*

58 *Volks* para 219. Emphasis added.

position of R should succeed.⁵⁹ Moreover, it is clear that a reciprocal duty of support in fact existed between the life partners in *Volks*.⁶⁰ The failure of the majority judgment (as well as that of Ncgobo J) to recognise this fact is not only incomprehensible, but, when compared to the ease with which the courts have inferred the existence of such a duty in the same-sex cases,⁶¹ appears to be inconsistent.⁶²

Nevertheless, while Sachs J had no qualms in acknowledging the existence of a reciprocal duty of support *in casu*, it seems (as mentioned earlier) that the learned Judge did not appear to have identified this requirement as constituting the true cornerstone of his dissenting judgment. Indeed, a finding that the reciprocal duty of support was the key to R's claim would also have facilitated the refutation of a major concern raised by Skweyiya J in his majority judgment. The reservation in question is essentially based on the differences between the obligations created *ex lege* by marriage and those created *ex contractu* between life partners and the concomitant problematic application of these obligations beyond the death of the parties concerned. In this regard, Skweyiya J stated that:⁶³

[Sachs J contends] that for the law not to oblige survivors of relationships in this category to be maintained entails unfair discrimination against the survivor simply because the survivor does not have the piece of paper which is the marriage certificate. That is an over-simplification. Marriage is not merely a piece of paper. Couples who choose to marry enter the agreement fully cognisant of the legal obligations which arise by operation of law upon the conclusion of the marriage. These obligations arise as soon as the marriage is concluded, without the need for any further agreement. They include obligations that extend beyond the termination of marriage and even

59 In their dissenting judgment, Mokgoro and O'Regan JJ also appreciated the fact that the existence of a reciprocal duty of support was essential in order to allow cohabitants to claim in terms of the *Maintenance of Surviving Spouses Act* (see paras 139 and 140, as well as their proposed order as contained in para 145). It is submitted, however, that with the exception of this aspect, their order contains a number of critical deficiencies – see Smith *Domestic Partnership Rubric* Chp 5 para 3.3.1.2.

60 See Schäfer 2006 SALJ 626, 643, who appears to share the view that the couple's relationship was clearly "marked by commitment and mutual interdependence".

61 See, for example, *Du Plessis* paras 11–16; *Satchwell* para 25; and *Gory v Kolver* 2007 3 BCLR 294 (CC) para 2.

62 It is self-evident that the existence of a duty of support is a question of fact and not of gender. The recognition of such a duty within the context of homosexual relationships (see Smith *Domestic Partnership Rubric* Chp 5 para 3) but not in the case of a heterosexual couple is therefore an egregious anomaly.

63 *Volks* para 58.

after death. To the extent that any obligations arise between cohabitants during the subsistence of their relationship, these arise by agreement and only to the extent of that agreement. *The Constitution does not require the imposition of an obligation on the estate of a deceased person, in circumstances where the law attaches no such obligation during the deceased's lifetime, and there is no intention on the part of the deceased to undertake such an obligation.*⁶⁴

From the final sentence of this quotation, it appears that Skweyiya J was of the opinion that two factors, namely (i) the lack of an obligation imposed *ex lege*; and (ii) the absence of the intention of the deceased to incur such an obligation, would be decisive. Two paragraphs later, Skweyiya J summarised this reservation by concluding that it would be "incongruous, unfair, irrational and untenable" to impose a duty of support on a deceased estate in a case in which "none arose by operation of law during the lifetime of the deceased".⁶⁵

This objection to the extension sought by R deserves special attention:

(a) To begin with, it is to be noted that, although the "intention requirement" was specifically mentioned in the extract from Skweyiya J's judgment,⁶⁶ the learned Judge only makes one reference to this requirement and does not include it as a factor in summarising this finding on two subsequent occasions.⁶⁷ However, for the purposes of this discussion, it can be assumed that he nevertheless took cognisance of the deceased's (perceived) intention when considering whether R's claim for maintenance could succeed. However, it is submitted that ascertaining the intention of the deceased is not always a simple matter. This represents the first major difficulty with the "intention requirement" as prescribed by Skweyiya J: It attempts to formulate an absolute qualification of general application to all cohabitants on the basis of *his interpretation* of the facts in *Volks*. The learned Judge concluded that S did not intend to maintain R after his passing.⁶⁸ As no other evidence for drawing this conclusion is mentioned, it can

64 Emphasis added, footnote omitted.

65 *Volks* para 60. Also see para 68.

66 See the final sentence of para 58 as quoted above.

67 *Volks* para 60 (the essence of which is quoted above) and para 68: "As I have already said, it is not unfair not to impose a duty upon the estate of a deceased where no duty of that kind *arose by operation of law* during the lifetime of that person". Emphasis added.

68 *Volks* para 58.

be assumed that Skweyiya J reached this conclusion on the basis of the bequests made to R in S's will.

Considering the facts *in casu*, it is clear that S, *inter alia*, bequeathed a sum of R100 000 to R in terms of his will.⁶⁹ However, it does not follow from this fact that S never intended to maintain R. On the contrary, the bequests to her may indicate that he indeed wished to maintain her, but that in his opinion, the property bequeathed would be sufficient to do so. Therefore, the fact of the bequest should instead be used to assess (as the Act requires in the case of spouses to a valid marriage) the "own means" of the survivor, and not as an absolute bar to the institution of a claim in the first place. If this were to be done, it would follow that R would not, on the facts of the case, be entitled to additional maintenance from S's estate, as the bequest would in all probability be deemed to constitute sufficient maintenance. This much was pointed out in both dissenting judgments.⁷⁰ Moreover, this approach would also be in line with the order proposed by Sachs J, in which he clearly stated that, in his opinion, the Act was unconstitutional to the extent that it excluded cohabitants "from *pursuing* claims of maintenance".⁷¹ This obviously implies that each claim would be considered on merit, just as the case would be with a surviving spouse.

(b) Secondly, the majority judgment does not give due recognition to the potency of a contractual (as opposed to *ex lege*) duty of support.⁷² It is clear on the facts of the case that S and R had undertaken a contractual duty to support one another.⁷³ While it is true that one duty of support arises *ex lege* (in the case of marriage) and the other arises contractually (in the case of life partners, such as the situation *in casu*), these duties are equally worthy of protection. This fact is borne out both by legislation and by case law. Two examples can be cited:

69 *Volks* para 7. She was also entitled to other assets including a motor vehicle and the contents of the flat.

70 *Volks*. See Sachs J's dissenting judgment at para 240 and Mokgoro and O'Regan JJ's dissenting judgment at para 142. Also see Lind 2005 AJ 108–109 for the implications of these views on the finding of the majority.

71 *Volks* para 236. Emphasis added.

72 Also see Lind 2005 AJ 108, 122–123.

73 *Volks*. See, for example, para 240 of Sachs J's dissenting judgment and Mokgoro and O'Regan JJ's dissenting judgment para 104.

- (i) First, the *Maintenance Act*⁷⁴ no longer recognises maintenance in the restricted circumstances provided for by its 1963 predecessor⁷⁵ in terms of which the obligation to maintain was limited to blood relations and spouses.⁷⁶ As such, Section 2(1) of the 1998 Act has broadened the scope of maintenance obligations so as to include a legal duty to maintain that was created by a contractual undertaking.⁷⁷ In other words, a *contractually created* duty of support can found a legal duty to maintain that is protected by the 1998 Act.⁷⁸
- (ii) Second, in *Du Plessis* the existence of a *contractual* duty of support between the deceased and his same-sex partner played an integral role in holding the Road Accident Fund liable for damages for loss of support suffered by the survivor.⁷⁹ In this instance, a third party's interference with the (inferred) *contractual* duty of support between the life partners was, due to its specific nature and therefore in the light of the prevailing *boni mores* of society, found to warrant the imposition of delictual liability in the form of the defendant's action.⁸⁰ This implies that, in order for the claim against the third party to succeed, the survivor was required not only to prove that the contractual duty of support between himself and the deceased was legally enforceable, but also that the interference with this duty constituted a delict.⁸¹ It is important to emphasise that this claim therefore involved the

74 99 of 1998.

75 *Maintenance Act* 23 of 1963.

76 Cronjé and Heaton *Family Law* 58.

77 The section reads as follows: "The provisions of this Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty".

78 Cronjé and Heaton *Family Law* 58.

79 *Du Plessis* see paras 11–16; 37 and 42.

80 See Neethling *et al* *Law of delict* 259, 260. It is interesting to note Skweyiya J's statement (in para 58) that "[t]o the extent that any obligations arise between cohabitants during the subsistence of their relationship, *these arise by agreement and only to the extent of that agreement*". It is submitted that the *Du Plessis* judgment highlights the fact that this statement cannot be made without qualification as the contractual obligation that existed between the life partners in effect formed the basis for the outsider's delictual liability. This implies that an obligation that exists *inter partes* may be more far-reaching than this statement of the law would have one assume.

81 *Volks*, see paras 12 and 17 of the judgment, in which Cloete JA summarises the core elements in the case as firstly proving that a legally enforceable duty of support existed and, as an outflow hereof, that the killing of the deceased was wrongful and therefore actionable against the defendant in delict.

interests of outsiders and was not limited to those of the life partners themselves.

It is true that in *Du Plessis*, Cloete JA expressly refrained from commenting on the position of heterosexual couples.⁸² However, if one applies the ratio of the decision in *Du Plessis* to the circumstances in *Volks*, it is submitted that it is fallacious to contend that the existence of a contractual duty of support could be brushed aside with such ease in the latter case in circumstances in which (in contradistinction to the relief sought in *Du Plessis*) neither the state nor a third party was required to provide the requisite support.⁸³ This argument is strengthened all the more if one bears Sachs J's valid criticism of the "choice argument" in mind (which, it is to be remembered, constituted the underlying reasoning of the majority judgment in *Volks*).⁸⁴

When one applies this information to the facts in *Volks*, it becomes clear that the "intention requirement" introduced by Skweyiya J (referred to above) cannot be used in order to play *ex lege* and *ex contractu* duties of support off against one another. For example, in the case of a marriage, even if the deceased spouse had evinced a clear intention not to maintain the surviving spouse, he/she would still have been allowed to institute a claim in terms of the *Maintenance of Surviving Spouses Act*. The deceased spouse's intention would be irrelevant. What is important is that a duty of support existed that was worthy of protection and therefore worthy of extension beyond death. As seen above, the fact that a contractual duty of support is as robust and as worthy of protection as an *ex lege* one is borne out by case law and by legislation. Bearing this in mind, Skweyiya J's finding presents the anomalous conclusion that, while the contractual duty of support that existed during the existence of the relationship between S and R could be enforced in terms of the 1998 *Maintenance Act*, such a duty would – on

82 *Volks* para 43.

83 *Volks*, see para 39 of Skweyiya J's judgment: "The obligation to maintain that exists during marriage passes to the estate. The provision does not confer a benefit on the parties in the sense of a benefit that either of them would acquire from the state or a third party on the death of the other".

84 This aspect is fully discussed in 2.2.1 above.

the basis of the majority's finding – be unenforceable after the death of either of the parties.⁸⁵

In the light hereof, it becomes clear that to exclude R's claim on the basis that no *ex lege* duty of support was present is to adopt an unnecessarily narrow approach towards contemporary South African family law, for, as Mokgoro and O'Regan JJ stated in their joint dissenting judgment:⁸⁶

[Skweyiya J's approach in terms of which it is fair to discriminate between relationships which occasion an *ex lege* duty of support and those which do not] defeats the important constitutional purpose played by the prohibition on discrimination on the grounds of marital status. *For if it does not constitute unfair discrimination to regulate marriage differently from other relationships in which the same legal obligations are not imposed upon the partners to that relationship by the law, marriage will inevitably remain privileged.*⁸⁷

Although Sachs J appeared to touch on this point in his dissenting judgment when he remarked that he could "see little reason in fairness" as to why a contractual duty could not be extended beyond the death of the survivor,⁸⁸ it is unfortunate that he did not take this point further. This might have been accomplished by expressly finding that a factual reciprocal duty of support indeed existed between S and R,⁸⁹ followed by a conclusion that – as a logical outflow hereof – Skweyiya J's argument regarding posthumous application could be thwarted owing to the removal of the very premise on which it was based.⁹⁰ This same criticism can unfortunately also be levelled

85 Ngcobo J's judgment (which concurred with the judgment of Skweyiya J) also failed to acknowledge both the fact and potency of a reciprocal duty of support. This becomes clear when one reads paras 88–91 of the judgment, in which the learned Judge emphasised that the *Maintenance of Surviving Spouses Act* extends the reciprocal duty of support beyond the death of one of the spouses and, in so doing, safeguards the survivor's right to "receive maintenance and support from the deceased spouse". As was the case with the majority judgment, Ngcobo J failed to acknowledge both: (i) the fact that a contractual duty of support existed between S and R; and (ii) that both case law and legislation have established that such a duty is just as worthy of recognition and protection as an *ex lege* duty.

86 *Volks* para 118.

87 Emphasis added.

88 *Volks* para 216.

89 Although Sachs J found that such a duty existed *in casu* (see para 240), he did not drive this point home.

90 Also see Lind 2005 AJ 108, 121: "To say that a duty does not exist because the duty upon which it is premised does not exist begs the question. If the one cannot exist without the other, the court must actively determine whether or not the latter exists in order for the former to fail". Lind, however, appears to focus more on the argument that the common law duty of support should have been "recast" (and that the court should have "extended a lifetime support obligation to cohabitants" (114)) than on recognising the factual duty of support as such. It is submitted that

against Mokgoro and O'Regan JJ's dissenting judgment. Although the learned Judges found that a reciprocal duty of support had indeed existed *in casu*,⁹¹ they also did not use this inference to counter Skweyiya J's finding by holding that it was logical that a factual duty of support that had existed while both partners were alive could be extended beyond the death of one of them.⁹² Such a finding, it is submitted, would also have served better to explain why Mokgoro and O'Regan JJ eventually held that, in their opinion, the Act would henceforth be extended only to heterosexual couples who had indeed undertaken mutual support obligations.⁹³

It is consequently submitted that the existence of a duty of support *during the existence* of a relationship is a *sine qua non* for the posthumous extension thereof under the parameters defined by the Act.⁹⁴

In conclusion, it is submitted that the second critical aspect of the *Volks* judgment highlights that the order proposed by Sachs J should have included a reference to the necessity of proving the existence of a reciprocal duty of support between the life partners. It is consequently proposed that his finding that "[t]he Act is accordingly invalid to the extent that it excludes unmarried survivors of permanent intimate life

extending the common law by recognising an *ex lege* support obligation between unmarried life partners was not necessary – the same result could have been achieved by simply giving effect to the *de facto* contractual duty of support that existed between S and R.

91 *Volks* para 104.

92 This point is also not taken by Schäfer (2006 SALJ 626, 630) who, while correctly stating that "at least in relation to financial benefits, there should be a broad measure of proportionality between the extent to which the state and third parties are expected to underwrite a life partnership and the extent to which its participants have elected to assume binding legal obligations towards one another", does not apply this principle to the majority decision in *Volks* despite apparently also being of the opinion that a reciprocal duty of support indeed existed *in casu* (643).

93 *Volks*, see paras 139, 140 and 145.

94 This being the case, it is difficult to understand why Sachs J was of the opinion (n 85 of his dissenting judgment) that it is more important to establish the existence of such a duty where the state is involved (as was the case in the *Satchwell* cases) as opposed to "a claim based on subsistence needs". It can surely be argued – as S 2(1) of the 1998 *Maintenance Act* (discussed above) shows – that some recognised form of legal duty or obligation to maintain is a vital requirement, even in cases in which the state is not directly involved. In order for such a duty to arise, some form of reciprocity is required – see Van Zyl *Handbook* 3. In addition, as was pointed out above, the distinction that Sachs J draws between the scenarios in which a tacit or express duty of support exists and those where maintenance is based on "the nature of the life partnership itself" does not appear to be convincing. It is therefore submitted that the existence of such a duty must be proved regardless of whether one is dealing with a claim involving the state, a third party or one of the parties himself/herself. If this cannot be done, it is submitted that Skweyiya J's argument (see para 60 of the majority judgment) regarding the inappropriateness of imposing such a duty on a deceased estate while none existed *inter vivos* would hold true.

partnerships as identified above, from pursuing claims for maintenance"⁹⁵ should instead have read that "[t]he Act is accordingly invalid to the extent that it excludes unmarried survivors of permanent intimate life partnerships *in which the partners have undertaken reciprocal duties of support*, from pursuing claims for maintenance".⁹⁶

2.3 *Conclusions and suggestions in the light of the critical aspects highlighted in respect of Volks v Robinson*

2.3.1 *The contractual duty of support*

The majority decision in *Volks* failed to acknowledge the existence (and, as a result, failed to appreciate the significance) of a contractual duty of support between heterosexual life partners. In addition, this judgment is clearly irreconcilable with earlier judgments dealing with factual duties of support, in which the courts have readily found that the existence of such a duty could be inferred from the facts of the matter at hand. That this earlier case law dealt with homosexual as opposed to heterosexual couples is irrelevant, as gender has no bearing on the capacity of two persons to enter into an agreement to support one another. On this count, the judgment must be criticised for the fragmented and inconsistent legal position that it has created. It can therefore be reiterated that the existence of a reciprocal duty of support between life partners is the key factor in determining whether a duty of support that existed *inter vivos* could be extended posthumously. This finding must be borne in mind when streamlining the draft *Domestic Partnerships Bill*.

2.3.2 *The "choice argument" and the reciprocal duty of support: Developing the "contextualised choice model"*

To begin with, it must be remembered that the "choice argument" formed the cornerstone of the majority decision in *Volks*.⁹⁷ In addition, cognisance should be taken that marriage has, subsequent to the decision in *Volks*, become available to

95 *Volks* para 236.

96 Emphasis added.

97 *Volks*, see Sachs J's minority judgment at para 154.

same-sex couples in the wake of the promulgation of the *Civil Union Act*⁹⁸ on 30 November 2006. (This Act makes provision for same-sex and opposite-sex couples to enter into a civil union, which may take the form of either a marriage or a civil partnership.)⁹⁹ Prior to this development, authors such as Currie and De Waal¹⁰⁰ expressed the opinion that:

If same-sex marriage or a form of registered partnership became available the same reasoning [as that employed by the majority judgment in the *Volks* case] would apply to gay people who opted merely to cohabit.

As seen in Section 2.2.1 above, it is submitted that this argument cannot, without more, be used to justify the refusal of the extension of the rights and obligations traditionally associated with civil marriage to life partners, whether of the same or opposite sex.¹⁰¹ A nuanced and flexible approach, that takes the dynamics and realities of South African society into consideration, is required. In this regard, it is suggested that the approach suggested by Gonthier J in the Supreme Court of Canada *Walsh* case (in terms of which a distinction is made between property disputes and claims based on need) is to be recommended as a point of departure for adjudicating similar disputes in South Africa.¹⁰²

In the *Walsh* case, Gonthier J¹⁰³ expressed the opinion that:

To invoke s. 15(1) of the [Canadian *Charter of Rights and Freedoms*] to obtain spousal assets without regard to need raises the spectre of forcible taking in disguise, even if, in particular circumstances, equitable principles may justify it.

98 17 of 2006.

99 See the S 1 definition of "civil union".

100 *Bill of Rights Handbook* 256.

101 Also see the discussion in 3.4.1 below of Wood-Bodley's criticism of the application of the "choice argument" to homosexual couples who, despite now being legally permitted to do so, elect not to marry one another.

102 Gonthier J's distinction was referred to with approval in the British Columbia case of *MAS* para 62. It has not been criticised in any reported case of which I am aware.

103 *Walsh* para 204.

Section 15(1) of the *Canadian Charter of Rights and Freedoms* states that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

While Section 9 of South Africa's Constitution is more encompassing than its Canadian counterpart as far as the listed grounds of unfair discrimination are concerned,¹⁰⁴ it is submitted that the opinion expressed by Gonthier J will also hold true in a South African context. Consequently, the failure of the law to permit asset distribution (that is to say, claims other than need-based claims) between life partners to take place in the same way as for married partners *would not necessarily constitute a violation of the right to equality*.¹⁰⁵

Therefore, it is *preliminarily*¹⁰⁶ submitted that should the extension sought by a life partner who has clearly chosen not to formalise his/her relationship by way of marriage or civil union be based on a property dispute (division of assets), a presumption should apply to the effect that the "choice argument" is relevant. As Sachs J put it: "merely choosing to cohabit [is] insufficiently indicative of an intention by cohabitants to share and contribute to each other's assets and liabilities".¹⁰⁷ In such an instance, the "choice argument" would be a highly persuasive factor in deciding to exclude the possibility of applying matrimonial (property) law to solve the dispute, as a consequence of which the ordinary principles of the law of obligations would determine the matter. However, that the law of obligations does not currently

104 See S 9(3): "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".

105 This conclusion is borne out by the positive law position as dictated by *Volks*, in which the majority of the court was prepared – on the basis of the "choice argument" – to hold that the denial of a claim based on need to the surviving cohabitant did not constitute a violation of the right to equality. It is submitted that, in the light of this approach, a court would in future be hard-pressed to find that the non-application of matrimonial property law to a property-based claim between cohabitants was unconstitutional.

106 It is important to note that this is only a preliminary conclusion that is revisited and revised after an assessment of the draft *Domestic Partnerships Bill* (see 4 below).

107 See *Volks* para 158.

provide the ideal structure for the regulation of such claims between life partners¹⁰⁸ provides ample evidence of the dire need for legislative intervention in this regard.

Should the extension sought be based on need (support), the "choice argument" would not be relevant and the enquiry would then be whether a reciprocal duty of support was expressly or tacitly undertaken between the parties. This criterion would be decisive in determining whether the claimant's need was within sufficient proximity of the other life partner's estate.

The model described above will henceforth be referred to as the "contextualised choice model".

3 Assessing the validity of the choice argument and the necessity (or otherwise) of a reciprocal duty of support in the context of intestate succession: The Gory case

3.1 Introduction

The *Gory* case provides an opportunity to assess whether the contextualised choice model developed in Section 2 above can find application in the context of intestate succession claims. The crisp issue in this case (which was decided shortly before the enactment of the *Civil Union Act*) was whether, in limiting its application to the deceased's surviving "spouse" and/or his/her "descendant[s]", the *Intestate Succession Act*¹⁰⁹ discriminated unfairly against same-sex life partners by not providing for the surviving partner to such a relationship to inherit intestate. The Constitutional Court had no qualms in confirming that, on the basis that same-sex couples were not at the time permitted to marry and given the post-1994 jurisprudence relating to same-sex life partners, the Act was unconstitutional to the extent that it did not permit "permanent same-sex life partnerships *in which the partners have undertaken reciprocal duties of support*" to inherit intestate.¹¹⁰ It is insightful that the Constitutional Court expressed no reservation regarding the court

¹⁰⁸ See Smith *Domestic Partnership Rubric* Chp 6 for a detailed discussion.

¹⁰⁹ 81 of 1987.

¹¹⁰ *Gory* para 19. Emphasis added.

a quo's finding that the existence of a reciprocal duty of support could be inferred from the facts *in casu*.¹¹¹

In addition to the obvious relevance of this case as far as the law of succession is concerned, the Constitutional Court also made a finding of broader significance when it held that, as far as the post-1994 jurisprudence relating to same-sex life partners was concerned, these developments would continue to stand until amended by the legislature.¹¹² As a result, it can be accepted that the *Civil Union Act* has not, without more, deprived same-sex couples of the rights accorded to them by the courts and the legislature in the period between the advent of the democratic constitutional era in 1994 and the validation of same-sex marriage on 30 November 2006.

3.2 *The anomaly created by the Gory case*

Accepting the correctness of the conclusion reached in the preceding paragraph pertaining to the continued relevance of the pre-*Civil Union Act* judgments, it becomes self-evident that an anomaly arises in that, barring further legislative intervention, same-sex couples who have elected not to marry or to conclude a civil partnership in terms of the *Civil Union Act* will be entitled to inherit intestate, while their heterosexual counterparts will not.¹¹³ Although this is not the only anomaly that has arisen in the wake of the promulgation of the *Civil Union Act*,¹¹⁴ this specific anomaly needs to be explored in further detail for the purposes of this discussion, as there are those who are of the opinion that no anomaly exists in the first place. For example, Wood-Bodley¹¹⁵ questions the very existence of this anomaly on the basis of "a substantive approach to the right to equality".¹¹⁶ The thrust of his contention is that the continued differentiation between same-sex and opposite-sex life partners as far as the law of intestate succession is concerned could be permitted if it is borne in mind that, despite the enactment of the *Civil Union Act*, ongoing homophobia

111 Gory paras 40 and 51.

112 Gory para 27 *et seq.*

113 See Smith and Robinson 2008 *IJLPF* 356, 373, 374.

114 See Smith and Robinson 2008 *IJLPF* 356, 368 *et seq* and 2008 *BYUJPL* 419, 430 *et seq.*

115 2008a *SALJ* 46, 54.

116 Also see Wood-Bodley 2008b *SALJ* 259, 260 and 2008c *SALJ* 483, 486.

implies that marriage (or civil partnership) is simply not an option for many same-sex couples.¹¹⁷ As Wood-Bodley¹¹⁸ states:

[This] approach would recognise that although gay and lesbian couples are in theory able to marry, it would be difficult or unwise for many of them to do so in view of ongoing homophobia in society and the concomitant need for many to remain closeted to a greater or lesser degree. To be *married or in a civil union* is to be unrelentingly 'out' and yet, as Altman observed more than thirty years ago, '[t]he key factor in being a homosexual in contemporary society is that very few of us do not feel, at least in part, the need to live a double life' This statement remains true today, notwithstanding huge changes in society.¹¹⁹

The submission regarding the effects of homophobia on the "choice argument"¹²⁰ is a powerful one, in support of which Wood-Bodley lists a number of examples of homophobia as encountered or experienced in contemporary South Africa. All of these examples provide compelling and thought-provoking reading, not least the reports of complaints being lodged against officials of the Department of Home Affairs for allegedly refusing to marry and/or insulting prospective same-sex spouses.¹²¹

On the basis of this argument (which, for the sake of convenience, may be called the "homophobia argument"), Wood-Bodley concludes that, with reference to the finding of the majority of the Constitutional Court in *Volks*, it is possible to distinguish the position of same-sex couples who elect not to marry or to conclude a civil partnership from the position of opposite-sex couples who similarly choose not to do likewise. This is so because "the order of the magnitude of the obstacles to marriage or civil union is so much greater in the case of same-sex partners than it is for opposite sex partners".¹²²

117 Also see De Vos 2007 *SAJHR* 432, 463 *et seq.* In a further contribution, Wood-Bodley (2008c *SALJ* 483, 483 *et seq.*) uses the same argument in support of his contention that employee benefits should be retained for the partners of employees or pensioners involved in post-*Civil Union Act* same-sex relationships who have neither married one another nor have entered into a civil partnership in accordance with that Act.

118 2008a *SALJ* 54, 55. Also see Wood-Bodley 2008b *SALJ* 259, 260 and 266; and De Vos 2004 *SAJHR* 179, 183 and 198.

119 Emphasis added.

120 See the discussion of *Volks* above.

121 Wood-Bodley 2008a *SALJ* 46, 56.

122 Wood-Bodley 2008a *SALJ* 46, 57.

It is submitted that three possibilities present themselves as far as Wood-Bodley's stance is concerned:

- (a) The first possibility is that Wood-Bodley's argument is totally incorrect. Supporters of this contention would immediately argue that the "objective model of choice" – as Schäfer¹²³ describes the "choice argument" – dictates that the legalisation of same-sex marriage implies that the same arguments used by the majority decision in the *Volks* case could be used to conclude that no unfair discrimination could be established in a case in which a same-sex couple chose not to marry one another (or to enter into a civil partnership), despite being legally permitted to do so. This point of view would also, at face value, be consistent with Van Heerden AJ's acknowledgment in the *Gory* case that, once the impediment to same-sex marriage was removed, "there would appear to be no good reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples in respect of intestate succession".¹²⁴ However, as seen below, this argument is not as clear-cut as it appears and it is submitted that this clinical distinction between married couples (or civil partners) and unmarried couples cannot be supported.
- (b) The second possibility is that Wood-Bodley is correct and that it would consequently be permissible to continue to allow same-sex couples who have not formalised their unions to inherit intestate even after the enactment of the *Civil Union Act*, while similarly situated heterosexual couples would not be permitted to do the same.

As seen above, this argument is premised on Wood-Bodley's postulation that the ongoing homophobic stigmatisation of same-sex relationships is sufficient to conclude that in real terms, such couples cannot avail themselves of the choice to formalise their unions.¹²⁵ It is submitted that Wood-Bodley's argument in this regard is persuasive, and that one could agree with him that same-sex couples

123 2006 SALJ 626, 627 and 640.

124 *Gory* para 29. Also see Sinclair and Heaton *Law of Marriage* 300, who opine that gay couples who choose not to marry despite being permitted to do so "should be treated like any other cohabitants".

125 Also see Wood-Bodley 2008b SALJ 259, 260 and 266.

often, (but not necessarily always), do not really have the option of marriage or civil partnership available to them. However, it must be remembered that the same is true of heterosexual couples, where – as was pointed out in the criticism of the *Volks* case above – the option of marriage is often also illusory. In fact, Bonthuys¹²⁶ correctly points out that the same inequalities that often result in a "choice" not to marry within a heterosexual context will also often apply to same-sex couples. Therefore, although Wood-Bodley¹²⁷ insists that there is a difference between the "choice argument" within the context of same-sex and opposite-sex couples, it remains that *neither* of these groups necessarily has the option of formalising their union open to them. That the *context* within which this "choice" may present itself may differ is irrelevant. Rather, the critical fact is that, regardless of the gender of the parties involved, *the choice to formalise their union is often merely theoretical*.

This being the case, it is submitted that some form of objective yardstick needs to be present in order to justify the (continued) extension of one of the invariable consequences of marriage to persons who live together, despite having the option of marriage or civil partnership available to them, and, despite the parties not having benefited one another in their respective wills. This yardstick, it is suggested, is the presence of a reciprocal duty of support.

At this point, it may be prudent to dispel a number of concerns raised by Wood-Bodley as to the perceived paramountcy accorded to the reciprocal duty of

126 2007 SAJHR 526, 540.

127 2008a SALJ 59:

[T]he order of magnitude of the obstacles to marriage or civil union is so much greater in the case of same-sex partners than it is for opposite-sex partners. The basis of marriage is consent, and that is consent by both partners (Schäfer [2006 SALJ 626, 642]). But with same-sex partners, the reason for their not marrying need not be that one partner is thwarting the wishes of the other (ie lack of mutual consent) but that they are practically unable to marry because ongoing homophobia in society creates an insuperable practical obstacle to their marriage. This is, I believe, different to the situation of the opposite-sex couple who do not marry because one of them does not wish to do so, even where the latter's resistance to marriage is assisted by unequal power relations between them. As Schäfer has remarked, "it is plain that the many hardships imposed by our law and by societal attitudes on same-sex couples provide a context quite different from that in which differentiation between married and unmarried heterosexual partners is evaluated". (Schäfer [2006 SALJ 626, 632]).

support within the context of same-sex unions in recent case law. For the time being, the analysis of the significance of this duty will be confined to cases other than the *Gory* case, as the application of this duty to the latter case will be explored fully when the third possibility is evaluated.

Wood-Bodley's first point of criticism is that in the *National Coalition* case (which he describes as the "most useful" case to deal with the recognition of same-sex unions), the provision of mutual "financial support" was listed as merely one of a host of factors to consider in order to recognise such a union, and that the court had expressed the view that none of these factors "[was] indispensable for establishing a permanent partnership".¹²⁸ Accordingly, Wood-Bodley¹²⁹ opines that the tendency in subsequent case law of placing a premium on mutual undertakings of support over the other factors enumerated by the court in the *National Coalition* case conflicts with this decision.

In this regard, it is submitted that Wood-Bodley lost sight of one crucial aspect, namely that the list of factors that Ackermann J enumerated in the *National Coalition* case was mentioned with a view to ascertaining the *permanence* of the relationship. It does not follow from this that a subsequent court would not be permitted to place additional emphasis (or even pre-eminence) on any (additional)¹³⁰ factor that it deemed to be pivotal for the purposes of permitting a specific claim or extending a consequence of marriage to life partners.¹³¹ Indeed, all of the case law in which the existence of such a duty was deemed to be crucial has involved claims in which a link between the existence of a reciprocal duty of support and the particular claim sought was fairly obvious.¹³² However, the extension sought in the *National Coalition* case was not comparable with any

128 *National Coalition* para 88.

129 2008b SALJ 259, 268.

130 Ackermann J pointed out that the list was not all-inclusive – see para 88.

131 In point of fact, Ackermann J appears to have intended the list of factors only to apply within the context of the matter *in casu* (ie the constitutionality of the *Aliens Control Act* 96 of 1991): "Whoever *in the administration of the Act* is called upon to decide whether a same-sex life partnership is permanent, in the sense indicated above, will have to do so on the totality of the facts presented". Emphasis added.

132 See, for example, *Du Plessis; Satchwell* and the minority judgment of Mokgoro and O'Regan JJ in *Volks*.

of these cases, as the issue in that case (immigration rights) was not even remotely linked to the issue of mutual support between the parties involved.

The second objection raised by Wood-Bodley is that the reciprocal duty of support is an automatic, invariable *ex lege* consequence of marriage that is not dependent on any undertaking to this effect by the spouses involved. In this regard, he hastens to explain that:

I am not suggesting that gay and lesbian couples in a permanent same-sex partnership which is recognised by law should escape these duties of support, merely that it is artificial to suggest that these undertakings are commonly thought about, or given, by healthy, financially comfortable persons – whether they be heterosexual, gay or lesbian – who are in love and entering into a permanent relationship. To import such undertakings as a requirement for the recognition of a same-sex partnership, as Madala J has done [in *Satchwell*], is in itself discriminatory. Whether the equality clause demands that couples in a permanent same-sex relationship must owe each other a reciprocal duty of support supplied by operation of law, not as a contractual undertaking, is a separate issue.¹³³

Once again, it is submitted that the extension sought by non-formalised same-sex life partnerships needs to be recognised on the basis of some or other objective yardstick. Therefore, what has been said regarding Wood-Bodley's failure to appreciate the link between the reciprocal duty of support and the nature of the particular extension sought is equally relevant in this regard. The undertaking of mutual support obligations is a logical consequence of any relationship based on interdependence. Furthermore, proof of such an undertaking is required *precisely because the law does not automatically attach such a duty to non-formalised relationships*. Consequently, to regard such an undertaking as an absolute minimum before extending a consequence of marriage that is logically linked thereto, to unmarried life partners is nothing short of common sense.¹³⁴

133 Wood-Bodley 2008b *SALJ* 259, 269.

134 It is submitted that this may be the reason that the courts have, according to Wood-Bodley (2008b *SALJ* 271), "not articulated" Schäfer's view (2006 *SALJ* 630) in terms of which the latter opines that the courts insist on a reciprocal duty of support for the purposes of specific claims only.

Finally, proving the existence of a reciprocal duty of support is not as onerous as it may at first appear. Indeed, case law confirms that the existence of such a duty has readily been inferred;¹³⁵ a phenomenon that Wood-Bodley¹³⁶ himself concedes. (In fact, it is worth noting that the existence of such a duty was inferred without question in the *Gory* case despite the parties having lived together for less than one year).¹³⁷ Furthermore, both case law and legislation testifies that, irrespective of the demands of the equality clause, a contractual duty of support is as worthy of recognition and protection as its *ex lege* counterpart.¹³⁸ Therefore, it is submitted that Wood-Bodley's fears pertaining to proving the existence of such a duty in circumstances in which, for example, the same-sex couple is "poor or unsophisticated", or in which either or both of them have been dissuaded by homophobia or bigotry from making express provision for their life partner in respect of employment benefits can be allayed by the fact that the existence of a contractual duty of support may be relatively easy to prove and is not dependent on inflexible criteria, such as "mimic[ing] the heterosexual marriage ceremony".¹³⁹

In conclusion, that Wood-Bodley categorically denounces the necessity of this requirement for the purposes of the legal recognition of same-sex unions in appropriate circumstances is respectfully submitted as being an oversight on his behalf, and, in turn, the reason that the possibility that Wood-Bodley's point of view is completely correct cannot be supported. The rationale behind this assertion will be explained when the third possibility is considered.

(c) The third possibility is based on the premise that when Wood-Bodley's "homophobia argument" is considered in conjunction with the criticism of the "choice argument" (as explained in the discussion of the *Volks* case above), it becomes apparent that *neither heterosexual nor homosexual couples of necessity have the option of marriage (or similar formalisation)*¹⁴⁰ available to

135 See the authority referred to in n 61.

136 2008b SALJ 259, 269–270.

137 *Gory v Kolver* 2006 5 SA 145 (T) para 5 read with para 18 (hereafter *Gory v Kolver*).

138 See 3.3.1.2 above.

139 Wood-Bodley 2008b SALJ 259, 270.

140 For example, in the form of a civil partnership.

them. Indeed, in addition to the homophobia argument, it stands to reason that many of the obstacles that have traditionally negated the choice of formalisation within the context of heterosexual unions (such as unequal power relations and ignorance of the consequences of marriage or similar formalisation) apply equally to same-sex, post-*Civil Union Act* couples.¹⁴¹ Nevertheless, as was seen in the discussion of *Volks*, it was suggested that, within the context of the *Maintenance of Surviving Spouses Act*, a distinction needed to be drawn between cases involving property disputes and those based on need (or spousal support).¹⁴² In terms of this approach – referred to as the "contextualised choice model" – it was suggested that the "choice argument" would not be relevant in cases based on need, but rather that, in order to establish a proximal nexus between the deceased estate and the survivor's need-based claim, the existence of a reciprocal duty of support would be the decisive criterion. If applied to Wood-Bodley's arguments for the continued permissibility of intestate succession claims for same-sex unmarried couples, the third possibility therefore concedes that homophobia may go as far as to negate the choices available to homosexual couples. However, at the same time, the third possibility suggests that this lack of a real choice may (in much the same way as was argued in the case of heterosexual couples) in any event be irrelevant *in as far as a claim based on need is concerned*.

However, before it can be determined whether the approach suggested in the discussion of the *Volks* case could be transplanted into the realm of intestate succession, it is first necessary to determine whether the purposes served by the respective Acts in *Volks* and *Gory* are comparable.¹⁴³ If it indeed were true that both Acts served a similar purpose – in the sense of catering for the needs of survivors as opposed to satisfying proprietary claims – it would follow that the approach suggested in *Volks* could also apply to the situation in *Gory*.

141 Bonthuys 2007 SAJHR 526, 540.

142 See 2.3.2 above.

143 See J-case para 24: "*The precise parameters of relationships entitled to constitutional protection will often depend on the purpose of the statute.* For instance in *Satchwell* [2002 6 SA 1 (CC)] where the issue was pensions and related benefits, a mutual duty of support was an essential element. In the present case, where the rights of children are implicated, this was not an essential element, though it might have been an appropriate one. [emphasis added, footnote omitted]".

De Waal¹⁴⁴ describes the rationale underlying intestate succession in the following terms:

It would be generally correct to say that most systems of intestate succession do not find their rationale in trying to establish the hypothetical intention of the deceased, *but in the legal conviction that the surviving spouse and family members are, in a sense, the deceased's 'natural heirs'*. The South African system of intestate succession, as set out in the *Intestate Succession Act*, certainly reflects this idea.¹⁴⁵

In the case of *Daniels v Campbell*,¹⁴⁶ a case that examined the constitutionality of both the *Maintenance of Surviving Spouses Act* and the *Intestate Succession Act*, Sachs J (writing for the majority) expressed the following view regarding the purpose of both of these statutes:

An important purpose of the statutes *is to provide relief to a particularly vulnerable section of the population*, namely, widows. Although the Acts are linguistically gender-neutral, it is clear that in substantive terms they benefit mainly widows rather than widowers. [...] Widows for whom no provision had been made by will or other settlement were not protected by the common law. *The result was that their bereavement was compounded by dependence and potential homelessness – hence the statutes.* The Acts were introduced to guarantee *what was in effect a widow's portion on intestacy* as well as a claim against the estate for maintenance. The objective of the Acts was to ensure that widows would receive at least a child's share *instead of their being precariously dependent on family benevolence*.¹⁴⁷

By providing for a system of "forced succession,"¹⁴⁸ the elucidation of the basis of intestate succession provided by De Waal, coupled with the Constitutional Court's description of the purpose of the *Intestate Succession Act* in *Daniels* makes it clear that the principle driving intestate succession in South Africa is indeed a social one,¹⁴⁹ aimed at "the maintenance and protection of the family as

144 De Waal "The law of succession and the Bill of Rights" 3G-13.

145 Emphasis added.

146 2004 5 SA 331 (CC) – hereafter *Daniels*.

147 *Daniels* paras 22 and 23. Emphasis added.

148 De Waal 1997 *Stell LR* 162, 164–165 and 166.

149 De Waal 1997 *Stell LR* 162, 166. Also see Ngcobo J's minority judgment in *Daniels* para 99.

a social unit".¹⁵⁰ Although it may be argued that the elucidation of the purpose of the *Intestate Succession Act* by the court in *Daniels* could be criticised for apparently overlooking the fact that members of wealthy families also die intestate, it is submitted that this does not alter the fact that the Act was *in principle* enacted in order to perform a social function by supporting the family of the deceased. Furthermore, sight should not be lost of the fact that the Act applies regardless of the *de facto* financial position of the survivor; a position that is certainly liable to fluctuate throughout the existence of the relationship, and for which, it is submitted, the Act intends to provide contingent relief. Consequently, it would be incorrect to argue that, because the Act may from time to time¹⁵¹ regulate the distribution of an estate involving a *de facto* wealthy survivor, intestate claims cannot be regarded as falling under the category of need-based claims.

It is submitted that it can therefore be accepted that both the *Intestate Succession Act* and the *Maintenance of Surviving Spouses Act* serve a similar fundamental purpose, namely to address the *needs* of the survivor. Consequently, while it is true that the extent of the survivor's needs will differ from case to case and that the Acts do not treat the issue of need in an identical manner,¹⁵² this does not detract from the fact that both pieces of legislation were enacted with a view to serving the same fundamental purpose. As such, it follows that what was said in relation to the *Volks* case above regarding the irrelevance of the "choice argument" in the case of a need-based claim should apply *mutatis mutandis* to the facts in the *Gory* case. However, it would simultaneously imply that proving that a reciprocal duty of support existed between the deceased and the survivor would be essential in order to succeed with the claim to inherit intestate. (Indeed, the essentiality of proving the existence of a reciprocal duty of support is pertinently illustrated by the situation

150 De Waal "The law of succession and the Bill of Rights" 3G-1. On the other hand, the principle of freedom of testation (in terms of which a person is permitted to dispose freely of his/her property by means of a will) is based on economic considerations and has as its objective the transferring of wealth – see De Waal 1997 *Stell LR* 162, 166; Du Toit 2001 *JJS* 1, 14.

151 It appears to be a recognised fact that wealthy people are less likely to die intestate than affluent people – see De Waal 1997 *Stell LR* 162, 165; Du Toit 2001 *JJS* 1, 13.

152 For example, the *Maintenance of Surviving Spouses Act* contains criteria to establish the "reasonable maintenance needs" and the "own means" of a survivor, while the *Intestate Succession Act* contains no similar criteria.

in which affluent persons are involved: In the event of a wealthy survivor being a potential intestate heir [so that it may be argued that need is not at issue], it is submitted that the existence of a reciprocal duty of support would justify such a survivor's claim, despite the *de facto* lack of need).

For this reason, Wood-Bodley's¹⁵³ submission that the prerequisite of a reciprocal duty of support in both *Gory* judgments was "unwarranted" cannot be supported. This argument is substantiated by the fact that, despite persuasive arguments to the contrary,¹⁵⁴ sight simply cannot be lost of the fact that even though the option of marriage may be illusory, the parties have the option of the law of testate succession at their disposal: In the absence of such testamentary provision within the context of non-formalised relationships, proof of a reciprocal duty of support is required as an objective benchmark in order to establish the proximal link between the claim based on need and the deceased estate. Viewed in this light, it is submitted that the existence of a reciprocal duty of support in a permanent relationship in fact establishes that the survivor of such a non-formalised relationship is "now regarded as close family of the deceased" thereby justifying his/her claim as one of the deceased's natural heirs.¹⁵⁵

As a consequence, it is submitted that, as was concluded within the context of maintenance claims in the *Volks* case, prospective domestic partnership legislation must take cognisance that the existence of a reciprocal duty of support is a *sine qua non* for the continued extension of the principles of intestate succession to permanent life partners who have not formalised their relationship by way of appropriate legislation.

This construction, it is further suggested, may provide the solution to the three post-*Civil Union Act* scenarios identified by Wood-Bodley,¹⁵⁶ all of which are

153 2008a SALJ 46, 52.

154 See for example Hartzenberg J's statement in the judgment of the court *a quo* in *Gory v Kolver* para 22.

155 The quoted words are included in order to contrast this submission with that of Wood-Bodley 2008b SALJ 259, 271, who states that: "Surely the reason for a 'spouse' inheriting on intestacy is because the spouse is now regarded as close family of the deceased, equivalent to a close blood relation, not because of the existence of duties of support?".

156 2008a SALJ 46, 60–61.

based on the premise that no legislative amendment to the legal position in the light of *Gory* is forthcoming:

- (i) The first scenario envisions an equality challenge being brought by the surviving blood relations of a deceased person who was involved in a non-formalised same-sex life partnership, on the basis that they are being discriminated against, as they would have been able to inherit intestate, but for the fact that their deceased family member had been involved in a homosexual relationship.
- (ii) The second scenario proffered by Wood-Bodley suggests that, as an alternative to the first scenario, the surviving partner to a heterosexual life partnership may challenge the current legal position on the basis that he/she is prevented, on the basis of having elected not to marry, from exercising a right to which a same-sex survivor who had also elected not to marry is entitled.¹⁵⁷
- (iii) In the final instance, Wood-Bodley¹⁵⁸ raises the pertinent question as to whether – bearing the recently established right to intestate succession in mind – a surviving homosexual partner to a non-formalised union would be entitled to institute a claim in terms of the *Maintenance of Surviving Spouses Act*.

It is suggested that the approach adopted earlier in this study as a solution to the difficulties presented by the *Volks* case will provide an adequate solution to all three scenarios sketched by Wood-Bodley. On the basis of the "contextualised choice model", the point of departure would be to accept the premise that a maintenance or succession claim instituted after the termination of a life

157 If the court were to find in the applicant's favour, Wood-Bodley 2008a SALJ 46, 61 suggests that this would be an appropriate instance to hold that such an order should not be imposed with any retrospective effect (see the Constitutional Court's judgment in *Gory* para 39 for an explanation of the general principles in this regard) and that Parliament should be provided with an opportunity to rectify the position before the order would take effect. It is submitted that Wood-Bodley's purely prospective approach overlooks the fact that such an order would not vindicate the successful litigant's rights. For this reason, his suggestion cannot be supported.

158 2008a SALJ 46, 59; also raised in 2008b SALJ 259, 270.

partnership in principle serves a social objective and forms part of the genus need-based claims (as opposed to those involving property disputes).¹⁵⁹ This fact would be sufficient to circumvent any need for recourse to the "choice argument", which, moreover, would automatically imply that this (constitutional) issue could be avoided.¹⁶⁰ The second aspect would then simply be for the surviving life partner to prove that a reciprocal duty of support existed between himself/herself and the deceased. The existence of this duty would, it is submitted, justify the survivor's right either to inherit intestate or to claim for maintenance.

3.3 Conclusion

While it was concluded in the earlier analysis of the *Volks* case that heterosexual unmarried couples do not necessarily have the option of formalising their unions open to them, it has been found that the same inequalities present themselves within the context of same-sex relationships.¹⁶¹ This reality, coupled with a consideration of Wood-Bodley's "homophobia argument,"¹⁶² leads to the conclusion that neither heterosexual nor homosexual unmarried couples are necessarily availed of the option of formalising their relationships. This notwithstanding, provided the claim is based on need, nothing turns on the exercising (or otherwise) of such a choice: as a claim under the *Intestate Succession Act* serves a social objective and can be regarded as a need-based claim, it follows that the "contextualised choice model" – as distilled from Canadian law and adapted in the light of South African case law – can be applied equally to a post-*Civil Union Act* claim for intestate succession, with the result that, provided a reciprocal duty of support existed during the existence of a permanent life partnership, such a claim can be instituted regardless of whether the claim arises in the context of a heterosexual or homosexual relationship. Such an objective approach would remove the need for differentiating (and indeed possibly unfairly discriminating) between same-sex and opposite-sex life partners in a post-

159 As seen above, the purpose of both the *Maintenance of Surviving Spouses Act* and the *Intestate Succession Act* was to provide for need-based claims – see *Daniels* paras 22 and 23.

160 See *National Coalition* para 21.

161 See Bonthuys 2007 SAJHR 526, 540.

162 Also see De Vos 2007 SAJHR 432, 463 *et seq* for a further discussion of the hardships suffered by homosexual couples.

Civil Union Act context.¹⁶³ The potential application of this approach within the context of prospective domestic partnerships legislation should now be considered.

4 Applying these findings to prospective domestic partnerships legislation

4.1 Introduction

In a recent study, I concluded that the draft *Domestic Partnerships Bill* requires substantial modification in order for it to regulate domestic partnerships in South Africa in a reliable and effective manner.¹⁶⁴ It is therefore of importance to note that the amendments that will be suggested in the sections that follow constitute only a handful of those that have been recommended for the draft Bill. Thus, the amendments recommended below will be confined to those that are relevant for the purposes of the topic of this article.

4.2 The registered domestic partnership (Chapter 3 of the draft Bill)

The draft *Domestic Partnerships Bill* provides that a reciprocal duty of support arises by operation of law once a registered domestic partnership has been entered into.¹⁶⁵ In addition, a surviving registered domestic partner to a partnership terminated by death qualifies as a "spouse" for the purposes of the *Maintenance of Surviving Spouses Act* as well as the *Intestate Succession Act*,¹⁶⁶ while Clause 18 of the Bill facilitates a claim for inter-partner maintenance if the partnership is terminated *inter vivos*. As a result, it is clear that the "contextualised choice model's" conclusions

163 This objective approach would also serve to iron out the anomalies of Wood-Bodley's staggered approach (in terms of which same-sex life partners would – despite the enactment of the *Civil Union Act* – be able to inherit intestate despite choosing not to marry or to enter into a civil partnership, while the same would not apply to heterosexual couples) that would result in a case in which one of the partners had altered his/her sex description and status in accordance with the procedures prescribed by the *Alteration of Sex Description and Sex Status Act* 49 of 2003. Assume, for example, that A (born male) altered his sex by gender reassignment surgery to that of a female and thereafter entered into a life partnership with B (female). In terms of S 3 of the Act, A would henceforth "for all purposes" be deemed to be a person of the "new" sex, ie female. On Wood-Bodley's construction, A would be able to inherit intestate from B by virtue of her altered sex description, while the same would not have been permitted if A had never undergone the surgery and had (as a male) entered into the life partnership with B.

164 See in general Smith *Domestic Partnership Rubric* Chp 7.

165 Draft *Domestic Partnerships Bill* Clause 9.

166 Draft *Domestic Partnerships Bill* Clauses 19 and 20, respectively.

regarding need-based claims and the necessity of proving the existence of a reciprocal duty of support within the context of such claims is not at issue as far as the *registered* domestic partnership is concerned. However, it is necessary to evaluate the model's conclusions regarding property disputes. In this regard, it is of cardinal importance to note that the model's conclusions were drawn within the context of life partnerships in cases in which the partners: (i) are not married in terms of civil, customary or religious law; or (ii) have not concluded a civil partnership in the prevailing family law system *in terms of which no alternative statutory framework exists* within which they are enabled to solemnise their relationship. However, if it were to be enacted as an Act of Parliament, the *Domestic Partnerships Bill* would have a dramatic effect on this state of affairs by (at least in principle) providing the said alternative statutory framework. As such, the Bill provides the ideal sounding-board for testing the preliminary conclusions reached regarding the "contextualised choice model".

The starting point in this regard is to note that the long title of the Bill, as well as its preamble¹⁶⁷ and stated objectives¹⁶⁸ leave no doubt as to the fact that it is intended to provide the legislative substructure of the domestic partnership in South African law. As such, the Bill should be expected, through comprehensive and effective regulation of these partnerships, to provide a *realistic alternative* to marriage. The method by which the legislature appears to intend to do so is illustrated in the preamble to the Bill, which notes firstly that, according to Section 9(1) of the Constitution, "everyone is equal before the law and has the right to equal protection and benefit of the law" and secondly, that there is no existing "legal recognition or protection" for domestic partners. From the way in which this preamble is constructed, the conclusion can be reached that the Bill intends to regulate domestic partnerships by way of correlating the right to equality with the recognition provided. In other words, *the right to equality is to provide the benchmark for determining the extent to which the current lack of recognition and protection of such partnerships are to be cured* by the Bill.

167 See Smith *Domestic Partnership Rubric* Chp 7 para 3.1 for suggestions regarding the amendment of the preamble.

168 Draft *Domestic Partnerships Bill* Clause 2.

Given the content of the 2008 Bill, the question that needs to be answered is whether any discrepancy that persists between matrimonial property law and the property regime as provided for in the Bill may constitute an infringement of the equality clause to the extent that the Bill does not provide "equal protection and benefit of the [matrimonial property] law". In this regard, it is important to note that the Bill provides that registered domestic partnerships are by default out of community of property, while the partners are permitted to enter into a registered partnership agreement in order to "regulate the financial matters pertaining to their partnership",¹⁶⁹ and, hence, to deviate from the default system if they wish to do so.

Bearing this in mind, the following example illustrates a scenario that may potentially arise if the Bill were to be enacted in its present form:

Assume that X and Y enter into a registered domestic partnership. They approach an attorney who drafts a registered partnership agreement in terms of which the accrual system is made applicable to their domestic partnership by means of the following provisions:

- (a) At the termination of the registered domestic partnership between X and Y, the accrual of each partner's estate is to be determined by subtracting the net value of each partner's estate at the commencement of the partnership from the net value of his/her estate at the termination of the partnership.
- (b) The partners agree that the inventories of assets and their corresponding values as listed in the annexures to this agreement are to be used for the purposes of proving the net commencement value of the partners' respective estates. X's inventory is attached as Annexure A, and Y's inventory is attached as Annexure B.
- (c) At the termination of the partnership, the registered partner whose estate shows no accrual or a smaller accrual than the estate of the other registered partner, or his/her estate if he/she is deceased, acquires a claim against the other registered partner, or his/her estate if he/she is deceased, for an amount equal

¹⁶⁹ Definition of "registered partnership agreement" in Clause 1 of the Bill.

to half of the difference between the accrual of the respective estates of the registered partners.¹⁷⁰

No other provision pertaining to the accrual system is to be found in the agreement. Furthermore, as notarial attestation is not required by the relevant legislation,¹⁷¹ the agreement was never scrutinised by such a professional prior to being signed by the parties. Shortly before X and Y's relationship begins to deteriorate, Y inherits the sum of R500 000 from her father who died intestate. When X and Y decide to terminate their partnership, X, *inter alia*, relying on the principle of *pacta sunt servanda* (agreements are binding and must be enforced),¹⁷² insists that Y's inheritance must form part of the accrual calculation, as their agreement contains no provision that excludes such an inheritance from the calculation. Y alleges that the *Domestic Partnerships [Act]* is unconstitutional to the extent that it violates Section 9 of the Constitution by not providing her with "equal protection and benefit" that Section 5(1)¹⁷³ of the *Matrimonial Property Act*¹⁷⁴ provides for spouses to a marriage to which the accrual system applies. Would Y succeed in her claim?

In attempting to answer this question, it is submitted that valuable insights can be gained from the judgment of the Constitutional Court in *Van der Merwe v Road Accident Fund*.¹⁷⁵ In this case, the issue was whether Section 18(b) of the *Matrimonial Property Act* in not providing for a spouse married in community of property to be compensated for patrimonial loss for bodily injuries sustained due to the fault of the other spouse – while the same restriction did not apply to spouses married out of community of property – constituted a violation of the right to equality.¹⁷⁶

170 Example taken from Clause 14(1) of the proposed registered partnership legislation as contained in Annexure D of SALRC 2003 <http://bit.ly/hnporV>.

171 This is a *lacuna* in the Bill that should be rectified – see Smith *Domestic Partnership Rubric* Chp 7 para 7.

172 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 10.

173 This section states that "[a]n inheritance, a legacy or a donation which accrues to a spouse during the subsistence of his marriage, as well as any other asset which he acquired by virtue of his possession or former possession of such inheritance, legacy or donation, does not form part of the accrual of his estate, except in so far as the spouses may agree otherwise in their antenuptial contract or in so far as the testator or donor may stipulate otherwise."

174 88 of 1984.

175 2006 4 SA 230 (CC) – hereafter *Van der Merwe*.

176 *Van der Merwe* paras 1 and 3.

One of the first important aspects of this case is that it was argued that the impugned Section in the *Matrimonial Property Act* violated Sections 9(1) and 9(3) of the Constitution by infringing a spouse married in community of property's "right to equal protection and benefit of the law", as well as by discriminating unfairly on the listed ground of "marital status".¹⁷⁷ Dealing with the latter contention first, Moseneke DCJ held that the distinction created by Section 18(b) did not involve a benefit that was reserved for married as opposed to unmarried couples, but instead differentiated between married couples on the basis of their respective matrimonial property regimes.¹⁷⁸ For this reason, this case differed from earlier case law dealing with this listed ground (all of which had revolved around the distinction between married versus unmarried couples) as the matter *in casu* dealt with different regimes *within* the law of marriage.¹⁷⁹ Without making a decisive ruling in this regard, Moseneke DCJ expressed his reservations as to whether the listed ground of "marital status" could be interpreted so liberally as to include a matter of this nature for "[i]f that were so, it would imply that any difference in proprietary consequences of marital regimes prescribed by the common law or legislation is presumptively discriminatory and unfair unless shown not to be".¹⁸⁰

Instead, Justice Moseneke held that the case fell to be decided with reference to Section 9(1) of the Constitution, and therefore, in accordance with the test for unfair discrimination as formulated in *Harksen v Lane*,¹⁸¹ it had to be determined whether "the differentiation bear[s] a rational connection to a legitimate government purpose".¹⁸² The premise from which this analysis needed to proceed was "to ensure that the [constitutional] State is bound to function in a rational manner".¹⁸³ According to Moseneke DCJ, it is true that laws often treat persons differently. However:

when a law elects to make differentiation between people or classes of people it will fall foul of the constitutional standard of equality if it is shown that the differentiation does not have a legitimate purpose or a rational

177 *Van der Merwe* para 44.

178 *Van der Merwe* para 45.

179 *Van der Merwe* para 46.

180 *Van der Merwe* para 47.

181 1998 1 SA 300 (CC) – hereafter *Harksen*.

182 *Per Goldstone J* in *Harksen* para 53, as quoted by Moseneke DCJ para 42.

183 *Per Ackermann, O'Regan and Sachs JJ* in *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 25, as quoted by Moseneke DCJ para 48.

relationship to the purpose advanced to validate it. Absent the pre-condition of a rational connection the impugned law infringes, at the outset, the right to equal protection and benefit of the law under s 9(1) of the Constitution. This is so because the legislative scheme *confers benefits or imposes burdens unevenly and without a rational criterion or basis*. That would be an arbitrary differentiation which *neither promotes public good nor advances a legitimate public object*. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes, inasmuch as it breaches the 'rational differentiation' standard set by s 9(1) thereof.¹⁸⁴

The distinction created by Section 18(b) was, according to the court, based on the notion that pre-eminence had to be given to preserving the joint estate as a cohesive unit that in turn implied that inter-spousal claims for patrimonial loss were futile, as they would be paid from and immediately fall back into the joint estate. However, this rationale was a "relic of the common law of marriage" that was not only outdated, arbitrary and detrimental to third parties, but could easily be remedied by providing for any damages awarded to an injured spouse to fall into that spouse's separate estate.¹⁸⁵ Furthermore:

by prohibiting recovery of patrimonial damages for personal injury, s 18(b) arbitrarily prevents the fullest possible compensation for spouses who are victims of violence, negligent driving or other wrongdoing that leads to bodily harm by their marriage partners.¹⁸⁶

On behalf of the Road Accident Fund, it was contended that the limitation imposed by Section 18(b) was justifiable on the basis that the matrimonial property regime that applied to any given marriage was a matter of choice to which, once exercised, the spouses were immutably bound.¹⁸⁷ This argument – categorised by the court as implying a "waiver defence" that effectively entailed that the spouses to a marriage undertook not to challenge any laws to which their marriage were subjected¹⁸⁸ – was disposed of by the court on two counts:

184 *Van der Merwe* para 49. Emphasis added.

185 *Van der Merwe* paras 51–55.

186 *Van der Merwe* para 56.

187 *Van der Merwe* para 59.

188 *Van der Merwe* para 60.

- (a) The Constitution itself, and not the "personal choice, preference, subjective consideration or other conduct of the person affected [thereby]" determined the constitutional validity of a law;¹⁸⁹ and
- (b) The state had not submitted any grounds upon which a legitimate purpose for the limitation in question could be construed.¹⁹⁰

In the end result, the court held that Section 18(b) "[failed] the rational connection test"¹⁹¹ and therefore needed to be rectified by severing the words that imposed the distinction between patrimonial and non-patrimonial loss therefrom, and by reading words to the effect that any damages so awarded fell into the separate estate of the injured spouse into it.¹⁹²

Returning to the position of X and Y: Would Y succeed in her claim that the *Domestic Partnerships [Act]* is unconstitutional to the extent that it does not protect her in the same way as Section 5(1) of the *Matrimonial Property Act* would have done had she been married to X? Her counsel could aver that the broader legislative scheme differentiates between spouses and registered domestic partners by conferring benefits on an inconsistent basis. In order to substantiate this argument, she could rely on the following *dictum* by Sachs J in *Minister of Home Affairs v Fourie*:¹⁹³

The law must be measured in the context of what is provided for *by the legal system as a whole*. In this respect, exclusion by silence and omission is as effective in law and practice as if effected by express language.¹⁹⁴

While counsel for Y may concede that the *Domestic Partnerships [Act]* does not exclude her from the protection, she could allege that a differentiation nevertheless exists as Section 5(1) of the *Matrimonial Property Act* applies *by operation of law* to all spouses married out of community of property with the accrual system *unless they include a provision to the contrary in their antenuptial contract*. While married couples are therefore automatically entitled to the protection unless specifically

189 *Van der Merwe* para 61.

190 *Van der Merwe* paras 62, 63.

191 *Van der Merwe* para 70.

192 *Van der Merwe* para 80.

193 2006 1 SA 524 (CC).

194 *Van der Merwe* para 81. Emphasis added.

opting out of it, registered domestic partners, such as X and Y, have to regulate this matter themselves and will only be entitled to the protection that is explicitly contained in their registered partnership agreement. Therefore, within the context of property regimes that are essentially identical, the one Act allows protection by default while the other places an onerous duty on the parties to act positively in order to secure the same. For an Act to expect such action, so Y's counsel could contend, is unreasonable and incongruous and simply expects too much of the ordinary South African citizen.¹⁹⁵

Applying the test as formulated in *Harksen* to the position of Y would firstly require that, in order to fall foul of the Section 9(1) "equality clause", there should be no rational connection between the differentiation and any legitimate government purpose. The purpose behind the introduction of the registered domestic partnership model in its current form can be gleaned from SALRC's¹⁹⁶ 2006 report in which it is stated that "[i]nstead of largely duplicating marriage, a simplified version of registered partnerships would serve as a proper *alternative* to marriage, making it more accessible to vulnerable partners and affordable to indigent people ...". As far as the property regime of a registered domestic partnership as such is concerned, the report states that the "complexities" of the 2003 model had been revisited in the light of the less complicated registration procedure that was put forward in the 2008 Bill. The Commission therefore opted for separation of property as the default regime,¹⁹⁷ but concluded that "it should nevertheless be open" to the registered partners to enter into a registered partnership agreement.¹⁹⁸ Therefore, although accessibility seems to have been the major reason for the suggested default property regime, the autonomy of the partners appears to have been the overriding motive for permitting a deviation therefrom. In view of the wide array of settings within which life partnerships present themselves, the diverging reasons for cohabitation and the vastly differing financial arrangements that the partners may require to suit their

195 See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 24: "the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them".

196 SALRC 2006 <http://bit.ly/gp7ni6> 320.

197 See Clause 7(1) of the Bill.

198 SALRC 2006 <http://bit.ly/gp7ni6> 332.

unique needs,¹⁹⁹ it appears that the autonomy argument may constitute a legitimate government purpose. Consequently, it can be deduced that the government's purpose behind the introduction of the model in its current form was to ensure the autonomy of the partners. The question is, however, whether this legitimate purpose is advanced by distinguishing between a spouse married out of community of property with the accrual system and a registered domestic partner in the position of Y.

Although the autonomy consideration is a powerful one, it is suggested that it cannot be rationally connected to the lack of protection provided by the Bill in its current form. In much the same way as the reason for protecting the joint estate as a cohesive unit was found to have fallen away in *Van der Merwe*,²⁰⁰ it is submitted that the justification for distinguishing between the legal protection to which married couples and registered domestic partnerships are entitled must also fall away with the enactment of the *Domestic Partnerships [Act]*. There can surely be no legitimate government purpose behind denying protection to a person who has entered into a relationship that, in the same way as marriage does, involves both the undertaking of a formal public commitment before the state, as well as an alteration of legal status.²⁰¹

In consequence, it is submitted that the only way in which the autonomy argument could be rationally connected to the provision in question would be if the [Act] instead provided an "opt-out" provision (similar to that which applies to spouses) by which protection similar to that conferred by Section 5(1) of the *Matrimonial Property Act* applies unless the parties have expressly agreed that it does not, or, in the alternative, if the [Act] granted the courts the competency to extend matrimonial property law to registered domestic partnerships in circumstances similar to those in which Y finds herself.

199 See in general Goldblatt 2003 SALJ 610, 613–615; SALRC 2006 <http://bit.ly/gp7ni6> 19–35.

200 *Van der Merwe* see para 51.

201 Although listed within the context of a need-based claim (maintenance from a deceased estate) and as part of the test for unfair discrimination, the fact that many of the distinctions between marriage and unmarried cohabitants mentioned by Skweyiya J in *Volks* paras 55 and 56 would fall away once the Bill is enacted (see in general Smith *Domestic Partnership Rubric* Chp 7 para 6.3) could be mentioned in further support of this contention.

In the alternative, if a court were somehow to conclude that Section 9(1) is not infringed, the second leg of the *Harksen* test would come into operation, in terms of which it would have to be determined whether the law discriminates unfairly against registered domestic partners.²⁰² To this end, it must first be established whether the differentiation takes place on a listed ground, and, more particularly, whether the ground of "marital status" is at issue. Applying the rationale in *Van der Merwe* shows that there is no clear-cut answer to this question. This is because the position in which X and Y find themselves falls somewhere between the distinction drawn by Mosenike DCJ between jurisprudence involving: (i) married versus unmarried couples (such as in *Volks*); and (ii) a distinction between the rights and obligations occasioned by the "different property regimes *within* marriage"²⁰³ (such as in *Van der Merwe*).²⁰⁴ X and Y's case therefore constitutes a "mixture" of these two categories: They are neither married nor "unmarried" in the sense of a life partnership, such as the one in *Volks*, yet their case indeed involves a distinction between the various property regimes encountered *within* domestic partnerships and marriage. Nevertheless, Y's situation differs from the situation in *Van der Merwe* in that in her case the differentiation indeed involves a benefit "that attaches to married people but is denied to unmarried people."²⁰⁵ Consequently, it can be concluded that the differentiation takes place on "marital status" and is therefore presumed to be unfair in accordance with Section 9(5) of the Constitution. According to the *Harksen* case, it follows then to determine the impact of the discrimination on a person in the position of Y.²⁰⁶ In this regard, relying on the majority judgment in *Volks*, "one must consider the differences between the two groups".²⁰⁷ Although the latter case had involved a need-based claim and therefore differs from the matter *in casu*, it was decided chiefly on the basis of the differences between marriage and unmarried life partnerships, most of which would fall away with the enactment of the *Domestic Partnerships [Act]*. For example, registered domestic partners would not be free to withdraw from their relationships at will, and a number of significant legal duties (such as a reciprocal duty of support) would attach to such partnerships by operation

202 See para (b) of the test formulated in *Harksen* para 53.

203 Emphasis added.

204 *Van der Merwe* para 46.

205 *Van der Merwe*, *per* Mosenike DCJ para 45.

206 See para b(ii) of the test as formulated in *Harksen* para 53.

207 *Volks*, *per* Skweyiya J para 51.

of law. More particularly, as far as "the nature of the provision or power and the purpose sought to be achieved by it" is concerned, it was seen above that the autonomy argument simply cannot be regarded as "achieving a worthy and important societal goal" by the legislative scheme not providing similar *ex lege* or alternative protection to registered domestic partners who wish to make the accrual system applicable to their marriage as it does for spouses who wish to do the same.²⁰⁸

Finally, as far as the justification analysis on the basis of the "choice argument" is concerned, one need look no further than Moseneke DCJ's comments in *Van der Merwe*. In this regard, it has already been seen that such a "waiver defence" argument will not hold water, as the constitutional validity of an Act is independent of any choice exercised by the parties who are affected thereby.²⁰⁹ As a result, that X and Y chose to enter into a registered partnership agreement in order to deviate from the default property regime will not change the fact that the *Domestic Partnerships [Act]* fails a person in the position of Y and is therefore unconstitutional.

In conclusion, it is submitted that the hypothetical scenario sketched above may have important implications for the application of the preliminary conclusions concerning the "contextualised choice model" to *registered* domestic partnerships. As a point of departure, it can be assumed that the fact that the partners have entered into such a partnership reflects a *positive choice to enter into the same*. By implication, this encompasses a positive choice on their behalf *not to marry*, which would, *strictu sensu*, on the conclusions thus far reached in this article, "be a highly persuasive factor in deciding to exclude the possibility of applying matrimonial (property) law to solve the dispute". The scenario explored above however points to the need for the application of the model to be revised, particularly within the context of registered domestic partnerships. Indeed, the preceding analysis cautions that it may be unconstitutional to use this argument in support of such a contention. It is therefore submitted that even if legislation that specifically regulates domestic partnerships were to be enacted, the "contextualised choice model" could only be applied in order to exclude the application of matrimonial property law to property disputes *if that legislation provided an effective and well-defined alternative to*

208 Quotes *per* Ackermann J in *National Coalition* para 41.

209 *Van der Merwe* para 61.

matrimonial property law. The *Domestic Partnerships Bill* clearly does not achieve this goal and must therefore be amended in order to avoid the risk of unconstitutionality.

It is of the utmost importance to note that the aim is not *to replicate* matrimonial property law in registered domestic partnerships legislation. Rather, what is suggested is that the means be provided by which the protection provided by matrimonial property law should be available by way of a court application *where this is necessary*. Such protection is therefore not enforced onto registered domestic partnerships, but is simply available should it be needed.

In the result, it is submitted that the most equitable outcome will be achieved by an amendment that takes the golden midway between outright autonomy and sufficient legal protection. The solution must therefore be framed in such a way as to be able to accommodate the individual requirements of the partners and the principles of the law of obligations, and yet be robust enough in order to protect a vulnerable partner *should this be necessary*. In order to achieve this, it is submitted that the courts be given the competency, on application by either or both domestic partners, and provided that there are sound reasons for doing so, to extend any principle of matrimonial property law in order to give effect to the original intention expressed by the parties in their registered partnership agreement. Applying this amendment to the scenario between X and Y above, Y would be able to approach the High Court for an order extending the application of Section 5(1) of the *Matrimonial Property Act* to her situation, provided that this was consistent with the original intention expressed in her agreement with X. As it is clear that X and Y intended the accrual system to apply to their partnership, the extension sought would give proper effect to their intention as expressed in their original agreement without falling foul of the principle of *pacta sunt servanda* or of the rule that a court cannot make a contract for the parties.²¹⁰

A final remark that must be made is that, while the example above dealt with a situation involving the termination of a registered domestic partnership, it is of the

210 See *Laws v Rutherford* 1924 AD 261 264.

utmost importance to note that an extension of matrimonial property law may also be required *during the existence* of the partnership. The need for such a power will probably be particularly necessary in the case of domestic partnerships that are entered into with community of property, in which there literally are "two captains" of the same ship.²¹¹ For example, assume that C and D entered into a registered domestic partnership with community of property but that their registered partnership agreement neglected – through a *bona fide* oversight or fault of their attorney – to regulate the liability for delicts committed by one of them. In such an instance, it is submitted that the same rationale as that explained in the case of X and Y above may be used to justify an application to court for an extension of the principles contained in Section 19 of the *Matrimonial Property Act* (which, as in the case of Section 5 of that Act, applies by default to married couples) so as to compel the "guilty" partner to include a provision in the registered domestic partnership entitling the "innocent" partner to a claim for adjustment at the termination of the partnership.²¹²

The precise wording of the amendments that were recommended in the preceding discussion is set out in the study upon which this article is based.²¹³

211 Sonnekus "Matrimonial property" B21.

212 With reference to this specific example, an interesting question arises as to the applicability of Clause 21(1) of the draft *Domestic Partnerships Bill*, which is included under Part III of the Bill that deals with the termination of a registered domestic partnership and states that "[f]or the purposes of claiming damages in a delictual claim, partners in a registered domestic partnership are deemed to be spouses in a legally valid marriage". The question that arises is whether the "innocent" partner may, relying on this clause, allege that S 19 of the *Matrimonial Property Act* deems her to be in the same position as a spouse married in community of property at any rate, thereby entitling her to an adjustment without the need for seeking a specific extension of matrimonial property law. Two major problems present themselves in this regard. First, the innocent spouse would not be "claiming damages" against the other spouse but would simply be requesting an adjustment or amendment to the registered partnership agreement. (If anything, damages are being claimed *from* her half of the joint estate and not *by* her.) Second, in the absence of an express legislative power granting the courts the power to make such an order, it is doubtful whether the courts could, on the basis of Clause 21(1) in its current form, interfere with the contract that exists between C and D. Nevertheless, even if the two problems just identified could somehow be overcome, it is still submitted that the amendment proposed in the main text would be more successful, for the simple reason that not all extensions sought by the registered domestic partners will necessarily involve delictual claims, and that the need for the extension sought will not necessarily only arise at the termination of the partnership.

213 See Smith *Domestic Partnership Rubric* Chp 7 para 7.

4.3 *The unregistered domestic partnership*

4.3.1 *Introduction*

The unregistered domestic partnership stands to be regulated by Chapter 4 of the Bill. Clause 26 of the Bill bears the title "[c]ourt application" and states that:

- (1) One or both unregistered domestic partners may, after the unregistered domestic partnership has ended through death or separation, apply to a court for a maintenance order, an intestate succession order or a property division order.
- (2) When deciding on an application for an order under Section 26 of this Act, a court must have regard to all the circumstances of the relationship, including the following matters as may be relevant in a particular case:
 - (a) the duration and nature of the relationship;
 - (b) the nature and extent of 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) the degree of mutual commitment to a shared life;
 - (f) the care and support of children 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 partners with third parties.
- (3) A finding in respect of any of the matters mentioned in Section (2), or in respect of any combination of them, is not essential before a court may make an order under this Act, and regard may be had to further matters and weight to be attached to such matters as may seem appropriate in the circumstances of the case.

Briefly stated, Chapter 4 of the Bill ostensibly envisions the situation whereby, at the termination of a relationship, either or both persons can apply to a competent court, which, on the basis of a list of factors, will determine whether the relationship qualifies for the protection provided by the Bill. Once this evaluation has been completed, the merits of the claim itself (such as a claim for property division or maintenance) will be assessed with a view to making a final order.²¹⁴ The procedure

²¹⁴ SALRC 2006 <http://bit.ly/gp7ni6> 393.

therefore, in theory, comprises two separate enquiries, both of which should be answered in the affirmative: (i) the assessment as to whether the relationship in which the applicant was involved satisfies a threshold criterion for recognition; and (ii) if so, the assessment of the merits of the particular claim sought. It has been suggested that the failure of Clause 26(2) to stipulate a clear threshold criterion implies that this intention is not adequately conveyed by the Bill and that the clause should therefore be amended to require a court considering an application under Chapter 4 of the Bill to apply the list of factors mentioned in Clause 26(2) in order to ascertain whether the threshold criterion of "permanence" has been met.²¹⁵ Once a court is satisfied that this criterion has been fulfilled, the merits of the particular claim sought (that is intestate succession, maintenance or property division) can be assessed. It is within the context of the latter enquiry that the application of the "contextualised choice model" becomes relevant.

4.3.2 *Part II of Chapter 4: "Maintenance after termination of an unregistered domestic partnership"*

4.3.2.1 Introduction

The position regarding post-termination maintenance of unregistered domestic partners stands to be regulated by Clauses 27 to 30 of the Bill. The general principle is contained in Clause 27, which states that such partners "are not liable to maintain one another and neither partner is entitled to claim maintenance from the other, except as provided for in this Act".²¹⁶ This clause was, according to the SALRC, included as a consequence of the fact that the creation of an *ex lege* duty of support (such as the one attached to marriage by the common law and the one proposed in the Bill for *registered* domestic partners) was impossible in view of the decision to opt for a judicial discretion (*ex post facto*) model as opposed to one in which *de facto* recognition was provided during the existence of a relationship that exhibited certain pre-determined characteristics.²¹⁷ A consequence of this model would be that "limited" rights to post-termination maintenance and succession could be provided by

215 See Smith *Domestic Partnership Rubric* Chp 7 para 11.2.

216 New South Wales *Property (Relationships) Act 1984* S 26.

217 SALRC 2006 <http://bit.ly/gp7ni6> 397.

the relevant legislation.²¹⁸ Proceeding from this premise and its manifestation in Clause 27, the provisions regulating post-termination maintenance will be analysed in the paragraphs that follow.

4.3.2.2 Maintenance after separation

4.3.2.2.1 Introduction

According to Clause 28(1)²¹⁹ of the Bill, an application may be made to court by either or both unregistered domestic partners for a maintenance award that is "just and equitable" in terms of which maintenance will be payable by one partner to the other "for a specific period" after the partnership has been terminated by separation.

The most glaring problem with the way in which the Bill attempts to regulate post-termination maintenance is the fact that it disregards the principle identified in the "contextualised choice model" in respect of all need-based claims (such as a claim for maintenance) in terms of which the existence of a reciprocal duty of support *during the existence* of a relationship has been found to be a *sine qua non* for the extension thereof beyond its termination. To illustrate: Clause 27 expressly states that unregistered domestic partners "are not liable to maintain one another" or to claim maintenance from one another. From this statement, the logical assumption flows – as stated above – that no *ex lege* duty is created between unregistered domestic partners; a fact that stands to reason when it is considered that, in contrast with the registered domestic partnership, no formal public commitment has ever been undertaken by the parties. However, it has also been emphasised throughout this article that parties to non-formalised relationships are perfectly capable of *contractually* binding themselves to support one another, and that the existence of such mutual obligations has often been inferred on the facts of a particular case.²²⁰ Moreover, it has been seen that an *ex contractu* duty of support is as robust and

218 SALRC 2006 <http://bit.ly/gp7ni6> 397–398.

219 "After the separation of unregistered domestic partners, a court may, upon application of one or both of them, make an order which is just and equitable in respect of the payment of maintenance by one unregistered domestic partner to the other for a specified period".

220 See, for example, *Gory v Kolver* para 18; *Satchwell* para 25; *Du Plessis* paras 11–16. As was pointed out in 2 above, it is submitted that the courts erred by not inferring the existence of mutual support obligations on the facts in *Volks*.

capable of enforcement as its *ex lege* counterpart. However, when a situation arises in which *neither* an *ex lege* nor a contractually created duty to maintain is present during the existence of a relationship, it would be impossible to lodge a claim that is essentially based on that duty after its termination. The conclusion therefore is that while the SALRC has – with respect correctly – decided not to impose an *ex lege* duty of support on unregistered domestic partners, such partners must have undertaken contractual mutual support obligations *during the existence of their relationships* in order for *any* need-based claim to be instituted after their termination. Consequently, it is submitted that the *sine qua non* for a post-termination maintenance claim under Chapter 4 of the Bill is that mutual support obligations must either expressly or by implication have been undertaken during the existence of the relationship. This principle will apply irrespective of whether the unregistered domestic partnership is terminated *inter vivos* or by death. It is imperative for Clause 28 of the Bill to be amended to reflect this fact.²²¹

In the light of the preceding conclusions, it is also recommended that Clause 27 of the Bill be amended to reinforce that contractual support obligations are permissible and enforceable between the parties involved.²²²

4.3.2.2.2 Maintenance after the death of an unregistered domestic partner

The possibility of a surviving unregistered domestic partner instituting a claim for maintenance against the estate of his/her deceased partner is regulated by Clauses 29 and 30 of the Bill. The same problem as that identified in the discussion of Clause 28 appears in Clause 29 regarding the principle identified in the "contextualised choice model" in respect of a need-based claim, in that the clause nowhere requires a reciprocal duty of support to have existed during the existence of the unregistered domestic partnership. This *lacuna* requires urgent attention for the same reasons as those proffered in the discussion of Clause 28.

221 See Smith *Domestic Partnership Rubric* Chp 7 para 11.3 for the proposed amendment.

222 An amended version of this clause (amendments in italics) could read: "Unregistered domestic partners are not *by operation of law* liable to maintain one another and neither party is entitled to claim maintenance from the other; except as provided for in this Act *or by agreement between such partners*".

4.3.3 *Intestate succession*

According to Clause 31:

- (1) Where an unregistered domestic partner dies intestate, his or her surviving unregistered domestic partner may bring an application to court, subject to Sections (2) and (3), for an order that he or she may inherit the intestate estate.
- (2) Where the deceased is survived by an unregistered domestic partner as well as a descendant, such unregistered domestic partner inherits a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of Justice by notice in the *Gazette*, whichever is the greater, as provided for in the *Intestate Succession Act*.
- (3) In the event of a dispute between a surviving unregistered domestic partner and the customary spouse of a deceased partner regarding the benefits to be awarded, a court may, upon application by either the unregistered domestic partner or the customary spouse, make an order that it regards just and equitable with reference to all the relevant circumstances of both relationships.

By not providing for the merits of a claim for intestate succession to be assessed according to any defined criterion, the structure of this clause indicates that it is intended to operate on the sole basis of the court's discretion as exercised in Clauses 26(2) and 26(3) (quoted in Section 4.3.1 above). In other words, it creates the impression that an unregistered domestic partner who satisfies the criteria mentioned in the latter provision will automatically be entitled to inherit either the entire intestate estate (Section (1)), a child's share (Section (2)) or a portion of the estate that the court deems "just and equitable" after considering the competing claims of a customary spouse (Section (3)). This approach cannot be supported. As a claim for intestate succession can in principle be regarded as a need-based claim,²²³ this clause ignores that a reciprocal duty of support is, in accordance with the "contextualised choice model", a *sine qua non* in order for such a claim to succeed. The provision in question should be amended accordingly.²²⁴

223 See 3.2 above.

224 See Smith *Domestic Partnership Rubric* Chp 7 para 11.4 for the proposed amended version of Clause 31. It should be noted that the amendments suggested by Smith also pertain to multiple unregistered domestic partnerships, as well as to intestate succession claims involving the competing claims of an unregistered domestic partner and a spouse to a marriage concluded in

4.3.4 *Property division*

According to Clause 32 of the Bill:

- (1) In the absence of an agreement, one or both unregistered domestic partners may apply to court for an order to divide their joint property or the separate property, or part of the separate property of the other unregistered domestic partner.
- (2) Upon an application for the division of joint property, a court may order the division of that property which it deems just and equitable with due regard to all relevant circumstances.
- (3) Upon an application for the division of separate property or part of the separate property, a court may order that the separate property or such part of the separate property of the other unregistered domestic partner as the court regard [sic] just and equitable, be transferred to the applicant.
- (4) A court considering an order as contemplated in Sections (2) and (3) must take into account—
 - (a) the existing means and obligations of the unregistered domestic partners;
 - (b) any donation made by one unregistered domestic partner to the other during the subsistence of the unregistered domestic partnership;
 - (c) the circumstances of the unregistered domestic partnership;
 - (d) the vested rights of interested parties in the joint and separate property of the unregistered domestic partnership; and
 - (e) any other relevant factors.
- (5) A court granting an order contemplated in Section (3) must be satisfied that it is just and equitable to do so by reason of the fact that the unregistered domestic partner in whose favour the order is granted, made direct or indirect contributions to the maintenance or increase of the separate property or part of the separate property of the other unregistered domestic partner during the existence of the unregistered domestic partnership.

With reference to this clause, it is imperative to consider the role, if any, to be portrayed by the "choice argument", in terms of which it is contended that parties who have elected not to marry or to enter into a civil partnership with one another are, by virtue of this choice, not entitled to avail themselves of the protection provided by matrimonial (property) law. In developing the "contextualised choice model" in Section 2.3.2 above, the conclusion was reached that the "choice

terms of religious law that has not been solemnised in accordance with applicable marriage legislation.

"argument" would have no role to play as far as need-based claims are concerned, but that if a person who had chosen not to formalise his/her relationship attempted to institute a claim based on a property dispute (division of assets), "the 'choice argument' would be a highly persuasive factor in deciding to exclude the possibility of applying matrimonial (property) law to solve the dispute". This conclusion was re-examined within the context of registered domestic partnerships (in Section 4.2 above), where it was concluded that despite such partners having made a positive choice not to marry, the absence of provision in Chapter 3 of the Bill for "an effective and well-defined alternative to matrimonial property law" implied that the extension of matrimonial property law could be justifiable and that the Bill needed to be amended accordingly.

Attempting to apply (or to adapt) this rationale within the context of the unregistered domestic partnership should be based on the foundational principle that such a partnership is based on one of two possibilities: In the first place, the partners may have made a positive choice not to marry or to enter into a registered domestic partnership. In the alternative, it may happen that the applicant partner was never given the choice to formalise the relationship, either because his/her partner simply refused to co-operate in this regard or because of a lack of awareness of the possibilities of formalisation provided by the law. It goes without saying that the "choice argument" can at best apply only within the context of the former possibility. In addition, in a case in which a conscious choice not to formalise the relationship has been taken, this autonomous choice must be respected as far as possible. This notwithstanding, the law must still provide adequate protection for an applicant partner who falls into this category, particularly where this positive choice was made in ignorance.²²⁵ Although Clause 32 requires a few minor amendments,²²⁶ it is submitted that this clause provides adequate protection to unregistered domestic partners as far as property division is concerned. Furthermore, the protection provided by Chapter 4 of the Bill on the whole is on par with other jurisdictions that

225 Also see Lind 2005 AJ 108, 119: "[I]t is possible to argue convincingly that even the most ardent choice made to cohabit [and hence not to formalise one's relationship] impacts disproportionately upon women and men, because it is made in a severely gendered environment".

226 See Smith *Domestic Partnership Rubric* Chp 7 para 11.6, who opines that the clause should make provision for the partners to enter into a written agreement regarding property division and that it conflates the *quantum* and merit requirements regarding the division of separate property and should therefore be amended.

adopt a judicial discretion model in respect of non-formalised domestic partnerships.²²⁷ In the result, it is suggested that if any protection were to be required beyond the scope of that already offered by Chapter 4 (once it has been amended in accordance with my submissions made in the study upon which this article is based), that the parties had deliberately chosen not to formalise their relationship could be deemed by a court to be a cogent reason for refusing to extend the protection any further, for, as the SALRC²²⁸ has remarked, "the protection offered to relationships should be on a par with the level of commitment by the parties". Furthermore, the provision of an additional formalisation alternative in the enactment of a registered domestic partnership option would strengthen this assumption. However, where the facts of an application lead a court to conclude that a vulnerable applicant was unable to convince his/her partner to formalise their relationship, the extension of a principle of matrimonial (or registered domestic partnership) property law may conceivably be justifiable due to the lack of any real choice. Fortunately, the wide range of protection provided by Chapter 4 (as modified in accordance with the study upon which the article is based) makes it unlikely that such an extension would ever be necessary.

5 Conclusion

A rethinking of the judgment of the Constitutional Court in *Volks* has established the need for a "contextualised choice model" to be applied to domestic partnerships and the concomitant appreciation of a distinction between claims based on need and those involving property disputes. The application of this model to prospective domestic partnerships legislation will go some way towards ensuring a more consistent and principled legal position for domestic partners once the legislation is enacted.

227 Smith *Domestic Partnership Rubric* Chp 7 para 11.6.

228 2003 <http://bit.ly/hnporV> 321.

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List of abbreviations

AJ	Acta Juridica
BYUJPL	Brigham Young University Journal of Public Law
IJLPF	International Journal of Law, Policy and the Family
JJS	Journal for Juridical Science
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
Stellenbosch LR	Stellenbosch Law Review

**RETHINKING VOLKS V ROBINSON: THE IMPLICATIONS OF APPLYING A
"CONTEXTUALISED CHOICE MODEL" TO PROSPECTIVE SOUTH AFRICAN
DOMESTIC PARTNERSHIPS LEGISLATION**

B Smith*

Summary

The article considers certain critical failings of the so-called "choice argument" (that is the view that, by opting to cohabit in a life partnership rather than marry or enter into a civil partnership, a life partner is not entitled to the legal benefits provided by matrimonial [property] law) as it was applied to opposite-sex life partnerships by the majority of the Constitutional Court in *Volks v Robinson*.¹ On the basis of Canadian jurisprudence, a "contextualised choice model" is developed that distinguishes between need-based claims and those involving property disputes, and holds that the "choice argument" could at best be relevant regarding the latter category of claims, while the existence of a reciprocal duty of support is *sine qua non* for any need-based claim to succeed. These findings are applied to registered and unregistered domestic partnerships under the draft *Domestic Partnerships Bill*, 2008, with the aim of suggesting certain amendments to the Bill in the hope of ensuring a more consistent and principled legal position once the Bill is enacted.

Keywords

Life partnership; domestic partnership; Domestic Partnerships Bill; choice argument; contextualised choice model; reciprocal duty of support.

* Bradley Smith. BCom LLB LLM LLD. Senior lecturer, Department of Private Law, University of the Free State, Bloemfontein, South Africa (smithbs@ufs.ac.za).

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