LIFE PARTNERS: BEWARE THE “COMMON LAW MARRIAGE” MYTH!

“The general rule of our law is that cohabitation does not give rise to special legal consequences, no matter how long the relationship has endured” (From a 2010 High Court judgment and still applicable)

One of the more pervasive myths in South Africa is that, if you live together for long enough as “life partners”, you have some form of legal protection because you are in a “common law marriage”.

Not so! Our law has never recognised any such concept, and you could well be left high and dry when your partner dies or leaves you. The problem is that cohabitants have none of the general legal rights and duties to each other that apply to formal marriages and civil unions. The draft Domestic Partnerships Bill, which was published in 2008 and was supposed to remedy this situation, appears to have fallen off our lawmakers’ radar.

So what should you do?

If you don’t want to get formally married or register a civil union (some customary marriages are also recognised), ask your lawyer as soon as you can for advice on –

Drawing up a full “domestic partnership agreement” (often called a “cohabitation agreement”). Make sure that at the very least it regulates your legal rights and financial arrangements both -

During your relationship, and

In the event of separation or death. Under this heading, address questions such as -

How will your various assets be divided?

Will you be liable/eligible for maintenance and other financial support?

Whether there will be any financial adjustment between you. What happens for example if only one of you works? Or if you paid for an extension to your life partner’s house or have been paying the bond?

Who will take over ongoing liabilities and contracts such as leases, bonds, medical and life policies, monthly accounts and so on?

Anything else that will need to be regulated in your particular circumstances. This item is of course particularly important if there are children involved.

Drawing up wills to provide for the survivor on death. Without a will, our laws of “intestacy” apply and the surviving partner has no right to inherit nor to claim maintenance from the deceased estate. Have your will professionally drafted; amateur drafting has caused many bitter disputes and litigation between potential heirs.

The risk of doing nothing

If you don’t have such an agreement and wills in place, you will have no rights of inheritance on death, and will walk away from a broken relationship with nothing but whatever you can prove to be your own separate assets. Our law reports are full of tragic cases of long-term life partners left destitute and homeless after decades of cohabitation.

If you are faced with that bleak prospect, ask your lawyer for advice on whether –

There are any specific rights applicable to you. In a few limited cases our laws have already addressed this issue - such as in regard to child maintenance, medical aid, income tax, estate duty, pension funds, protection from domestic violence and the like.

Where our laws have not yet addressed the issue of equal rights for cohabitants you may be able to convince a court to declare them unconstitutional, but that’s a long and expensive road.

You may also be able to prove the existence of a “universal partnership”. That can be difficult to achieve in practice, and even if you succeed there is no guarantee of anything like a 50/50 split.

Avoid all that risk, cost, delay and dispute with a comprehensive life partnership/cohabitation agreement!