IS THERE SUCH A THING AS A 'COMMON LAW MARRIAGE'?

South African law does not recognise the concept of a "common law marriage". This means that no amount of time spent living with another person will convert a cohabitation relationship into a marriage. Many people are nonetheless under the mistaken belief that "common law marriages" are legally recognized and that rights and duties automatically arise therefrom. Although our Courts have, in specific instances, recognized that certain reciprocal duties flow from such relationships, this is not a given.

Domestic Partnerships in South Africa
It is nowadays common to enter into a permanent relationship with another person (whether of the same or opposite sex) with the intention of living together 'as married persons', without ever getting married. There is currently limited legal protection afforded to partners in such relationships. As such, where the relationship breaks down or ends as a result of death, a party may face dire consequences due to the fact that there was no prior agreement with regard to assets, maintenance and the like.

The only way to ensure that both parties are protected when the relationship ends, is for them to enter into an agreement in which they regulate their affairs – often referred to as a 'domestic partnership agreement'. This agreement will shed light on the expectations that each partner may have with regard to his/her financial contribution to their joint household and assets (acquired individually or jointly), and is an opportunity to iron out issues that may otherwise arise in future.

Remember that such an agreement is only enforceable between the parties thereto and does not affect the rights of third parties.

If no agreement was entered into in which the parties regulated the financial and proprietary consequences of their relationship, and the relationship between them breaks down, a party is often left with little more than that which he/she had when the relationship started, or that which they acquired during the duration thereof in his/her own name – and neither partner has an automatic claim or share in that which was 'jointly' acquired.

The Domestic Partnership Bill
The situation described in the previous paragraphs is evidently not satisfactory for persons in such relationships and our legislature has commenced finalizing the Domestic Partnership Bill, to address the issues and hardship caused as a result.

The Bill aims to regulate the position of persons who live together outside of a legally
recognised marriage or civil union. It sets out the rights and obligations of domestic partners, and further seeks to protect the interests of other interested parties. In its current draft form, it makes no provision for community of property between domestic partners, but allows parties to register a domestic partnership agreement wherein they set out their respective contributions made to the property acquired jointly during the duration of the relationship, as well as their financial resources.

The Bill distinguishes between:

- registered domestic partnerships; and
- unregistered domestic partnerships.

Registered domestic partnerships occur where parties enter into a domestic partnership agreement, as we have discussed above. In such instances, the Bill aims to ensure that such parties are afforded similar benefits as married persons. (The Bill is still in draft form and many provisions may change. The latter is one such provision that may be scrapped or amended, as our law already provides that domestic partners can enter into an agreement to have consequences, similar to those flowing from a recognised marriage, apply to their relationships. This is done by registering the partnership in terms of the Civil Unions Act.) As this is an agreement entered into, and not a marriage, it cannot be dissolved by divorce, and will be dissolved by agreement or death of one the partners, or by an order of Court.

In the case of unregistered domestic partnerships, there is no agreement in place and the partners do not have the protection (or safety net) of what they initially agreed upon. In this instance, the Bill provides that a domestic partner may approach the Court for a maintenance order, an intestate succession order, or a property division order, provided they do so within two years from date of dissolution of such unregistered domestic partnership.

The Bill was promulgated in 2008, but it is uncertain if and when it will be enacted into law. If the day comes, it will bring significant change in the lives of partners in domestic partnerships.

Contact nicoles@stbb.co.za for assistance in drafting a domestic partnership agreement.