

Common-law marriage in South Africa

A client asked me how long a couple must live together, before they are regarded as being in a common-law marriage.

Common-Law marriage

In South African law, there is no such thing as a common-law marriage, no matter how long a couple may live together. Their cohabitation does not create any automatic legal rights and duties between them. This is a common misunderstanding.

Cohabitation Agreement

In an age when most marriages fail, parties with a trail of prior relationships and marriages behind them may prefer to live together, rather than marry. Same-sex or heterosexual partners who choose not to get married should sign a domestic partnership (also called a life partnership or cohabitation) agreement to protect them should their relationship end. It is cheaper than ending up in court!

A widely-used definition describes “domestic partners” as “two adults who share an emotional, physical and financial relationship like that of a married couple but who either choose not to marry or cannot legally marry. They share a mutual obligation of support for the necessities of life.”

Cohabiting couples do not have the same rights as married couples under the law, so it makes sense to set out at the outset of the relationship what the division would be if the cohabitation breaks down.

The life partnership agreement will provide for such things as:

- **Movable property:** Provide for a fair division of household goods on dissolution. A good idea is to list the respective assets of the parties at the start of the relationship and agree whether or not these become joint assets. Similarly, keep a register of assets acquired during the relationship and agree whether these too become joint assets.
- **Immovable property:**
 1. Who owns the home that you live in? If it is co-owned, deal with the proportion of your respective shares and who gets what, on dissolution.
 2. If it is solely owned, you may consider compensating the non-owner for improvements done to the property at his or her expense.
 3. If the common home is leased property, provide for who stays on when you part company.
- **Financial arrangements:**
 1. During the relationship, will you operate a joint bank account? Who will pay the household and living expenses? Who will own cars and other assets? Who will enter into credit agreements? Will you take out life insurance on each other's lives?
 2. When the relationship ends who pays the debts of the partnership?
- **Children:** If you have or intend to have children, agree whether one partner is to support the other party during the relationship if such a partner is unemployed or staying at home to care for small children born from the relationship.

Universal Partnership Agreement

If parties live together but don't conclude any form of agreement regulating their respective legal rights and obligations, on dissolution of the cohabitation, a party that feels he or she is entitled to something from the other party (who disagrees), must go to court, at some expense, to prove that entitlement. To do so, the party must prove they were in a 'Universal Partnership', so that one party is entitled to certain property and assets of the other party, on separation.

Because the existence of a universal partnership is difficult to prove, it makes sense to conclude a life partnership agreement.

If you did not, and need to approach a court to prove the existence of such a partnership you must show that:

- The aim of the partnership was to make profit.
- Both parties must have contributed to the enterprise.
- The partnership must operate to benefit both parties.
- The contract between the parties must be legitimate.
- There must be valid consent.
- There was an intention to create a legally binding partnership agreement.

If a party cannot prove the existence of such a partnership, he or she may walk away with nothing, even if the parties lived together for years.