'HERE'S TO YOU, MRS ROBINSON': PECULIARITIES AND PARAGRAPH 29 IN DETERMINING THE TREATMENT OF DOMESTIC PARTNERSHIPS

HELEN KRUUSE*

> There is always need of persons not only to discover new truths, and point out when what were once truths are true no longer, but also to commence new practices, and set the example of more enlightened conduct.[1]
>
> The law is one of the important architects of social norms. At times, it can be a tool to solve problems, eradicate inequalities, and advance the rights of the disadvantaged. At other times, the law is an anchor and a constraint upon social and ideological advances. With regards to equality and non-traditional partnerships, it seems that law falls into this latter category.[2]

I INTRODUCTION AND CONTEXT

The *Fourie*[3] case (and subsequent adoption of the Civil Union Act 17 of 2006) has had an enormous influence on our lebenswelt in South Africa.[4] Not only has it led us to a new understanding of matrimony, but it has also forced us to rethink and challenge the particular legal and social status afforded to matrimony and other forms of family life in our constitutional democracy.

The purpose of this note is more modest. Although the question of whether marriage 'is an acceptable piece of baggage to be carried over the constitutional bridge'[5] inevitably arises out of any discussion about life partnerships, this note seeks only to consider the current treatment of opposite-sex life partnerships outside of 'marriage' in terms of the Marriage Act 25 of 1961 and the Civil Union Act, and to seek a way in which to ameliorate the effects of that treatment. The comparator (or yardstick) in this exercise is to consider the

* Lecturer, Rhodes University.

1 JS Mill *On Liberty* (1859) Chapter 3.

2 Madame Justice C L'Heureux-Dube 'Recognising Relationships: The New Role of the State' in J Sloth-Nielson & Z du Toit (eds) *Trials and Tribulations, Trends and Triumphs* (2008) 35, 39.

3 *Minister of Home Affairs v Fourie (Doctors for Life International and Others, amicus curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC).

4 Loosely translated, lebenswelt means 'the context of the world we live in'. See UHJ Kortner 'Sexuality and Partnership: Aspects of Theological Ethics in the Field of Marriage, Unmarried and Homosexual Couples' (2008) 64 *HTS* 209.

5 P de Vos 'Still out in the Cold? The Domestic Partnerships Bill and the (Non)protection of Marginalised Woman' (sic) in Sloth-Nielson & Du Toit (note 2 above) 129, 133. In a similar vein, Sachs J in his minority judgment in *Volks NO* v *Robinson and Others* 2005 (5) BCLR 446 (CC) questions the view that only a legally valid marriage can create a family worthy of legal protection – as opposed to alternative and unconventional lifestyles of partnerships that serve the same purpose as marriage. See *Volks v Robinson* paras 172ff.

treatment of same-sex life partnerships where no marriage or civil partnership[6] is entered into in the context of succession. Lurking behind this comparison is the disquieting sense that the treatment of opposite-sex life partnerships does not truly accord with, in the words of Cameron JA, 'the greater project of ... gender and social justice through law to which the Constitution has committed us'.[7] Acting on this disquiet, I wish to recommend a way to challenge the lack of recognition of opposite-sex partnerships while we wait for the Department of Home Affairs, like the whining schoolboy in Shakespeare's *As You Like It*[8] – to creep like a snail to Parliament for the Bill's first reading.[9]

The status of both same-sex life partnerships and opposite-sex life partnerships has been subject to numerous court cases, academic writing and legislative angst.[10] The piecemeal development of ways to protect partnerships outside the institution of marriage has led to a peculiar state of affairs for unmarried opposite-sex life partnerships. As a point of departure, this situation is best illustrated by a simple set of fictitious facts from which the issues – or in my mind, the peculiarities – arise. By doing so, we have to consider a same-sex life partnership scenario akin to that found in *Gory v Kolver & Others (Starke NO & Others intervening).*[11]

On 1 March 2009, Bukiswa dies in a car accident. She is survived by her partner of five years, Joyce and her mother Jenny. Bukiswa and Joyce never formalised their life partnership and Bukiswa did not leave a will. A local attorney, called Solly, is appointed as the executor of Bukiswa's estate. Her estate turns out to be quite considerable and includes the home in which Bukiswa and Joyce lived, most of the furniture in the house and some investments.

6 See s 11(1) of the Civil Union Act which requires that the 'marriage officer must inquire from the parties ... whether their civil union should be known as a marriage or a civil partnership' at the time of solemnisation. It is important to note, however, that this is *not* a marriage in terms of the Marriage Act.

7 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) para 10.

8 Act II Scene VII 152–5.

9 Even before this Bill, the protection of opposite-sex life partnerships was contemplated in the Civil Union Bill 26 of 2006 published on 31 August 2006. However, any reference to domestic partnerships was deleted in the final version of the Bill (26B of 2006) and the subsequent Act. This is presumably because the legislature ran out of time due to the *Fourie*-deadline, which required the legislature to adopt measures to protect same-sex couples by the end of November 2006. Thus, since 2006, the Department of Home Affairs has failed to provide effective protection of opposite-sex couples despite a willingness in draft legislation to do so.

10 See Goldstone J's comments in *J v Director General Department of Home Affairs* 2003 (5) SA 621 (CC) para 23 where he complained that comprehensive legislation was needed to regularise the relationship between gay and lesbian couples and that the granting of piecemeal legislation was unacceptable. For a comprehensive list of all cases dealing with same-sex life partnerships, see footnote 20 of para 19 in *Gory v Kolver NO (Starke & Others intervening)* 2007 (4) SA 97 (CC). See also B Goldblatt 'Regulating Domestic Partnerships – A Necessary Step in the Development of South African Family Law' (2003) 120 *SALJ* 610; B Goldblatt et al 'Cohabitation and Gender in the South African Context – Implications for Law Reform: A Research Report prepared by the Gender Research Project of the Centre for Applied Legal Studies, University of the Witwatersrand' November (2001) 24 para 2.2.

11 In this case the question arose as to whether the estate of the late Henry Harrison Brooks went to his life partner (Mark Gory) or to Mr Brooks's parents as his intestate heirs. It is important to note that the Civil Union Act was not yet in force at the time of delatio or the hearing.

Two main claims are lodged against the estate. In the first instance, Joyce, Bukiswa's partner of five years, claims to be an heir in terms of s 1(1) of the Intestate Succession Act 81 of 1987 (ISA). In terms of this section, the surviving 'spouse' of a deceased person has a right to inherit.[12] Alternatively, she claims maintenance from the estate since she considers herself to be a 'survivor' in terms of s 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990 (MSSA). In terms of s 2(1) of the MSSA, a survivor shall have a claim against the estate of the deceased spouse for the provision of his or her reasonable maintenance needs until death or remarriage where need is shown. In terms of s 1, a 'survivor' is defined as 'the surviving spouse in a marriage dissolved by death'. In support of Joyce's claim, she relies on the Constitutional Court judgment of *Gory v Kolver* where the Court extended the right of spouses to inherit in terms of the ISA to partners in same-sex life partnerships who have undertaken reciprocal duties of support. This the Court did by reading the words 'or same-sex life partnerships who have undertaken reciprocal duties of support' into s 1(1) of the ISA. In the light of the purpose behind the MSSA, Joyce believes that an executor would have to make the same finding in respect of s 2(1) read with s 1 of the MSSA.

However, Jenny (Bukiswa's mother) claims that she is the sole heir to Bukiswa's estate. She contends that Joyce is neither an 'heir' nor a 'survivor' in terms of succession legislation because, despite there being no legal impediment to their union (the ability to marry or enter into civil partnership), Bukiswa and Joyce did not choose to formalise their union. Since the relationship was one 'in which each was free to continue or not, and from which each was free to withdraw at will, without obligation and without legal or other formalities',[13] Joyce cannot benefit. In support of her claim, Jenny relies on the Constitutional Court judgment of *Volks v Robinson*[14] in which the Court held that benefits that were available to spouses in terms of the MSSA were not available to unmarried opposite sex partners who faced no legal impediment to their marriage.[15] While the judgment dealt with unmarried opposite-sex partners, Jenny contests that the same ruling now applies to unmarried same-sex couples given that the Civil Union Act, which came into force on 1 December 2006, removes the legal impediment to marriage[16] in

12 While not relevant to this set of facts, the extent of the claim depends on whether or not the deceased is survived by descendents.

13 *Volks v Robinson* (note 5 above) para 55.

14 Ibid.

15 Ibid para 91.

16 For the purposes of this note, it is accepted that the Civil Union Act removes the legal impediment to marriage especially given the content of ss 11(1) & 13 of the Civil Union Act. In terms of the latter section, all legal consequences of a marriage are applied to a civil union, with such changes that may be required by the context. It is beyond the scope of this note to critique the creation of a 'separate but equal' regime with the coming into force of the Civil Union Act. For a discussion of this regime in another context, see Y Merin *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (2002) Chapter 10.

respect of same-sex couples.[17] In fact, in our hypothetical case, the letter sent to Joyce's lawyer is similarly worded to the one sent to Mrs Robinson by the executor's attorney in *Volks v Robinson:*

> *prima facie* it would appear that the deceased and your client considered their position during the lifetime of the deceased and elected not to enter into a marriage in accordance with the laws of South Africa. That election, included implicitly, if not expressly, the choice not to have the automatic consequences of the laws of marriage apply to their relationship.[18]

The *Volks v Robinson* decision by the Constitutional Court surprised more than a few people, especially since the Cape High Court (the Court a quo) found that the omission from the definition of 'survivor' in s 1 of the MSSA of the words 'and includes the surviving partner of a life partnership' at the end of the existing definition was unconstitutional and invalid.[19] The Court a quo found that the law's failure to recognise and protect opposite-sex life partnerships violated the right to equality, particularly in that it discriminated against opposite-sex life partners on the basis of marital status and infringed her right to dignity.[20] In his judgment, Davis J noted that failing to recognise domestic partnerships 'render[ed] the guarantee of equality somewhat illusory insofar as a significant percentage of the population [was] concerned'.[21] However, when the matter was referred to the Constitutional Court,[22] the Court rejected the strong submission by the Centre for Applied Legal Studies (CALS) – supported by evidence[23] – that for many cohabitants (especially women), the choice to marry is not their own.[24] Notwithstanding, the Court based its finding on what Goldblatt critically calls a 'libertarian notion of autonomy' which is underpinned by the same assumptions underlying the common law notion of pacta sunt servanda in the law of contract.[25] In other words, the Court took for granted that women in co-habiting relationships had the freedom within an unmarried opposite-sex life relationship to (using a colloquialism) 'call the

17 See M Mamashela & M Carnelley 'Cohabitation and the Same-Sex Marriage. A Complex Jigsaw Puzzle' (2006) 27 *Obiter* 379, 386 & 388. Note that the authors' comments were made before judgment was given in *Gory v Kolver* (note 10 above). Specifically, note their comment that cohabiting same-sex couples who choose not to get married should *not* be able to rely on the invariable consequences of a marriage after the death of one of the life partners.

18 See *Volks v Robinson* (note 5 above) para 9 footnote 3 therein (which sets out an excerpt of the letter of refusal).

19 *Robinson v Volks NO* 2004 (6) SA 288 (C).

20 Constitution of the Republic of South Africa, 1996 ss 9 & 10 respectively.

21 *Robinson v Volks* (note 19 above) 299I. Over two million people described themselves as living in domestic relationships, which resembled marriage in the 2001 Census. See *Volks v Robinson* (note 5 above) para 119.

22 In terms of s 172(2)(a) of the Constitution, a decision of constitutional invalidity has to be confirmed by the Constitutional Court.

23 CALS presented the Court with a social science study it had conducted, which dealt with the impact that unmarried cohabitation was likely to have on women. Skweyiya J found the study to be 'controversial' and 'not incontrovertible' and therefore refused its admission into evidence. See *Volks v Robinson* (note 5 above) paras 31–5. See C Lind 'Domestic Partnerships and Marital Status Discrimination' *Acta Juridica* (2005) 108, 119 who argues that the evidence should have been admitted in terms of Rule 31 of the Rules of the Constitutional Court.

24 *Volks v Robinson* (note 5 above) para 31ff.

25 Goldblatt (note 10 above) 616.

shots'.[26] Similarly, Schäfer characterised the judgment as one where the court adopted an 'objective model of choice' in which the Court only considered the presence or absence of legal impediment to marriage between couples in their class (ie opposite-sex and same-sex).[27]

But what of these claims? Even though we are dealing with two separate pieces of succession legislation,[28] both decisions *appear* to decide the issue squarely on whether there was a legal impediment to the marriage. In *Gory,* the Court held that it 'needed to cure the existing and historical unconstitutionality of s 1(1) of the [ISA]'[29] and in *Volks* the Court specifically stated (per Ngcobo J): 'The law expects those heterosexual couples who desire the consequences ascribed [to marriage] to signify their acceptance of those consequences by entering into a marriage relationship'.[30] It is important to note that the *Gory* case was decided seven days before the Civil Union Act came into force,[31] thus appearing to have been decided on the basis that the partners did not have the option of getting married in terms of the Marriage Act 25 of 1961. So what is the problem? It is here that the peculiarities and paragraph 29 enter the picture demonstrating that all is not what it appears to be.

II PARAGRAPH 29 IN *GORY V KOLVER*

At paragraph 29 of the *Gory* judgment, Van Heerden AJ expressly states:

> Unless specifically amended, section 1(1) [of the ISA] will ... also apply to permanent same-sex life partners who have undertaken reciprocal duties of support but who do not 'marry' under any new dispensation.

Here then is an explicit direction from the Constitutional Court that notwithstanding the 'legal impediment' rationale in *Volks*, same-sex partners will continue to benefit whether they are married or unmarried (in terms of the Civil Union Act).[32] In our scenario then, there is no doubt that Joyce will be able to inherit. However, in the same paragraph, Van Heerden states 'once the impediment [to marry] is removed, then there would appear to be *no*

26 De Vos (note 5 above) 131. See also Wildenboer 'Marrying Domestic Partnerships and the Constitution: A Discussion of *Volks NO v Robinson* 2005 5 BCLR 446 (CC)' *SA Public Law* 20 (2005) 459; Lind (note 23 above) 108.

27 L Schäfer 'Marriage and Marriage-like Relationships: Constructing a New Hierarchy of Life Partnerships' (2006) 123 *SALJ* 626, 640. See also Wildenboer (ibid) 463.

28 Namely the ISA and the MSSA.

29 *Gory v Kolver* (note 10 above) para 31.

30 *Volks v Robinson* (note 5 above) para 92.

31 23 November 2006. The Civil Union Act came into force on 1 December 2006.

32 32 See s 40 of the Children's Act 38 of 2005 which re-enacted s 5 of the Children's Status Act 82 of 1987 in July 2007 *without* the reading in order provided in *J v Director General Department of Home Affairs* (note 10 above). It will be recalled that the Court in that case found s 5 of the Children' Status Act (now s 40 of the Children's Act) unconstitutional in that it rendered children born from artificial insemination legitimate where the mother is married, but not where she is a partner in a same-sex partnership. The reading in order included permanent same sex life partners within its ambit.

good reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples in respect of intestate succession'.[33]

III Responses to Paragraph 29

There have been broadly two responses to this peculiar situation in our law. The first response is to describe the different treatment of unmarried same-sex life partners and opposite-life partners as fair discrimination and a 'pseudo-anomaly' in our law.[34] The argument is put forward by Wood-Bodley and, in a nutshell, runs as follows: The differential treatment of such partnerships amounts to substantive equality since homophobia is of a far greater order of magnitude than the obstacles that may prevent an opposite-sex couple from marrying.[35] While recognising that the present rules of intestate succession, as amended by *Gory,* may be subject to challenge under the equality clause Wood-Bodley argues then that the extent of homophobia (derived from looking at internet sources) warrants such differential treatment.[36] The second response – and one that I support – is to describe the situation as peculiar, ironic,[37] paradoxical[38] and anomalous.[39]

The reasons for such a response are simple. Such differential treatment undermines the right to equal protection and benefit of the law. Wood-Bodley's justification for the differential treatment is that the differentiation between partnerships is justified in that, by recognising same-sex life partners, we are serving the legitimate governmental purpose of fighting homophobia in our society.[40] However, if one looks carefully at the Wood-Bodley argument, it asks the adjudicator to adopt a sliding scale of obstacles and then asks one to position different listed and unlisted grounds in the equality provision of the Constitution[41] in a type of hierarchy. In this hierarchy then, we are asked to

33 My emphasis. See Davis J in *Robinson v Volks* (note 19 above) at 294C where he also found that there was no justification to distinguish domestic partnerships from other types of partnerships, his examples being: permanent life partnerships of same-sex life partnerships and marriage by Muslim rites.

34 M Wood-Bodley 'Intestate Succession and Gay and Lesbian Couples' (2008) 125 *SALJ* 46, 54.

35 Ibid 60.

36 Ibid 55ff.

37 De Vos (note 5 above) 129, 129.

38 P de Vos & J Barnard 'Same-sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga' (2007) 124 *SALJ* 795, 823.

39 F du Bois & C Himonga 'Life Partnerships' in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 363, 369. See also L Picarra *'Gory v Kolver NO 2007 (4) SA 97 (CC)'* (2007) 23 *SAJHR* 563, 565.

40 It is now well-settled jurisprudence under the Constitution (*Harksen v Lane NO* 1998 (1) SA 300 (CC)), that where an impugned provision differentiates between categories of people, it must bear a rational connection to a legitimate government purpose; otherwise the differentiation is in violation of s 9(1) of the Constitution (*Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC)). Further, if the differentiation is on a ground specified in s 9(3) of the Constitution, unfairness is presumed (*Pretoria City Council v Walker* 1998 (2) SA 363 (CC)). Absent a rebuttal of the presumption, unfair discrimination is established, resulting in a violation of s 9(3) of the Constitution.

41 Section 9(3) of the Constitution prohibits discrimination on the basis of, inter alia, race, gender, sex, pregnancy, marital status, ethnic or social religion, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.

put sexual orientation near the top because of the prevalence of homophobia in our society. However, where then do we place the obstacles faced by opposite-sex co-habiting partners? This question is important particularly in the light of the context of patriarchy and poverty where co-habiting partners, especially women, occupy a vulnerable space in our society.[42] This question is also pertinent given Sachs J dissenting judgment in *Volks* where he comments that '[The choice of many women] has been between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other'.[43] It appears then that Wood-Bodley goes beyond the insufficient 'objective model of choice' when considering the status of same-sex partners, but fails to do so in respect of opposite-sex cohabiting partners, specifically women.[44] When he argues for the courts to take into account the hard reality of homophobia in our society, he ignores the equally real, lived inequality of co-habitants in a society where '... family roles remain profoundly gendered spaces in South Africa [and] gender based inequality remains rife'.[45]

IV Challenging Stare Decisis in this Context

So what then is the way forward? While a draft domestic partnerships Bill is in the pipeline, it is far from being finalised. Notwithstanding, there have been many issues raised regarding the present content of the Bill.[46] In the meantime, the legislature has explicitly not codified the reading-in order in *Gory* into the ISA[47] because of the very issue that 'the proposed changes would create a situation that unfairly favours unmarried same-sex partners over those in heterosexual permanent partnerships'.[48]

42 See the dissenting judgment of Sachs J in *Volks v Robinson* (note 5 above) para 163ff.

43 *Volks v Robinson* (note 5 above) para 225.

44 In a prescient article prior to the *Gory v Kolver* judgment, Bonthuys (at 539) foresaw the possibility that 'the achievement of equality for some same-sex couples, in being allowed to enter into marriage or a marriage-like institution, could potentially erode the rights of other same-sex couples and *those of certain opposite-sex couples*' (my emphasis). Bonthuys goes on to argue (at 540) that the limited concept of choice and individual autonomy used by the Constitutional Court in cases dealing with same-sex rights 'poses a danger both for gender equality and for the equality of lesbian and gay couples'. See E Bonthuys 'Race and Gender in the Civil Union Act' (2007) 23 *SAJHR* 526.

45 Lind (note 23 above) 113, 118 & 128.

46 See for instance the submission on the Draft Domestic Partnerships Bill by the Alliance for the Legal Recognition of Domestic Partnerships (15 February 2008) <http://web.wits.ac.za/Academic/Centres/CALS/>.

47 A codification of *Gory v Kolver* (note 10 above) was, inter alia, contained in a draft omnibus Bill called the Judicial Matters Amendment Bill [B 48-2008] (National Assembly – s 75), 21 October 2006.

48 See Parliamentary Monitoring Group Minute of the Portfolio Committee on Justice and Constitutional Development (21 October 2006). See also the statement by Len Joubert, Member of Parliament (MP), during the second reading debate of the Judicial Amendment Bill on 22 October 2008: 'There is a convention that such a Bill [ie an omnibus Bill] may not contain any contentious matters and for that reason the Committee rejected the clause *that would have resulted in unmarried same-sex partners being in a more favourable position than heterosexual permanent partnerships as far as intestate succession is concerned*' (my emphasis). Of interest is the incorrect impression of the MP that the reading-in order does not apply if not 'codified' in this manner. This stands in direct contrast with the Van Heerden J's dictum at para 29 in *Gory v Kolver* (note 10 above).

So what do opposite-sex partners (in a position similar to that of Joyce in the above set of fictitious facts) do between *Volks* and the promise of an Act sometime in the future? Time waits for no man, or woman ... Partners die and estates need to be wound up – specifically Bukiswa's estate in the above hypothetical set of facts. Quite simply, on the Court's most recent pronouncement in *Gory*, Joyce would have no problem inheriting Bukiswa's estate (or claiming maintenance where needed). However, the more tricky situation is what we do with a claim by an opposite-sex life partner who, like Mrs Robinson in *Volks v Robinson,* lived for 16 years with her partner to be left with little, if nothing, from the estate?

And this is where I want to unsettle the settled lawyers. Is this not the right time to resurrect a controversial proposition made by Rycroft in respect of the doctrine of stare decisis in 1995[49] and repeated by Woolman and Brand in 2003?[50] Prior to setting out this proposition, it is useful to quote a leading question posed by Woolman and Brand in this regard: 'Should we slavishly adhere to stare decisis or the application of precedent for the purposes of legal stability even where such stability works an injustice?'[51] If our response is 'no, we should not', then what comes next is inevitable: a proposal that asks for a softening of the doctrine of stare decisis. Also termed 'the moderate view of precedent',[52] this proposal is based on the belief that distinguishing, narrowing, and *occasionally overruling* precedent are acts that the Constitution itself authorises.[53] Here, the value of certainty in precedent (which is arguably the most cited reason for the doctrine) is limited when compared to its 'empty commitment to equality and its palpable lack of efficiency'.[54] Woolman and Brand justify the softening of the doctrine on two grounds specifically in the context of our present scenario (ie dealing with post-Constitution decisions). First, the courts themselves should not tolerate prior legal errors in constitutional interpretation. Second, constitutional adjudication is heavily value-laden and prevailing values can – and often do – change rapidly.[55] The approach advocated above is not as extreme as it first seems, especially if one has recourse to the framework and qualifications set out by both Rycroft, and Woolman and Brand.[56] In fact, it could be argued that a more flexible

49 A Rycroft 'The Doctrine of Stare Decisis in Constitutional Court Cases' (1995) 11 *SAJHR* 587.

50 S Woolman & D Brand 'Is there a Constitution in this Courtroom? Constitutional Jurisdiction after *Afrox* and *Walters* (2003) 18 *SA Public Law* 37.

51 In the current context, this question might even read: for the purposes of *supposed* legal stability. The problem here is that the position is anything but stable – it can be more aptly described as peculiar. Since the rationale for denying rights to opposite-sex life partnerships appears to have been removed by both the Court in *Gory v Kolver* (note 10 above) and the legislature in passing the Civil Union Act *without* amending the ISA, there appears to be no good reason for denying equal benefit and protection before the law. This casts the purpose of preserving *Volks v Robinson* (note 5 above) as precedent into doubt – since the situation is not as certain as is implied.

52 MJ Gerhardt *The Power of Precedent* (2008) 33. See also MJ Gerhardt 'Non-Judicial Precedent' (2008) 61 *Vanderbilt Law Review* 713.

53 Ibid 8.

54 Woolman & Brand (note 50 above) 39.

55 Ibid 55.

56 Ibid.

approach to precedent accords with practice in the Roman-Dutch tradition (as used in various continental systems)[57] and, more recently, in the United States (US) Supreme Court.[58]

By accepting a softening of the doctrine of stare decisis, it does not imply carte blanche with each and every judgment. Neither does it mean that applying a softer doctrine of precedent will tend 'to bring adjudications ... into the same class as a restricted railroad ticket, good for this day and train only'.[59] In fact, to guard against such an occurrence, Rycroft proposed a checklist of what the Constitutional Court might consider when deciding to depart from precedent, using the jurisprudence of the US Supreme Court as a point of departure. Some of the more relevant considerations, listed here as questions, may then allow for a departure only when one can answer 'yes' to the following:

1. Have related principles of law so far developed as to have left the old rule no more than a remnant of abandoned doctrine?[60]
2. Have facts so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification?[61]
3. Is the decision a direct obstacle to the realisation of important objectives embodied in other laws?[62]

57 JG Kotze 'Judicial Precedent' (1917) 34 *SALJ* 280, 287. Chief Justice Kotze observed as far back as 1917 that in these systems, judicial precedent does not have 'any binding effect'.

58 Gerhardt (note 52 above) records that from 1789 until the end of the 2004 court term, the US Supreme Court in 133 cases expressly overruled 208 precedents. Gerhardt notes at 9–10: 'These cases are the instances in which the court declared in so many words that it was overruling constitutional precedents'. In 1995, Rycroft described one of these decisions (*Adarand Constructors v Pena* 515 US 200 (1995)) as an example of the situations where South African courts could deal appropriately with overruling precedent in constitutional cases. In *Adarand*, the US Supreme Court reversed its own ruling in *Metro Broadcasting Inc v FCC* 497 US 547 (1990) by holding that affirmative action programmes had to survive a strict scrutiny test, rather than following the two-tiered system for analysing racial classifications set out in the previous *Metro* judgment. See Rycroft (note 49 above) 587.

59 *Smith v Allwright* 321 US 649 (1944) per Justice Owen Roberts dissenting. The justice goes on to say: 'I have no assurance ... that the opinion announced today may not be shortly repudiated and overruled by justices who deem they have a new light on the subject'.

60 Rycroft (note 49) 590.

61 Ibid. Although not explicit, Rycroft must be referring here to legislative rather than adjudicative facts. The former concern the immediate parties, while the latter concern the background, purpose and context of the legislation. In *Danson v Ontario (Attorney General)* [1990] 2 SCR 1086, 1099, Sopinka J states that adjudicative facts are the 'who did what, where, when, how and with what motive or intent ...' (quoting Davis *Administrative Law Treatise* (1958) vol 2 353). In comparison, he describes legislative facts as those that 'establish a purpose and background of legislation, including its social, economic and cultural context'. The example given by Rycroft supports this contention: he describes the advances in maternal healthcare as a 'change of fact' which was used in *Planned Parenthood of Southeastern Pennsylvania v Casey* 120 L 2 ed 674; 112 SCt 2791 (1992) to move away from the trimester approach expounded in *Roe v Wade* 410 US 113 (1973).

62 Rycroft's proposals regarding the doctrine of stare decisis have recently been affirmed by G Devenish 'The Doctrine of Precedent in South Africa' (2007) 28 *Obiter* 1 where he advocates for a flexible approach regarding precedent. This flexible approach, Devenish argues will not result in a destabilisation of our system of precedent (as many ominously warn) since a departure from precedent would have to be supported by convincing jurisprudential justification. In this way, Rycroft (note 49 above) adheres to a statement made by US Justice Stevens whom he quotes as saying (at 391): 'Preoccupation with abstract standards can sacrifice common sense'.

In the context of our scenario, Rycroft's second and third considerations seem most apt. The change of circumstance is twofold. First, the fact that the Civil Union Act has come into force (which did not provide for a transitional period as suspected by the Court in *Gory*).[63] Second, the fact that the state has recognised the need to protect domestic partnerships (in the form of the previous draft of the Civil Union Bill and the current draft Domestic Partnerships Bill). The former change of circumstance is alluded to by De Vos and Barnard[64] when they state that at the time of the judgment in *Gory v Kolver*, the Court (this would apply equally to the Court in *Volks v Robinson*) did not and could not foresee that the jurisprudence would develop in such a way that it would grant same-sex cohabiting parties *more* rights than it does opposite-sex cohabiting couples. In respect of the third consideration, one could validly argue that in *Volks v Robinson* the Court simply failed to realise the important objective of protecting all types of family life under our Constitution.

Similarly, the situation post-Civil Union Act fits into Woolman and Brand's general thesis and proposition that courts should be free from precedent – even after a legal system has developed a stable body of constitutional jurisprudence.[65] This situation is, for example, where there is a change of circumstance that alters our understanding of the law.[66] Does the passing of the Civil Union Act constitute 'a change of circumstance' within Woolman and Brand's scheme? I believe it does, in much the same way as that noted in respect of Rycroft's scheme.

What would this mean practically? My suggestion is that we challenge the precedent-setting nature of *Volks v Robinson* in situations where unmarried opposite-sex life partners are left out in the cold, especially women in long-standing life-partnerships. This accords with the intention of the proposed Domestic Partnership Act and thus will give expression to the intention of the legislature and with the very ideas expressed in *Gory* that there is no good reason for differentiating between these types of life partnerships.[67] Thus, if challenged, a court would have to find that *Volks v Robinson* was wrong. Given that the highest Court of the land handed down the judgment, this finding would seem an impossibility unless we accepted that it is possible to depart from precedent. And it is my suggestion that we can. Especially if we have regard to Allen who tells us that 'throughout the whole application of the law, the principles are primary and the precedents are secondary, and if we lose sight of this fact precedents become a bad master instead of a good servant'.[68] In fact, the very idea of certainty (which proponents of a strict adherence to stare decisis seek to champion) can be said to be undermined where, as in the

63 *Gory v Kolver* (note 10 above) para 29.

64 De Vos & Barnard (note 38 above) 824.

65 Woolman & Brand (note 50 above) 71.

66 Ibid 74.

67 Making a finding of this kind would not mean the court would need to bloody its hands with policy- or legislative-drafting – a court would simply need to find the statutes non-compliant with the equality clause. See Lind (note 23 above) 120.

68 Quoted by Devenish (note 62 above) 6.

Volks scenario, the Constitution fails to meet the public's expectations of equitable treatment that supplants longer-standing inequitable arrangements still secured at common law.[69] The question whether the public is certain of the law applicable to their domestic partnerships is itself debatable. For example, research conducted in the United Kingdom demonstrated overwhelmingly that people in co-habiting relationships not only believe that similar consequences to marriage should apply to their relationships, but that they actually do![70] There is reason to believe that the public in South Africa follow the very same belief – aptly called 'the common-law wife myth'[71] – especially in the light of a Constitution that explicitly prohibits unfair discrimination based on marital status.[72] Considering the constant reference to the term 'common-law wife' in the South African media,[73] it may well be that the values of certainty and clarity (which keeps *Volks* as precedent) are not being achieved in any event.

Of course, there may be those who tell us that we need not find *Volks* wrong, and that we might be able to distinguish an apparently binding precedent on a technical basis. For instance, we could distinguish on the basis that the *Volks* case dealt with the MSSA and not the ISA or such like. But Devenish, in advocating for a more flexible system of precedent, warns against such an approach stating that:

> this would be expedient, but undoubtedly highly artificial and is not conducive to clarity or legal certainty. Instead a court should be bold enough to declare that his or her decision would be wrong, if he were not justified in adopting the interpretation of it he suggests and deems is most apposite.[74]

If one applies Rycroft's formulation to a *Volks*-type situation today, is there not a strong case to be made for a departure from the rule set out in the majority judgment? My answer in our peculiar situation would be an emphatic yes. If the justification for the original ruling in *Volks* was the absence of legal impediment to marriage, and since that rule no longer holds any sway in the light of Van Heerden's dictum in *Gory*, then surely we should come to the aid

69 See Woolman & Brand (note 50 above) 60. Lind (note 23 above) re-iterates this in the context of domestic partnerships when he says (at 116): '... the fact that the Bill of Rights protects people from discrimination on the basis of martial status, must ... have confused the clarity of those understandings'.

70 See A Barlow, S Duncan, G James & A Park *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (2005) as quoted in Lind (note 23 above) 116.

71 C Dyer 'The Common-law Wife Myth' *The Guardian* (23 July 2002).

72 Constitution s 9(3).

73 For example: 'Man arrested for murder of *common-law wife' The Mercury* (29 December 2006); 'Inside, police found a naked Jabulani Siphethu sitting on top of his *common-law wife's* body ...' quoted in 'Man eats dead wife, dies choking' news.24.com (17 June 2006); 'Husband hired people to kill her, says *common-law wife' Legalbrief Today* (31 January 2008); 'The judge found that Van Ameron knew what he was doing when he fired several shots at his *common-law wife* ...' quoted in 'Wife murder trial: Court rejects amnesia plea' *Pretoria News* (19 March 2009). South African media aside, Patel J in *Singh v Ramparsad* 2007 (3) SA 445 (D) referred to 'marriages under the common law', dependants in a 'common-law marriage' and 'spouses married by common law' in his judgment. While Patel J presumably meant to refer to marriages which are not *prohibited* by the common law, the impression created by the use of these terms is somewhat misleading, and in some instances, wrong. My emphasis.

74 Devenish (note 62 above) 6.

of partners? This would cover the situation of vulnerable women in unmarried opposite-sex life partnerships in the same way the law has aided those persons in unmarried same-sex life partnerships. Obviously, this could only ever be canvassed if the deceased person in our scenario was called Mark and not Bukiswa, and if Joyce could find a lawyer willing to take up the cudgels of challenging precedent.[75] Perhaps the minority judgments of O'Regan and Mokgoro JJ and Sachs J in *Volks* will then be put into its proper context, that is, as:

> an appeal to the brooding spirit of the law, the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.[76]

By taking on this particular challenge then, we can truly recognise and protect a diversity of family formations and ensure equal protection and benefit of the law – not only for the Joyces of today, but for the Mrs Robinson's of the future.

75 See para 33 in *Satchwell v President of the Republic of South Africa & Another* 2002 (9) *BCLR* 986: 'The intended accommodation of heterosexuals cannot be introduced via the backdoor into this case. It was not properly before us, nor did we hear argument on the complexities involved'.

76 US CJ Hughes in *The Supreme Court of the United States* (1928) 68. See also Wildenboer (note 26 above) 467: 'Sachs J [in his minority judgment in *Volks v Robinson*] was willing to step outside the confines of black letter law and instead based his judgment on the general spirit, purport and object of the Constitution. If one judge was prepared to do this, why not the other judges as well?'.