



What to do before you say “I do”

1. INTRODUCTION

Whilst planning a wedding couples place their focus more on the ceremony, the dress, the décor and food. It is however an unfortunate reality that sometimes couples tend to overlook the legal aspects of getting married and the potential ramifications of such oversight.

2. DIFFERENT MARITAL REGIMES

Prospective spouses in South Africa have wide-ranging party autonomy and may select the matrimonial property system they would like to make applicable to their marriage.¹ In terms of the Matrimonial Property Act 88 of 1984 (“*the Matrimonial Property Act*”) there are three types of to choose from in South Africa being (1) marriages in community of property; (2) marriages out of community of property, without the application of the accrual system; and

¹ De Jong M & Pintens W “Default matrimonial property regimes and the Principles of European Family Law – A European-South African comparison: Part 2” (2015) 3 TSAR 551 566.

(3) marriages out of community of property, with the application of the accrual system.

2.1 *Marriages in Community of Property*

If parties do not exercise their freedom of contract to enter into an antenuptial contract prior to their marriage, the default matrimonial property system of community of property will apply to their marriage. There is, in fact, a rebuttable presumption in South Africa that when a couple enters into a civil marriage the couple is marrying in community of property.² When spouses get married in community of property their separate estates are merged into a single joint estate for the duration of the marriage. In essence the spouses share everything – all their assets and all their debts which exists prior to the marriage and accumulated thereafter.

There are, however, some exceptions to the abovementioned rule that all assets of both spouses become joint assets. In terms of legislation and common law either spouse may also own separate property which is consequently excluded from their joint estate. Separate property comprises *inter alia* the following: (1) testamentary bequests or donations made by a third party to a spouse subject to the express condition that the asset(s) are excluded from the joint estate of that spouse; (2) property in which a spouse holds a limited or inalienable interest, such as a usufruct or a *fideicommissum*; and (3) engagement or wedding presents from a husband to his wife.³

Since marital power has been abolished in South Africa spouses have equal independent powers to control or manage their joint estate and incur debts that bind the joint estate. Spouses however have to obtain each other's consent for certain important transactions which include alienation or

² De Jong & Pintens (2015) TSAR 551.

³ De Jong & Pintens (2015) TSAR 552.

burdening of immovable property, entering into a suretyship, entering into certain contracts, purchasing a house, receiving credit under a credit agreement, selling shares or other assets held mainly as investments, withdrawing money from each other's bank accounts, instituting or defending legal proceedings and selling furniture or other household effects.⁴ If a spouse performs any of the aforementioned transactions in the ordinary course of his/her profession, trade or business no consent is required.

Upon the dissolution of a civil marriage or a civil union in community of property through divorce, the balance of the joint estate, after all liabilities have been paid, must be divided equally between the spouses. Section 7(1) of the Divorce Act 70 of 1979 stipulates that the parties may agree on the division of the joint estate in any way that suits them. In the instance that parties cannot agree on how their joint estate is to be divided, a prayer for the appointment of a receiver and/or liquidator to divide the joint estate can be included in the divorce summons to be served.

2.2 *Marriages out of community of property*

If parties do choose to exercise their freedom of contract as aforementioned to enter into an antenuptial contract prior to their marriage, they have the option to get married either with or without the application of the accrual system. Both options will be briefly discussed below.

2.2.1 Marriage out of community of property with the exclusion of the accrual system

If parties elect to get marry without the application of the accrual system in simple terms it means what's mine is mine and what's yours is yours. All individual assets and liabilities, which makes up the parties' respective estates,

⁴ De Jong & Pintens (2015) TSAR 553.

remain separate throughout the duration of their marriage and upon the dissolution thereof.

2.2.1 Marriage out of community of property with the inclusion of the accrual system

If parties elect to get married with the application of the accrual system, they will share equally in the accrual or growth in their estates during the subsistence of the marriage. During the duration of the marriage spouses are basically in the same position as those who married out of community of property without the accrual system as each spouse retains the estate he or she had before the marriage and everything acquired thereafter also falls into his/her own estate. Spouses are individually liable for any debt incurred.

Upon the dissolution of a marriage out of community of property with accrual section 3(1) of the Matrimonial Property Act determines that the party whose estate shows a smaller accrual or no accrual at all may claim from the other spouse an amount equal to half the difference between the accrual in the parties' respective estates. In terms of section 4(1)(a) of the Matrimonial Property Act, the accrual in a spouse's estate must be determined by firstly deducting the net value of the spouse's estate at the commencement of the marriage from the net value of his or her estate upon the dissolution of the marriage.

Secondly, sections 4 and 5 of the Matrimonial Property Act makes provision for the value of certain assets to be deducted from the net end value of the spouse's estate. Such excluded assets *inter alia* include the following: (1) any non-patrimonial damages a spouse receives during the marriage⁵; (2) assets specifically excluded from the accrual in the antenuptial contract⁶; (3) any

⁵ Section 4(1)(b)(i)

⁶ Section 4(1)(b)(ii).

inheritance, legacy or donation which a spouse receives during the marriage⁷; and (4) donations *inter vivos* between the spouses.⁸

3 CONCLUSION

From the abovementioned it is clear that the default marital regime in South Africa is marriages in community of property. Should parties wish to get married out of community of property, either with or without the application of the accrual system, an antenuptial contract has to be concluded prior to the commencement of the intended marriage.

Contact **Malan Lourens Viljoen Inc** who will gladly assist with the legal aspects of planning a wedding!

Karla Swart (LLB) – Candidate Attorney

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⁷ Section 5(1).

⁸ Section 5(2).