

Options at marriage



Understanding the financial
implications of your marriage



EVERY STEP OF THE WAY



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We suggest that you consult an Old Mutual legal adviser or your professional financial adviser before taking any decisions based on the information contained herein.

What options do you have?

South African marriage law is unfortunately quite complicated. But this book gives you a simple, yet correct, summary of it.

Civil Law Marriages	3
Option 1: Marriage in Community of Property	3
Assets and debts outside the joint estate	3
Who administers the joint estate?	4
Equal administration	4
Joint administration	5
Insolvency	6
Life insurance policies	6
Can spouses sue each other?	7
Division of the joint estate at the end of the marriage	7
Summary: advantages and disadvantages	8
Option 2: Marriage out of Community of Property without the Accrual System	9
How do you enter into an ANC?	9
What is marriage out of community of property?	10
Insolvency	10
Donations between spouses	11
Bequests to spouses	11
Household necessities	11
Can spouses sue each other?	12
Division of property at the end of the marriage	12
Forfeiture of benefits	13
Judicial discretion	13
Summary: advantages and disadvantages	14
Option 3: The Accrual System	15
Who is married under the accrual system?	16
How does the accrual system work?	16
Summary: advantages and disadvantages	18
Remember to consider Retirement Fund Benefits on Divorce	19
Maintenance	20
Maintenance of spouses during marriage	20
Maintenance of spouses after marriage	20
Interim maintenance during divorce proceedings	21
Maintenance of children	21
Changing the Marital System	22
Jurisdiction in Matrimonial Actions	23
Customary Marriages	23
Hindu and Muslim Marriages	24
Religious Divorces	25
A Simple Legal Dictionary	26

For Richer or for Poorer . . .

It is not surprising that people getting married - especially for the first time - feel a little overwhelmed. It seems that there are literally dozens of decisions that you need to make. In the whirlwind, it is easy to forget one of the most important decisions ...

What kind of financial contract do I need?

Unfortunately, this is one decision you can't put off. Once you are married, it is very difficult to change your marriage contract. So you need to understand your options and decide BEFORE you get married.

This booklet is designed to take you through the various options at marriage and to help you make a decision. Once you've read it, you may need to contact a lawyer to help you draw up a contract, at a fee. Remember, this fee is to protect your rights, so if you can help it, don't make this decision based on cost now - in the long run, the right contract could be worth much more. Remember, there's an old truth about marriage ...

Plan for the worst but expect the best.

Congratulations from Old Mutual.

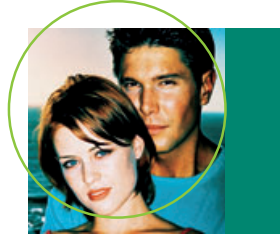
Civil Law Marriages - *The Old And The New*

In 1984, the marriage law was changed for whites, coloureds and Indians. In 1988, it was changed for blacks. All whites, coloureds and Indians marrying after 1984, and all blacks marrying after 1988, are automatically married in community of property, or can marry out of community of property by entering into a contract which either includes or excludes the accrual system.

Civil Law Marriages

Option 1: Marriage in Community of Property

Marriage in community of property is the most common marriage system in South Africa. Basically all marriages are in community of property, unless the spouses exclude community of property in a contract. In other words, if you do nothing other than get married before a marriage officer, you are married in community of property.



Marriage in community of property means that, on marriage, a common or joint estate is created. This estate consists of all the assets and debts of the spouses. On marriage, each spouse's assets and debts fall into the joint estate. All assets and debts acquired during the marriage also fall into the joint estate. (See exceptions to this general rule at the bottom of this page.)

The spouses are co-owners of the joint estate in half-shares.

What this means is that at the end of the marriage:

- first the debts of the joint estate are paid, and then
- the balance is divided between the husband and wife equally.

Assets And Debts Outside The Joint Estate

While most assets and debts fall into the joint estate, there are some exceptions. An example of an asset that won't fall into the joint estate, but which will go into a spouse's separate estate, is:

Someone may leave an inheritance to one of the spouses subject to the condition that this property is excluded from the joint estate. An illustration is the case of Erasmus vs. Erasmus. Here the wife's father bequeathed her some land subject to the condition that it would not be included in the spouses' joint estate. The husband used the land as if it were his own. The wife applied to court for an order declaring that only she was allowed to use the property. She won her case.

NOTE: *In Badenhorst vs. Bekker the court stated that when such a condition is attached to an inheritance, it will only protect the spouse during and on termination of the marriage against the other spouse. The condition will be ineffectual on insolvency of the joint estate.*

Who administers the joint estate?

Before 1 December 1993, many women who were married in community of property were subject to their husband's marital power. In 1993, the marital power was abolished for all marriages, regardless of their date or the race of the spouses.

The marital power meant that the husband administered the joint estate and the wife's separate estate. He could enter into contracts that were binding on these estates without the wife's consent. The wife could not enter into a contract without the husband's consent: she was treated as a minor by the law.

The abolition of the marital power means the end of male domination and female subordination. Marriage is a partnership of equals. The husband's administration of the estate is replaced by equal and joint administration of both spouses.

Equal administration

Each spouse can now perform acts that are binding on the joint estate without the consent of the other spouse. Examples of such acts are:

- the selling of certain movable assets such as a car;
- the borrowing and lending of money;
- certain listed share deals;
- dealing with a deposit in a building society or bank in the name of the spouse who deals with it;
- the setting up of a company or close corporation; and
- generally, transactions performed by a spouse in the course of his or her business, trade or profession.

A second example of an asset that doesn't fall into the joint estate is:

Where a spouse sues a third person for damages for a non-financial loss, these damages do not form part of the joint estate. To illustrate: The wife is involved in a car accident and she sues the other driver for damages for her hospital bills and for her pain and suffering. Compensation for her medical expenses will fall into the joint estate because this is a financial loss. However, her pain and suffering is not a financial loss. Compensation for her pain and suffering therefore doesn't fall into the joint estate.

Joint administration

Obviously equal management is not enough. One spouse may harm the joint estate if he or she can act totally freely with it. In order, therefore, to protect each spouse from the other, there is a requirement of **joint management**. This means that a spouse may not perform certain acts without the consent of the other spouse.

There are certain transactions for which the written consent of the other spouse is necessary:

- the selling of immovable property (land);
- the selling or disposing of shares, insurance policies, mortgage bonds, fixed deposits, or any similar asset;
- the selling of jewellery, coins, stamps, paintings or any other assets held mainly as investments;
- the withdrawal of money in the name of the other spouse from a bank or building society;
- entering into a credit agreement;
- the purchase of land on instalments;
- the binding of oneself as a surety; and
- generally, suing or being sued.

There are certain transactions for which the other spouse's consent is required, but it need not be written. Oral consent is sufficient for:

- the disposal of furniture and the other contents of the joint household;
- the receipt of money owing to the other spouse from earnings, salary, pension, inheritance, dividends from investments in the name of the other spouse, and proceeds from an insurance policy in favour of the other spouse; and
- donations to third parties of assets of the joint estate.



What is the position where a spouse enters into one of the transactions listed above without the consent of the other spouse? Unfortunately, our law favours the third person with whom the spouse contracted. If this third person doesn't know and can't reasonably know that consent wasn't given, then the transaction stands. The innocent spouse is, however, given some protection. When the joint estate is divided at the end of the marriage, the innocent spouse will be compensated.

Insolvency

The debts of the insolvent spouse are the debts of the other spouse, who is also treated as an insolvent. The whole joint estate becomes insolvent.

Life insurance policies

Life insurance policies which:

- are taken out on the life of the owner or that person's spouse,
- have been in force for 3 years, and
- are life, disability or health policies, enjoy protection up to an aggregate amount of R50 000 on insolvency of the joint estate.

A life policy effected by a woman married in community of property prior to or during her marriage on the life of her husband, is excluded from the joint estate if it was taken out prior to 1 January 1999. It forms part of her separate estate. This is not applicable to policies effected from 1 January 1999.

Can spouses sue each other?

A rule in our law says that spouses married in community of property cannot sue each other for damages. The reason is that it would be pointless to take money from the joint estate to pay the one spouse: this money would simply fall back into the joint estate.

But there is an exception to this rule. A spouse can sue the other spouse for non-financial loss arising out of bodily injuries caused by the other spouse. To illustrate: Say the wife is a passenger in a car driven by the husband. Because of his negligent driving, they are involved in a car accident. The wife can sue her husband for her pain and suffering because this is a non-financial loss. But she can't sue him for her medical expenses because this is a financial loss. (The damages that she recovers in respect of the non-financial loss will fall into her own estate.)

Division of the joint estate at the end of the marriage

It was stated earlier that at the end of the marriage, the joint estate is divided equally between the spouses. However, on divorce, the courts have a discretion to order what is called a **forfeiture of benefits**. Under this power, the court can order that one spouse forfeits or loses part or all of his or her half-share of the joint estate. **The idea is that no-one should benefit financially from a marriage which he or she has caused to fail.**

In the case of Singh vs. Singh, the court ordered a forfeiture of benefits against the wife because she had committed adultery. The wife had contributed 20% of the joint estate and the husband the other 80%. Instead of sharing the estate 50-50, the wife only got the 20% she contributed. Note that you cannot lose assets that you contribute to the joint estate. All you can lose is your right to share in the assets your spouse contributes to the joint estate.

Summary

Some of the advantages of marriage in community of property are:

- You get married in community of property automatically, without having to enter into a special contract.
- If you are the financially weaker spouse, you get to share in the assets of your spouse.

Some of the disadvantages of marriage in community of property are:

- The economically stronger spouse has to share his or her assets with his or her spouse.
- The spouses are jointly liable for each other's debts. This is particularly problematic on insolvency. (See the section on Insolvency earlier in this book.)
- The joint administration of the estate is quite complicated. While the marriage is a happy one, it is no real problem to obtain your spouse's consent. But when the marriage starts to fail, the requirement of joint consent is difficult to satisfy.

Option 2: Marriage out of Community of Property without the Accrual System

Marriage in community of property is achieved automatically, simply by marrying. On the other hand, marriage out of community of property is achieved only by drawing up a contract.

This contract is called an **antenuptial contract (ANC)**. It is a contract entered into before marriage. The purpose of an ANC is to change some or all of the automatic financial consequences of marriage. An ANC allows the husband and wife to decide on the financial consequences of their marriage. **If the spouses do not want to be married in community of property, they can enter into an ANC which excludes community of property.**

Spouses can include any provisions they want to in their ANC - as long as the provisions are not against the law, good morals or the nature of marriage. Basically, a husband and wife can construct their very own marriage system in an ANC. But in practice, people enter into one of two types of ANC:

- an ANC which excludes community of property, community of profit and loss and the accrual system; or
- an ANC which excludes community of property and community of profit and loss but which includes the accrual system.

How Do You Enter Into An Anc?

There are a number of requirements:

- 1. The contract must be entered into before the marriage.*
- 2. To be fully binding, the contract must be in writing.*
- 3. The contract does not have to be drawn up by an attorney or a professional. But the contract must be signed by the husband-to-be and wife-to-be before a notary (a special kind of attorney).*
- 4. Next, the contract must be registered in a deeds registry within the specified time limit. A deeds registry is a government office where important transactions are recorded. For example, land transfers are registered in a deeds office. These records are available to the public for their information. Thus a registered ANC lets the public know that a couple is married out of community of property.*



In this section we deal with the first type of ANC. We discuss the second type of ANC (the accrual system) in Option 3.

What is marriage out of community of property?

There are two basic aspects to marriage out of community of property:

- In a marriage in community of property, the two separate estates of the spouses combine on marriage to form one joint estate. Marriage out of community of property is the opposite. There is no joint estate. Here each spouse has his or her own separate estate. The husband's estate consists of his pre-marital assets and debts, and all the assets and debts he acquires during the marriage. The wife's estate consists of her premarital assets and debts, and the assets and debts she acquires during the marriage.
- In marriage in community of property, there is joint and equal administration of the joint estate. With marriage out of community of property, the husband and wife each administer their own separate estates. Each spouse has full and exclusive control over their own property.

Insolvency

Spouses married out of community of property have separate estates and are not liable for each other's debts. But if one spouse goes insolvent, the estates of both the solvent and insolvent spouses are taken over. This is done because the insolvent may try to defeat the claims of creditors by transferring his/her assets to his/her solvent spouse before sequestration.

However, after his/her estate has been taken over, the solvent spouse may apply to get it back by showing that the assets are really his/hers. The solvent spouse can get back the following assets:

- assets that belonged to him/her before the marriage;
- assets given to her/him by her husband/his wife in an ANC;

- assets acquired by her/him during the marriage from her/his own income or from a person other than her husband/his wife; and
- certain insurance policies.

Donations between spouses

Spouses married out of community of property can make enforceable donations to each other. No donations tax is payable on donations made to a spouse. No CGT* is payable on a donation to a spouse until the donee spouse disposes of the asset.

Bequests to spouses

No estate duty is payable on bequests to a spouse in a deceased estate. No CGT* is payable on assets bequeathed to a spouse in a deceased estate. CGT* will be postponed until the surviving spouse disposes of the assets.

The term “spouse” is very widely defined in the Income Tax Act and Estate Duty Act, to include a partner in a civil marriage, a customary union, a religious marriage or a permanent same sex or heterosexual partnership.

Household necessities

Household necessities are everyday items necessary for the running of the matrimonial household. They include food, clothing, small pieces of furniture, and medical and dental treatment.

Generally, spouses married out of community of property are not liable for each other’s debts. Household necessities are an exception to this general rule. Spouses are liable for debts incurred by each other to buy household necessities.

**Capital Gains Tax*

This means that if either spouse buys a household necessary, then:

- The trader who supplies the necessary can sue the husband or the wife or both for payment regardless of which spouse bought the necessary.
- Spouses are compelled to buy household necessities in accordance with their financial means. Thus if the husband's financial means are double that of the wife, the husband must pay twice as much as the wife for household necessities. If the wife contributes more than she has to, she can claim the excess from her husband in certain circumstances.



In the case of *Reloomel vs. Ramsay*, Dr and Mrs Ramsay were married out of community of property. While Dr Ramsay was overseas, Mrs Ramsay bought silk dresses on credit from Reloomel. Reloomel sued Dr Ramsay for payment. He succeeded because the court regarded the dresses as household necessities.

Can spouses sue each other?

Where spouses are married out of community of property, they can sue each other. In an old case, a wife sued her husband for damages as a result of injuries she had suffered. The car which her husband was driving, hit a wagon. The wife succeeded in her claim.

Division of property at the end of the marriage

The starting point is that at the end of the marriage, each spouse retains his or her own separate estate. One spouse has no right to any assets owned by the other spouse.

But the courts have two powers to alter this general outcome:

- forfeiture of benefits, and
- judicial discretion to redistribute assets.

Forfeiture of benefits has already been discussed under marriage in community of property. In a marriage in community of property, the court may order one spouse to give up part or all of his or her half-share of the joint estate. In a marriage out of community of property, there is no joint estate. But what can be forfeited is: any donation or benefit given to the spouse by the other spouse in an ANC.

Say a husband donates a house to his wife in their ANC. Say the wife behaves especially badly in the marriage and the court decides to order a forfeiture of benefits. The court may order the house to be returned to the husband. But the court may not take anything else away.

Forfeiture of benefits applies to all marriages. But the **judicial discretion to redistribute assets** only applies to certain marriages out of community of property:

- The marriages of whites, coloureds and Indians entered into before 1 November 1984; and
- the marriages of blacks entered into before 1 December 1988.

In other words, this power does not apply to new marriages. The law has been criticised for this gap. This is because the judicial discretion to redistribute assets is an important way of achieving equality between spouses.

Judicial discretion allows the court to order that any of the assets of one spouse be handed over to the other spouse, if the court thinks it is just and fair to do so. The receiving spouse must have contributed during the marriage, directly or indirectly, to the estate of the giving spouse.

In the case of *Beaumont vs. Beaumont*, the parties had been married out of community of property. When they married, the spouses had no assets. At the time of divorce, 20 years later, the husband had an estate of R450 000 and the wife had only R10 000. During the marriage, the wife looked after the house and children. She worked in her husband's business for no salary. The Supreme Court deemed it just to order a redistribution of assets because of the wife's indirect contribution to her husband's estate. She was awarded R150 000 from the husband's estate.

Summary

Some of the **advantages** of marriage out of community of property and without the accrual system are:

- Each spouse keeps his or her own assets and is free to deal with his or her own estate as he or she likes.
- Spouses are generally not liable for each other's debts. Thus, if one spouse becomes insolvent, creditors cannot touch the assets of the other spouse.
- The financially stronger spouse does not have to share his or her estate with the weaker spouse. This is subject to judicial discretion and forfeiture of benefits.

Some of the **disadvantages** of marriage out of community of property and without the accrual system are:

- The economically weaker spouse, usually the woman, does not get to share in the estate of the stronger spouse, even though she may have contributed to the estate indirectly by running the household and looking after the children. This is subject to judicial discretion and forfeiture of benefits.
- You have to enter into an ANC in order to be married out of community of property.

Option 3: The Accrual System

The main purpose of the accrual system is to remedy the injustice which can result where spouses are married out of community of property. When spouses are married in community of property, they generally share their assets equally. When spouses are married out of community of property, they generally have completely separate estates. This means that if one spouse, e.g. the wife, does not earn as much as her husband does, she is left with much less than the husband at the end of the marriage. Even though she may have made valuable contributions to the marriage by keeping house and looking after the children, she cannot always rely on judicial discretion or forfeiture of benefits to set things right.



The accrual system recognises this kind of inequality. It provides that, at the end of the marriage, spouses share equally in the gains (accrual) made by them during the marriage. **The accrual system is based on the idea of marriage as a kind of partnership.**

The accrual system forms part of a marriage out of community of property. It is not a form of community of property. During the marriage, the spouses each have their own separate estates and they are fully independent. Thus most of what has been said under Option 2 applies here as well. The sharing only takes place at the end of the marriage.

What is shared is the **profits** made during the marriage:

- Spouses do not share their **debts**, only their gains.
- Only the gains made **during** the marriage are shared. The spouses' assets **before** the marriage are not shared.

Who is married under the accrual system?

The accrual system was introduced in 1984 for whites, coloureds and Asians. Since 1988, it has applied to blacks too. After these dates, whoever enters into an ANC which excludes community of property and community of profit and loss, is automatically married under the accrual system. Spouses may, however, exclude the accrual system in their ANC. But if they do not do so expressly, they are married with it.

How does the accrual system work?

1. At the start of the marriage, each spouse's estate is given a net **commencement** (starting) value. The net value is arrived at by subtracting liabilities (debts) from assets. In other words, what is each spouse's estate worth if all his or her debts are paid?

Let us suppose that H and W are married under the accrual system. At the start of the marriage, H had R10 000 and W had R1 000. (The starting value can be put into the ANC or in a special statement. If you do not do this, the law assumes that the starting value is nil - unless you can prove the starting value in some other way.)

2. At the end of the marriage, each spouse's estate is valued again. A **net fixed** value is given to each estate. On divorce, this includes pension, provident and retirement annuity interests. (See "Remember to consider Retirement Fund Benefits on Divorce".) The net value is also arrived at by subtracting the spouse's liabilities from his or her assets.

NB: At the end of the marriage, the commencement value of each spouse's estate is revalued in the light of inflation over the period of the marriage. For example, at the end of the marriage of H and W, H's estate is worth R100 000 and W's is worth R12 000, if one takes inflation into account.

3. Next, the accrual (gain or profit) of each spouse during the marriage is calculated. Accrual = final value minus starting value.

In our example:

H's accrual:

Final value	R100 000
Starting value*	- R 14 500
	<u>R 85 500</u>

W's accrual:

Final value	R12 000
Starting value*	- R 2 400
	<u>R 9 600</u>

* *ADJUSTED FOR INFLATION: The example above assumes that the marriage lasted for 6 years and that the rate of inflation was approximately 5% per annum.*

4. The difference between the accruals is then worked out.

Here: (H's accrual)	R85 500
(W's accrual)	- R 9 600
difference:	<u>R75 900</u>

5. Now the sharing is calculated. The spouse with the smaller accrual gets half of the difference between the two accruals. In our example, W has the smaller accrual. So she gets half of the difference, which is half of R75 900, i.e. R37 950.

6. Result

W gets her	R12 000
plus part of the accrual:	+ R37 950
	<u>R49 950</u>

H gets his	R100 000
less accrual to W:	- R 37 950
	<u>R 62 050</u>

Summary

Some of the **advantages** of marriage with the accrual system are:

- Spouses share their gains made during the marriage.
This benefits the economically weaker spouse.
- Spouses do not share their assets acquired before the marriage.
Thus the accrual system appeals to people already wealthy at the time of marriage.
- During the marriage, each spouse runs his or her estate freely.
There is no complicated joint or equal administration.
- Spouses are not liable for each other's debts. All they share is their net assets. Thus, if one spouse goes insolvent, the other spouse is protected from the creditors.

Some of the **disadvantages** of marriage with the accrual system are:

- The economically stronger spouse has to share the profits made during the marriage.
- One has to enter into an ANC in order for the accrual system to apply.
- The calculation of accrual at the end of the marriage can be complicated.

Remember to consider Retirement Fund Benefits on Divorce

Prior to 1989, an interest that a spouse may have had in a pension, provident or retirement annuity fund, was not taken into account for the purpose of the division of assets on divorce. Of course, this caused severe prejudice to many divorcing spouses who were unable to share in the considerable value of these funds. In many cases, a spouse's retirement fund is the major asset of the marriage.



This resulted in provision being made by law for the inclusion of such an interest in the assets of spouses for division purposes on divorce. The law applies to all marriages except those which have excluded community of property, community of profit and loss, and the accrual system, and were concluded after 1 November 1984.

There are, however, a number of problems with this law:

- The non-member spouse may not receive immediate payment of the benefit at the time of the divorce. An endorsement may be made to the rules of the retirement fund (by court order) for the benefit to be paid when the member retires or resigns from service. This may be many years after the divorce.
- The non-member spouse is not entitled to any growth on the value which is payable by the fund, unless a special provision is written into the divorce agreement binding the member in his or her personal capacity.
- Any tax liability paid by the member on the non-member's portion can be claimed from the non-member.

Maintenance

Apart from the division of property at the end of the marriage, one spouse may also be ordered by the court to pay maintenance to the other spouse and their children.

Maintenance of spouses during marriage

During the marriage, spouses owe each other a duty of support. This is so regardless of what their marriage system is. The duty is divided between them in relation to their financial means.

In the case of *Milns vs. Protea Assurance Company*, Mrs Milns' husband was killed in a motor car accident. She sued the insurer of the other car for loss of support by her husband. The court allowed her claim.

A spouse in need of maintenance can apply to the maintenance court (which is a magistrates' court) for an order against the other spouse. If the other spouse then fails to pay maintenance, he or she commits a crime.

Closely related to the duty of maintenance is the **matrimonial home**. Both spouses have a right to live in the home, no matter who owns it. If one spouse ejects the other spouse from the home, the ejected spouse can ask the court to put him/her back in possession of the home.

In *Cattle Breeders Farm vs. Veldman*, the husband's company owned the home of the spouses. The company tried to eject the wife from the home. It was unsuccessful.

Maintenance of spouses after marriage

The starting point is that the duty of support between spouses ends when the marriage ends. But if the marriage ends through the **death** of one spouse, the norms of society demand that the surviving spouse should not be left destitute if the estate of the deceased spouse is able to provide maintenance. By law

the surviving spouse thus has a claim for his or her reasonable maintenance needs insofar as his or her own means and earnings are inadequate. If the marriage ends through divorce, the spouses can enter into an agreement about maintenance. The **divorce** court either accepts or rejects the agreement.



If the spouses do not reach an agreement, the court can order maintenance as it sees fit. There are no hard and fast rules on whether maintenance will be ordered, in what amount and for how long. It all depends on the facts of the particular case. The court considers the following factors: the financial means of the parties; their needs and obligations; their ages; the duration of the marriage; and the standard of living prior to divorce.

In the case of *Kroon vs. Kroon* the wife was granted permanent maintenance. She and her husband had been married for 20 years. She never worked outside the home. But she made important contributions to the marriage as the wife, mother and housekeeper. The wife could not maintain herself after the divorce.

A maintenance order can be changed by application to court if there is a good reason for the change.

Interim maintenance during divorce proceedings

There is a useful court rule for the following situation: A divorce action may have commenced and a spouse may need maintenance until the divorce is heard in court. A Supreme Court rule allows such a spouse to apply to court for a temporary order of maintenance. At this stage, the court does not investigate the matter fully. The procedure is quick. The court asks itself whether there is enough proof for the meantime. A final maintenance order is only granted when the divorce is granted.

Maintenance of children

Both parents have a duty to support their children, regardless of whether the parents are married or not. The children must need the support and the parents must be able to give it.

The duty is divided between the parents in relation to their financial means. If a parent dies, a child can claim support from the estate of the dead parent, just as the surviving spouse can. This support, like that of the surviving spouse, will be paid before any inheritances are paid out, so that if there is not enough money to pay for both the maintenance and the inheritance, the maintenance will be paid first. Creditors' claims always rank before maintenance claims, though.

Changing the Marital System

The general rule is that spouses cannot change their marital system after they have married. There are some exceptions, however. The most important one allows a couple jointly to apply to court for leave to change their marital system. The court must be satisfied that there are good reasons for the change and that no creditors will be prejudiced.

In a court case, Mr and Mrs Krös applied to court to change their marital system from marriage in community to marriage out of community of property. When they married, they were ignorant of the consequences of marriage in community of property. It was only after they got married that they realised that marriage out of community of property would suit their circumstances better, as the husband intended to start a business. If it failed, the assets which the wife brought into the joint estate would be snatched by the creditors of the business.

It is not possible to change your marital system informally - for example, by entering into a private contract between the two spouses. In *Honey vs. Honey*, this is what the parties tried to do. The court rejected their attempt and stuck to the ANC.

Jurisdiction in Matrimonial Actions

South African courts hold the view that the matrimonial property regime of spouses is determined by the law of the husband's domicile at the date of marriage. A person is domiciled in that country which the law regards as his permanent home.

To illustrate: A South African, who is studying at Harvard in the USA, gets married in a London registry office to an Australian girl holidaying in England. On completion of his studies, he and his wife return to South Africa. The question now arises whether their marriage is in or out of community of property. As the domicile of the husband at the date of marriage was South Africa, they would be married in community of property because they did not enter into an antenuptial contract.

Customary Marriages

In November 2000, the Recognition of Customary Marriages Act was passed. The Act ensures that marriages conducted according to the various customs of the people within South Africa will have legal recognition.

In order for a marriage to be recognised as a customary marriage it must have been concluded in accordance with customary law, the specific features of which will vary depending on the customs of the ethnic grouping of the participants. In other words, the Act does not give people the green light to make up marriage customs or adopt customs from other countries.

In addition, the Act makes it clear that people whose cultural backgrounds do not include the traditional culture practices of this country's indigenous people, cannot now decide to adopt these customs and have a legal marriage. However, the circumstances surrounding each case will have to be considered.



For a customary marriage to be valid, both prospective parties must be over 18 and they must consent to be married to each other by custom. In addition, the marriage must be negotiated, entered into and celebrated in accordance with customary law.

Polygamy, or the practice of a man having more than one woman to whom he is married at the same time, will be legally recognised only if it forms a part of the South African traditional culture of at least one of the participants in the customary marriage. However, it will not operate the other way. Women may not have more than one husband, as this is not a custom in South Africa. The Act lays down certain obligations that must be met before a man can take another wife. The man must first reach agreement with his existing wife or wives with regard to their property. This agreement must be made an order of court and registered in the deeds office.

The Recognition of Customary Marriages Act goes a long way towards bringing customary marriages in line with modern practices. Sadly, many people living in the rural areas might still be uninformed of the many new legal requirements that have to be satisfied before embarking on a customary marriage.

Hindu and Muslim Marriages

This book has explained the so-called civil law marriage. Currently, only this marriage is fully recognised by the law in South Africa. Muslim and Hindu unions are not recognised as legal marriages except for some specific exceptions made by the law. This means that partial recognition is granted to these marriages.

The denial of full recognition to Muslim marriages is based on the fact that they are potentially polygamous. This means that

they allow a man to marry more than one wife. However, in the light of our new constitution which promotes religious freedom, equality, tolerance of diversity and the recognition of the plural nature of our society, these unions cannot continue to be recognised in a partial fashion. In fact, in the case of *Ryland vs. Edros*, the court overturned previous decisions which refused, on the ground of public policy, to give effect to the consequences of potentially polygamous unions. The court found that it was contrary to the values promoted in the new constitution for one group to impose its values on another group. The South African Law Commission has been tasked with investigating polygamous marriages with the aim of recognising them. Eventual recognition of these unions will therefore be brought about, not only by the courts in interpreting our law in accordance with the values underlying our constitution, but also by express provision in legislation.

Hindu marriages are not potentially polygamous, but like other religious marriages, e.g.: Jewish marriages, the ceremony and rites are not recognised as a civil marriage. A civil marriage is concluded before a registered marriage officer either before or after the religious ceremony.

Religious Divorces

Our law did not recognise nor did it make provision for religious divorces. This has been remedied by an amendment to the Divorce Act. The Act empowers a court to refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage dissolved in terms of their religious beliefs has taken the necessary steps to have the marriage so dissolved. It is now necessary for couples to seek a divorce on two levels, a religious dissolution and a court order, before they can be regarded as legally divorced.

A Simple Legal Dictionary

Accrual system: The marriage system whereby the spouses share the net profits made during the marriage, at the end of the marriage.

Antenuptial contract (ANC): A contract entered into before marriage by people who intend to marry. This contract sets out the marital system that the spouses have chosen.

Assets: Things a person owns.

Civil law marriage: The only form of marriage that is currently fully recognised by South African law.

Commencement value: In the accrual system, the value that is given to the estate of each spouse at the start of the marriage.

Community of property: The marriage system whereby the spouses share equally all their assets and debts (profit and losses).

Customary law: The traditional African legal system that has existed in South Africa since before the European settlers came.

Customary union: A marriage between Africans according to customary law and the Recognition of Customary Marriages Act.

Deeds registry: The government office of records.

Equal administration: In marriages in community of property, the power of each spouse to deal with the joint estate freely.

Estate: The assets and debts of a person.

Forfeiture of benefits: In all marriages, a power of the court to divide the property at the end of the marriage where one spouse has behaved very badly in the marriage.

Household necessities: Everyday items necessary for the running of a household.

Immovable property: Property that cannot be moved, such as land and buildings.

Joint administration: In marriages in community of property, the requirement that each spouse can only deal with the joint estate in certain circumstances with the consent of the other spouse.

Judicial discretion: Only in marriages out of community of property and without the accrual system, entered into before 1984 and 1988: The court's power to order a redistribution of assets at the end of the marriage where this is just.

Liabilities: Debts a person owes.

Maintenance: Money paid to support someone.

Marital power: The husband's power to control his wife's property.

Marriage out of community of property: The marriage system whereby each spouse has his or her own estate and administers it by himself or herself.

Net value: The value of an estate after all debts have been paid.

Notary: A specific kind of lawyer with the power to witness the signing of important documents.

Polygamous union: A marriage in which the husband has more than one wife.

Workmen's Compensation Commissioner: The government official who pays compensation to workers who are killed or injured at work.

NOTES



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