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GETTING MARRIED – SHOULD YOU MARRY IN COMMUNITY OF PROPERTY OR OUT OF COMMUNITY OF PROPERTY?

When a couple decides to marry, they are required to determine under what matrimonial property system they would like to marry.

In South Africa, there are three (3) matrimonial systems under which a couple may marry:

1. In community of property;
2. Out of community of property, with the accrual system; and
3. Out of community of property, without the accrual system.

In Community of Property

If a couple does not sign an antenuptial contract before the marriage, they are automatically married in community of property in terms of South African law which means that the property, assets and liabilities belonging to both parties at the time of marriage or acquired any time during the marriage are merged into a single estate known as a joint estate. The parties own the assets and liabilities in the joint estate in equal undivided shares and they are joint administrators of the joint estate.

The consent of both spouses is needed when buying or selling a house, applying for a bond, signing a deed of surety or entering into a hire purchase agreement.

If one spouse is reckless with their financial affairs, it will affect the other spouse, as they are each responsible for one another's debts.

On termination of the marriage the joint estate will be divided equally regardless of what spouse earned the most or had the most assets when they married.

Out of community of property, with the accrual system

If a couple decides to get married out of community of property, they are required to execute an antenuptial contract before a notary public. This is a contract which they sign before they marry in terms of which they specifically exclude community of property.



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At the time of concluding the antenuptial contract, a couple must decide if they want the accrual system to apply or not. Under the accrual system, each spouse controls his or her own assets, liabilities (and debts) as they remain separate for the duration of the marriage, which means the creditor of one spouse cannot attach the assets of the other spouse. However, upon termination of the marriage by either death or divorce, the net value of each spouse will be determined and the spouse whose estate accrues the most value will be required to give the spouse with the lesser value, half the difference in the accruals (i.e. there is equal sharing of the accruals). "Accrual" is the increase in the net value of the respective estates from the commencement of the marriage until its termination.

Out of community of property, without the accrual system

Should the parties decide that they want to retain separate estates altogether and not share any portion thereof with the other spouse when the marriage ends, then they may choose to marry out of community of property without the accrual system and this must be specified in the antenuptial contract. This system operates on the maxim, "what's mine is mine, and what's yours is yours". Therefore, the spouses are liable for their own debts, the creditor of one spouse cannot attach assets belonging to the other spouse and each spouse is free to do as they want with their assets. Furthermore, upon termination of the marriage by death or divorce, each party shall retain their own assets and liabilities as there is no division of the accruals.

It is important to consider the correct matrimonial regime before entering into a marriage.



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