THE LEGAL IMPLICATIONS OF MARRIAGE

Marriage is a big step, both legally and financially – and starry-eyed as you may be, it will seem very unromantic to be thinking about money and legal issues when you are planning the wedding of your dreams. But in reality, marriage is a binding lifelong contract with a number of implications and therefore it is imperative for both the bride and groom to know and understand the implications of their decisions and the effect thereof on their future.

Remember that, during the wedding preparations, you should also be investigating which matrimonial property regime you will be entering into.

Presently in South Africa there are three ways in which you can get married:

1. Marriage in community of property.
2. Marriage out of Community of property with the application of accrual.
3. Marriage out of Community of property without the application of accrual.

IN COMMUNITY OF PROPERTY

If you do not physically sign an antenuptial contract (anc) before the marriage is solemnised you will automatically be married in community of property. In theory this may appear to be a fair and ideal way to get married as the assets are split down the middle on divorce. The truth of the matter is, that all liabilities are also split equally! This in effect means that if your spouse incurs debts, you will be liable for half of those debts and furthermore, if your spouse is sequestrated you will be too.

- No anc needs to be entered into.
- There is an automatic 50% share for either spouse in the estate.
- Both the husband and wife's credit worthiness is equal during the duration of the marriage.
- Any asset brought into the marriage, will be shared equally.
- Both parties are liable for each others debt – insolvency is a huge problem.
- The administration of the joint estate is complicated.
- If one partner should die, the estate of both the deceased and surviving partner will be wound up because it is a joint estate – not great for the surviving partner who will find themselves in legal limbo for a while.
- There is no financial independence as certain transactions need the consent of both parties.

OUT OF COMMUNITY OF PROPERTY

The antenuptial contract is an agreement between the parties in terms of which they reach consensus on patrimonial and financial consequences regarding their marriage. The essential characteristic of the marriage out of community of property is that there is no joint estate. The parties retain their respective estates as their own property and each administers his/her own estate independently. They can, however, be joint owners of assets, for example a house, or a vehicle. The independence can be seen that they can act independently and not be liable for the debts of one another.

- An anc is necessary to enforce the out of community of property system.
- The anc system provides almost totally different estates between the spouses during the course of their marriage.
- The administration of the estates are uncomplicated.
- Both spouses are protected against creditors of the other spouse.
- The assets in the estate do not get shared.
- The parties do not share each other's creditworthiness (creditors cannot attach the assets of the other spouse).
- Each party may freely dispose of his / her assets and make a separate will.

OUT OF COMMUNITY OF PROPERTY SUBJECT TO THE ACCRUAL SYSTEM

Once the parties decide to be married out of community of property, they can also have the accrual system made applicable to their marriage. The same principals which regulate the out of community of property marriage apply, but at the dissolution of the marriage either because of death or divorce, the spouse whose estate shows a smaller accrual has a claim against the other spouse for an amount equal to half of the difference between the accrual of the respective estates of the spouses. The net initial value of a spouse's estate is to be determined, either at commencement or at the end of the marriage.

- Each party would declare their net value before entering the marriage (i.e the value of the estate after all debt and any amount due to him/her has been taken into account).
- Certain assets can be excluded i.e. any inheritance.
- Should the marriage dissolve by means of death or divorce, the net value of the estate of both parties will be assessed. This will determine whether there is a loss or growth in the estate of each party during the marriage.
- The spouse, whose estate showed no growth or little growth, will have a claim against the other spouse's estate for an amount worth 50 % of the difference between the growths.

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