

Short Notes on:

FIRST COMES LOVE, THEN COMES ... CONTRACTS?

Introduction

Wedding planning and dreaming of the future is a combination of stress, nerves, and oh so much excitement! Yet couples on their way to happily ever after often forget the weighty decisions that need to be made, such as the matrimonial property regime that they will be married under. There are three types of matrimonial property regimes that couples may choose from. Thus it is always best to seek the appropriate legal advice that will guide you in making the most informed decision for your own set of circumstances.

In or Out of Community of Property

Marriage in community of property is by default entered into where parties wed without having entered into an antenuptial contract. Spouses married in community of property thus become **one** in that their assets and liabilities both before and accrued during the marriage, become part of their joint estate. One may therefore be held liable for the debts of the other. Likewise, one may lay claim to the assets of the other by mere virtue of having been married in community of property. Widows are thus often left with a substantial amount of debt that they now need to pay off, despite not having themselves incurred the debt. Additionally, there are many instances where spousal consent is required to transact. Such examples are when making bank transactions or buying and selling both property as well as assets that belong to the joint estate.

So how can you protect your assets and safeguard your spouse from your liabilities should something unforeseen happen? The best way to do so is to opt for marriage out of community of property. When electing this regime, a further decision ***must be made regarding the inclusion or exclusion of accrual.***

A marriage out of community with accrual is entered into when parties conclude an antenuptial contract ("an ANC"). This matrimonial property regime allows spouses to enjoy the profits of the other that was accrued during the subsistence of their marriage. This enjoyment is to the extent that the specific asset is not excluded in the ANC. Liabilities of the couple is kept separate and does not accrue to the other spouse. However, it is taken into account if the parties divorce or one of the parties, unfortunately, pass away. Should parties wish to enter into this matrimonial property regime after the conclusion of their marriage, they may do so by concluding a post-nuptial contract and making an application to the court.

The matrimonial property regime that has become more common is marriage out of community of property with the exclusion of accrual. Couples opting for this system essentially keep their estates separate from the other in its entirety. Thus upon dissolution of the marriage, parties will leave with what they entered the marriage with, and what accrued to their individual estate only. The benefits

that accompany this system are significant and include aspects such as the freedom to enter into any transaction as the individual pleases, with no potential consequences for their spouse. Thus if you are sequestrated or placed under debt review, there will be no legal ramifications for your spouse.

But this system does not come without its disadvantages. Often when estranged spouses are tangled in a messy divorce, one party may claim they are entitled to the accrual as they had looked after the family home whilst the other brought in the income. It is important to note that by having opted for the exclusion of accrual, they are not entitled to the accrual. However, they may attempt to claim maintenance during the divorce settlement. Additionally, you have to think about the future and how you, as a couple, will navigate big decisions. These decisions may include purchasing your family home and setting up a safety net for your family one day. Should something happen, how will you divided these assets if for all intent and purposes your assets and liabilities have always been kept separate?

Conclusion

Navigating your way through a decision that will govern your marriage and all the effects thereof is no easy task. At Schoeman Law, we can offer our legal services from start to finish. Our experienced attorneys will be able to guide you through the various options available and help you make a decision that is best suited for both you and your future spouse. For further enquiries or to set up a consultation, contact us directly on Whatsapp on +27716870378.