

“Till
death
do us
part”



- by Romeo Kariga

Marriage is one of the most fulfilling institutions given to men by God. However, it can have seriously negative consequences for the parties involved if not handled carefully. That is why it is important to prayerfully look for a partner who can help you achieve your best self. It is also of great importance that couples choose the best marriage regime depending on their unique circumstances. This regime can have a profound effect on their lives, and thus before wedlock couples need to explore the pros and cons of the different marriage types.

There are various marriage regimes that are operational in South Africa. These are marriage in community of property, marriage out of community of property without the accrual system, and marriage out of community of property with the accrual system. The legislations applicable to marriage in South Africa are the Civil Union Act, the Matrimonial Property Act, and the Recognition of Customary Marriages Act.

For some reason, marriage in community of property is common among Christians and marriage out of community of property is shunned. Couples mistakenly think that if they marry out of community of property, it

suggests that they do not have much love for their partners. Below we discuss the pros and cons of the various marriage regimes. This will help in deciding which one best suits the circumstances of a particular couple.

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Marriage in Community of Property

Marriage in community of property means that all the things that the couple own are owned collectively by the joint estate of the husband and the wife. Thus it is a situation of “what I have is yours and what you have is mine.” Even assets and liabilities acquired before the marriage are merged into the joint estate. Marriage in community of property happens when parties do not enter into an antenuptial contract. An antenuptial contract is an agreement concluded between two persons before their wedding to regulate their union, is signed before a Notary Public, and is lodged in the Deeds Office.

In a marriage in community of property, each party has equal power to deal independently with the joint estate save for certain transactions that will require the consent of both spouses. There are certain actions that one spouse has capacity and authority to carry out in terms of the joint estate without the other spouse's consent. These include selling certain movable assets like a car, entering into a contract in the ordinary course of that spouse's business, forming a company trust, or making a donation to a third party that do not prejudice the other spouse.

There are certain transactions that require informal consent or oral consent. These include receiving money that is due to the spouse from sources such as: an inheritance, a donation or a prize; receiving remuneration, bonuses, allowances, earnings, etc; income from his/her separate property, e.g. rent money; dividends or interest investments on their income; the proceeds of an insurance policy; selling or pledging common household furniture like washing machines, etc. Written consent is required when performing certain acts like alienating or burdening assets of the joint estate; alienating, ceding or burdening insurance policies, mortgage bonds, fixed deposits, shares, stocks or any of the other spouse's investments, and

“MARRIAGE IN COMMUNITY OF PROPERTY HAPPENS WHEN PARTIES DO NOT ENTER INTO AN ANTENUPTIAL CONTRACT.”

withdrawing money from any account held in the name of the other spouse. There are certain acts that require consent of the other spouse with two witnesses required. These include: alienating immovable property, such as a house, town house or farm belonging to the joint estate; entering into a credit agreement in terms of the National

Credit Act 34 of 2005; and entering into a contract to purchase immovable property.

When a spouse enters into a transaction requiring a spouse's consent and the other spouse has not consented, the third party is favoured by the law. If the third party does not know or cannot reasonably have known that consent was not given, then the transaction is

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regarded as valid. The innocent party may be compensated when the estate is divided.

One of the most devastating consequences of a marriage in community of property is that when one party becomes insolvent and cannot pay his/her debts, both parties will be declared insolvent, because there is one joint estate. If there is a Court Order against either one of the spouses, the joint estate will be affected.

Customary Marriage

A customary marriage is regarded as a marriage in community of property. The marriage must be concluded and celebrated in accordance with Customary Law. Thus the customs of a particular tribe is instructive in determining the validity of the customary marriage. Both parties are required to consent to being married under customary law. Both parties must be above the age of 18. The parties to a customary marriage must submit their identity documents to the registering officer, to enable the correct recording of their details on the application form. Two representatives, each from one family should be available. A lobola letter can also be produced, if it is available. Once these requirements are

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This marriage regime poses little risk to the spouses as every spouse is responsible for the growth of their estates and the liabilities that accrue. In the event of insolvency, the estate of

the other spouse is not affected. The problem arises in a situation where one of the spouses supports the other when they are pursuing their economic activities like working or building a business. On dissolution of the marriage, the spouse who supported the other, will not be entitled to the other spouse's estate.

met, the marriage is registered as a customary marriage concluded in terms of Customary Law. While registration of the customary marriage offers greater protection to the spouses, the customary marriage is valid whether it is registered or not. Since a customary marriage is regarded as a marriage in community of property, its consequences are similar to the marriage in community of property.

Marriage Out Of Community Of Property Without The Accrual System

A marriage out of community of property can be subject to accrual or it can exclude any accrual. Whether an accrual system is applicable or not is recorded in the antenuptial agreement which is concluded before the marriage, and is registered in the Deeds Office. In the case of a marriage out of community of property without the accrual system, the property that was owned by a person prior to the marriage, as well as all the property that is accumulated during the marriage, belongs to that person. The same applies to liabilities (e.g. debts), i.e. a person is responsible for their debts accumulated before and during the marriage.

Marriage Out Of Community Of Property With The Accrual System

A spouse's accrual is the growth or accumulation of assets that form part of his or her estate during the marriage. This accrual is calculated as the difference between the net value of the estate at the commencement of the marriage and the net value upon the dissolution of the marriage, whether this is by divorce or death.

At the commencement of the marriage, the value of each spouse's estate is disclosed and is recorded in the antenuptial contract or a separate statement concluded and certified by a Notary Public within six months of the marriage date. If there is no statement after 6 months then the commencement value of the estate is regarded as zero. On dissolution of the marriage

each spouse's estate will be valued in order to calculate the accrual of each estate and the commencement values will be adjusted to make provision for inflation. The spouse whose estate shows a smaller increase will be entitled to receive a portion of the other spouse's estate, calculated to the percentage agreed in the antenuptial contract. If the percentage is not stipulated the default is that a 50/50 split will be implemented.

For example, when John and Jessica got married, their estates had a value of R200 000.00 each. Thus the combined value of the estates was R400 000. On dissolution of the marriage, John's estate had grown to a value of R900 000 and Jessica's estate had not grown. The growth in John's estate over Jessica's estate is R700 000. Jessica will thus be entitled to half of the R700 000, the increase in John's estate over hers, which is R350 000. The marriage out of community of property does not have the negative consequences that are attached to the marriage in community of property especially regarding liabilities. Each spouse will thus be responsible for their own liabilities.

consider marriage out of community of property with or without the accrual. This tends to protect the livelihood of the family in the event of insolvency or another spouse being reckless with money.

The marriage out of community of property with the accrual system affords benefits that are akin to the marriage in community of property but without the negative consequences e.g. in cases of insolvency. Each couple will have to decide what is suitable in their circumstances.

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On dissolution of the marriage the spouse with the estate that has a lesser value will benefit from the growth in the other spouse's estate.

In Conclusion
People involved in business can



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