

## **CUSTOMARY MARRIAGES**

A customary marriage is concluded in accordance with customary law, being the customs and usages traditionally observed among the indigenous African peoples of South Africa which form part of the culture of those peoples. A customary marriage is recognized if it complies with the provisions of the Recognition of Customary Marriages Act 120 of 1998. If it is a first marriage, it is in community of property in accordance with the applicable sections of the Matrimonial Property Act, 1984.

## **GENERAL**

### **DIVORCE**

Protection is given to a husband or wife who married before 01 November 1984 out of community of property and who may find that the other spouse has built up or maintained a larger estate with the direct or indirect contribution of the former. The court has discretion to transfer part of the assets of one spouse to the other as the court deems just.

### **DONATIONS**

A donation from one spouse to the other is not revocable.

### **CLAIMS**

Husband and wife will, in certain cases, be entitled to institute a claim against each other even if they are married in community of property, such as in the case of motor vehicle accidents.

### **HOUSEHOLD REQUIREMENTS**

Persons married according to the accrual system or who agreed on a complete separation of property, must both contribute proportionally to the necessities of the joint household. In the case of marriages contracted after 1 November 1984, where one party contributes more than his/her share, he/she will only be able to claim a refund of the excess, if this was expressly agreed to beforehand.

### **ESTATE PLANNING**

Your attorney will provide you with the necessary information.

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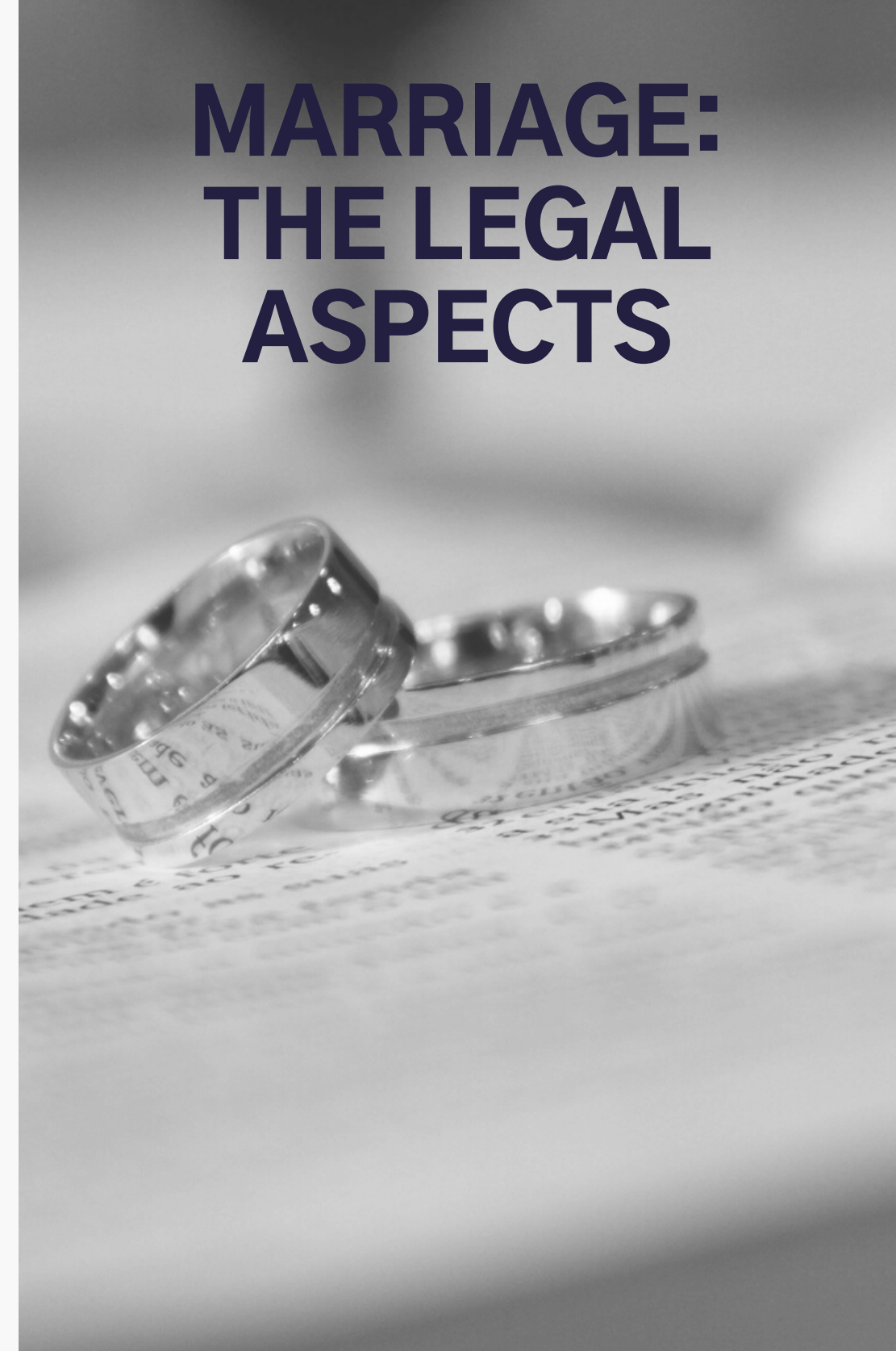
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# MARRIAGE: THE LEGAL ASPECTS



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## **THE MATRIMONIAL PROPERTY ACT 88 OF 184**

Whether you are already married or if you intend getting married soon, it is important to know that this Act has a direct effect on your assets. It is, therefore, important that you consider it carefully. This brochure is a short synopsis of the most important aspects of the Act. You are urged to consult an attorney to ensure that your interests are properly protected.

## **MARRIAGES CONTRACTED BEFORE 1 NOVEMBER 1984**

If you did not have an antenuptial contract drawn up, you are married in community of property, but you and your spouse must apply jointly to the High Court at any time to change your marriage to any form of out of community and also to have the accrual system apply to your marriage. There are, however, certain requirements first. If you are married out of community of property (an antenuptial contract was entered into) you can change to in community of property. Again an application must be made jointly to the High Court. Your attorney will inform you of the requirements. Marriages contracted after 1 November 1984. The matrimonial property system which you choose will affect your financial future and the position of your assets. You must exercise an informed choice. Your choice will determine your proprietary rights during your marriage, as well as when it is dissolved either by death or divorce.

## **WHAT ARE YOUR OPTIONS:**

- A marriage in community of property or out of community of property:
- In the case of out of community of property: with or without the accrual system.
- An antenuptial contract to suit your individual needs with or without the accrual system.

## **WHAT STEPS DO YOU FOLLOW TO LET A PARTICULAR SYSTEM APPLY TO YOUR MARRIAGE?**

In community of property applies should you marry without entering into any form of antenuptial contract before your marriage. The accrual system applies should you enter into an out of community of property marriage in terms of the antenuptial contract without expressly excluding the accrual system. The accrual system can be excluded. The accrual system may be qualified by, for example, a provision that the eventual distribution will not be on the 50/50 basis, but in another ratio; or that the accrual system will not apply if the marriage is dissolved by divorce or if one of the parties is insolvent when the marriage ceases. Any other provisions in your antenuptial contract can be made, provided that it is not contrary to the law or immoral.

## **WHICH SYSTEM IS THE BEST?**

One specific system is not necessarily the best for all couples. It all depends on the individual needs and circumstances of each couple. Consult your attorney, individually should you prefer. Do not allow your heart to rule your head.

## **MARRIAGE IN COMMUNITY OF PROPERTY**

Both spouse share equally in the assets and liabilities. Spouses have equal powers of administration and (with some exceptions) both can act independently. Written consent of both is required for certain important transactions such as those relating to fixed property, suretyship and credit agreements. Informal consent of both is required for transactions such as the selling of goods of the joint household, such as furniture. Consent is not a requirement for transactions relating to trade, business or profession of the spouses. The Act provides for protection of the spouses should one act to the prejudice of the other.

## **ADVANTAGES**

This system rests on a sound principle: namely that marriage is a partnership and as such can be conducive to a harmonious marriage relationship. It promotes both legal and economic equality of the spouses. During the marriage, and on its dissolution both partners are entitled to a half share in the joint estate and each one has equal powers of administration.

## **DISADVANTAGES**

Insolvency of one of the spouses affects the total communal property. Where a risk of insolvency exists, it is not the recommended system. The system of equal powers could, in cases where the temperament of one or both marriage partners is not collaborative, lead to conflict in the marriage.

## **MARRIAGE OUT OF COMMUNITY OF PROPERTY WITH THE ACCRUAL SYSTEM**

During the marriage each spouse retains control of his/her own property, builds up his/her own estate and each is responsible for his/her own debts. On dissolution of the marriage by death or divorce, the value of the assets obtained during the marriage (the accrual) will be shared equally. The accrual is determined by calculating the difference in the gross value of the estate of each spouse and then subtracting the starting value in the antenuptial contract as adjusted by inflation, debts, any assets excluded in

the antenuptial contract, non-patrimonial damages, inheritances, legacies and donations. On dissolution of the marriage the difference in the accruals of the two estates, as determined, is then divided equally. The Act enables each spouse to share in the accrual at dissolution of the marriage.

## **ADVANTAGE**

The accrual system is a modern, equitable system and may be conducive to a harmonious marriage relationship. During the marriage, the right of the spouses to deal with their own property is not limited in any way, provided that the one does not or will not seriously prejudice the right of the other to share in the accrual. It offers protection during the existence of the marriage against, for example, insolvency of one of the spouses and, at the same time, at dissolution of the marriage each spouse has an equal share of the accrual.

## **DISADVANTAGES**

A possible disadvantage, especially in the case of a wealthy spouse, might be that he or she feels that he or she is not quite free to deal with his or her property since the other could apply to court for the immediate division of the accrual should the former, by entering into a specific transaction, might, prejudice his or her right to share in the accrual. This may cause friction. Another disadvantage of the accrual system is that spouses do not share in each other's creditworthiness, which can have the result that a non-working spouse may have little creditworthiness during the marriage if his/her estate is small. Remember: if you do not want the accrual system to apply, it must be excluded specifically in the antenuptial contract.

## **MARRIAGE OUT OF COMMUNITY WITHOUT THE ACCRUAL SYSTEM**

You can have your attorney draft an antenuptial contract tailored to your own individual needs.

Such a contract is recommended where:

- Both parties are business people in an exceptionally high income group and where they plan not to have children and;
- The interest of children may be involved in second and further marriages.

In these cases independent legal advice for each of the parties is advisable especially for the woman, who on account of domestic obligations may be out of the labour market for a long period, to ensure that their interests are properly protected. At the dissolution of the marriage the parties have no claim whatsoever against the other party regarding the assets in their respective estates.