

How Marriage Affects the Purchase of Property

A short resume of marriages in community, ante nuptial contracts and the accrual system.

1. Introduction

It is important for couples planning to get married in the near future to pause and consider the property consequences of their marriage. The common law and legislation applicable to marriages in South Africa provide for different systems and an unwary couple may regret their lack of planning before their marriage when they find they are trapped in a system which does not suit them.

2. Marriage in Community of Property

This is the oldest system applicable to marriages derived from our common law. No ante nuptial contract is required and upon marriage the parties' estates are joined into what is called the "joint estate" in which each partner has an assets and each partner will have a claim to half the joint estate on dissolution of the marriage. The disadvantage is if one or both parties are in business and is sequestrated by his creditors, the creditors then take control of the entire joint estate and the "innocent" partner loses his/her assets as well.

3. Marriage out of Community of Property

If the partners to a marriage do not wish to be married in community of property as described above, they must sign an agreement with each other, before a notary, before the marriage, called an ante nuptial contract (anc). The result of this contract is that, after their marriage, each party retains his or her own estate and has no rights towards his/her spouse's estate ("what's yours is yours, and what's mine is mine").

3.1 Anc before 1984

This is the old type of ante nuptial contract popular before the law was changed in 1984, whereby couples were married out of community of property. Each partner retained his/her own estate which of course means full control over his/her own assets. The other obvious advantage of this system is that if one partner has a business which fails and is sequestrated, at least the other partner still has assets on which they can base their future. However, the major disadvantage of this system was that often one partner built a large estate by acquiring assets in his/her own name and the other partner did not build up anything. In divorce, this had very unfair consequences to the partner who had no assets. Remember, our law does not provide for automatic maintenance for a spouse after divorce anymore, which means a long and expensive battle in court to try to gain control of some of those assets in the other estate.

3.2 Anc with Accrual

In 1984, the matrimonial property act was passed, which introduced the accrual system. Accrual (meaning "growth") in the marriage is a system designed to remedy the inequalities of the old type of anc. Although it is still an out-of-community marriage, the accrual system provides that on dissolution of the marriage (by death or divorce) the net increase in the respective estates of the partners are notionally added up and then divided equally. Please understand that this is a mechanism available to the disadvantaged spouse - whether he/she chooses to use it is of course up to them and their divorce attorneys. The abovementioned act also excludes certain categories of assets from the operation of the accrual system (inheritances, legacies, donations, matrimonial gains) and the parties also have the right to exclude their own assets in the contract. The accrual system is fairly flexible and must be tailored to the financial needs of the couple. To summarize, the net effect of the accrual system is to place the spouse whose estate has shown the lesser accrual or growth, in a better position in which he/she would have been if married under the old type of ante nuptial contract, by giving such spouse a right to claim a share of the other spouse's larger estate.

4. Conclusion

The above is a very brief description of the property consequences of marriage. Please make an appointment with your attorney as soon as possible (do not leave it until the last moment when you have more important things on your mind, like the wedding dress or the champagne!). Your attorney will then explain the above systems more fully to you and, if you choose to enter into an ante nuptial contract, he will tailor that anc to suit your needs. In conclusion, remember that you must sign the anc before a notary before your wedding ceremony, otherwise you will be married in community of property and you will have to apply to court after the wedding to have your matrimonial property system varied, at great expense.