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FOR THE PERSONAL TOUCH | VIR PERSOONLIKE DIENS

MATRIMONIAL PROPERTY REGIMES

On the eve of the happiest day of your life, filled with last minute preparations for the big day, it is easy to forget about the legal consequences of your marriage.

It is however, essential that couples select the correct marital property regime, which will go a long way in protecting one another financially and getting a marriage off to a sound start.

MATRIMONIAL PROPERTY REGIMES

There are three types of matrimonial property regimes in South Africa, namely ***Married in Community of Property; Marriage out of Community of Property with the application of the Accrual System and Marriage out of Community of Property, with the exclusion of the Accrual system.***

These regimes are governed in terms of the Matrimonial Property Act 88 of 1984.

1. Married in Community of Property

This is the default marital regime in South Africa and does not require the registration of an antenuptial contract.

Each spouse joins their respective estates, which includes all assets and liabilities, and they are then regarded as one entity.

Upon death or divorce, the joint estate is valued and each spouse (or their estate) is entitled to an equal half share of the joint estate. Each spouse will also be equally liable should there be outstanding debts.

This option is no longer as popular as it once was, due to a number of disadvantages such as:

1. Today a number of spouses are self-employed, and this system does not protect the other spouse should the business's creditors come after the assets of the joint estate;
2. Should the marriage dissolve, each spouse will share equally in the joint estate irrespective of their actual contribution;
3. In most instances a spouse will require the other's consent should they wish to enter into certain contracts, i.e. Suretyships, Bonds etc

2. Married Out of Community of Property WITHOUT the application of the Accrual System

For all intent and purposes, the estates of both spouses are kept entirely separate before, during and after the marriage. "What's mine is mine and what's yours is yours".

The parties retain their separate estate and can freely enter into contracts without the need for consent from their spouse. On dissolution of the marriage, there will be no division of assets based on the matrimonial regime as there is no joint estate.

This system is typically popular amongst spouses who have been married previously, who are both financially independent or have acquired substantial assets prior to the marriage.

3. Married Out of Community of Property WITH the application of the Accrual System

This system is by far the most popular amongst young couples today. It combines the protection of an out of community marriage with the notion of sharing and rewarding each spouse equally for their advancements throughout the duration of the marriage.

Each spouse's estate is given a value at the commencement of the marriage. Upon death or divorce, each spouse's estate is again valued. The difference between these two amounts represents the growth (or reduction) in each spouse's estate during the marriage.

The difference between the two growths constitutes the ACCRUAL. The spouse with the smaller growth will have a claim against the other spouse for half this difference.

Take the following scenario as an example:

John starts the marriage with a commencement value of nil, as does Anne. After 3 years they decide to part ways.

Anne had a very successful business during the marriage and her estate is now valued at R 500 000. John stayed at home to cook and clean and his estate remained at nil.

Anne's growth is R500 000 and Peter's is nil. The difference between the two is R 500 000. This amount constitutes the accrual.

Upon their divorce, the court will award John R 250 000 and Anne will be left with R 250 000. EQUAL SHARES IN WHAT THEY ACCUMULATED TOGETHER DURING THE MARRIAGE.

THE REGISTRATION OF AN ANTENUPTIAL CONTRACT

Should a couple wish to get married Out of Community of Property with or without the Application of the Accrual System, an Antenuptial Contract must be entered into by the parties prior to their marriage.

The Antenuptial Contract is drafted by an attorney and attested by a Notary Public and then registered in the Deeds Office.