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## VARIETY OF MATRIMONIAL REGIMES IN SOUTH AFRICA

In a diverse society like our own, unlike homogenous societies like Japan or South Korea, there are various potential matrimonial regimes you can encounter

### 1. Married in community of property

While marriage exists, parties in respect of the joint estate cannot:

- 1.1 perform any juristic act without the **consent** of the other spouse;
- 1.2 sell in terms of an agreement, or sign a mortgage loan agreement without the **written consent** of the other spouse (can be ratified except where the consent is required to be lodged in the deeds office);
- 1.3 give transfer or mortgage property in the deeds office without **prior written consent** of the other spouse.

As section 15 of the MPA does not specifically deal with the acquisition of immovable property, which will enrich the joint estate, the general rule will apply in that the juristic act of purchasing cannot be performed without the consent of the spouse. Because the ALA determines that the sale of land and must be recorded in writing and signed by the parties thereto, it follows that the consent of the spouse to the sale will by necessity also need to be in writing.

### 2. Married out of community of property

Parties have independent contractual capacity.

### 3. Married, which marriage is governed by the laws of a foreign country

The deeds registries act provides that:

A person married in terms of the law of any other country, shall be assisted by his or her spouse in executing any deed or other document required or permitted to be registered in any deeds registry or required or permitted to be produced in connection with any such deed or document, unless the assistance of the spouse is deemed by the registrar to be unnecessary

As a seller – “.....duly assisted herein my my spouse....as far as needs be”;

As a mortgagor – “..... duly assisted herein my my spouse....as far as needs be”;

As purchaser – no requirement for assistance;

### 4. Married according to Muslim rites

The Marriage Act 25 of 1961 was amended to provide for the legalization of marriages concluded in line with Sharia law (Muslim law) provided the Imam who officiate over the marriage was appointed a

marriage officer in terms of our Marriage Act after passing the requisite examination on the Marriage Act.

On 30 April 2014, one hundred Imams were officially appointed as marriage officers in terms of the Marriage Act

In addition it should be noted that such a marriage officer may not marry any person who is already a party in another (Muslim) marriage, even where that marriage is not registered as intended in the amendments as yet.

In line with the Recognition of Customary Marriages Act, where the basis of not recognizing polygamous marriages fell away, there is further pressure being brought to bear on our courts to give full recognition to Muslim marriages entered into before the amendment of the Marriage Act and by Imams who were not appointed marriage officers, with a class action expecting to commence in the Western Cape High Court on 28 August 2017.

## **5. Married according to Hindu rites**

Currently as our law stands, if a couple wish to marry according to Hindu rites, their marriage will not be legally recognized, unless the couple also enters into a legal and binding civil marriage before a marriage officer. Furthermore, if the couple do wish to legitimise their marriage by entering into a civil marriage, should they wish to be married out of community of property, they will need to prior to the civil marriage sign and execute an Ante Nuptial Contract and ensure that same is registered within 3 months of its execution.

## **6. Married according to customary law and the Recognition of Customary Marriages Act**

Customary marriage is defined as a marriage concluded in accordance with customary law, while customary law is defined as the customs and usages traditionally observed amongst the indigenous African people of South Africa and which forms part of the culture of those people

6.1 Customary marriages contracted before 15 November 2000 resulted in recognized marriages provided the marriage was validly concluded in terms of customary law (this includes more than one validly concluded customary marriage and as such legal recognition is given to polygamous marriages).

The proprietary consequences continue to be governed by the customary law but spouses have equal status and capacity in customary marriages and spouses can therefore sell and purchase property in their own name.

## **7. Customary marriages contracted after 15 November 2000 resulted in recognized marriages provided the marriage complies with the requirements laid down by the RCMA, such as:**

7.1 consensus to get married in accordance with customary law

7.2 both 18 years of age or if either a minor parents/legal guardian must consent

7.3 marriage must be negotiated and entered into in accordance with customary law

The proprietary consequences where a spouse is not a partner in any other existing customary marriage, is a marriage in community of property, unless the consequences are specifically excluded by the spouses in an ante nuptial contract.

If husband wishes to enter into further customary marriage he must apply to court to approve a written contract which will regulate the future matrimonial property system of his marriages.

The legislative distinction drawn in terms of the Recognition of Customary Marriages Act (RCMA) between customary marriages entered into before and after 15 November 2000 came under attack when the Constitutional Court ruled that the distinction was inconsistent with our constitution and consequently invalid insofar as the husband as head of the household and owner of all family property results in unfair treatment, inequality and discrimination against a woman in such a marriage.

#### **8. Civil Union in terms of the Civil Union Act**

If an ANC was entered into before the registration of the Civil Union with the Department of Home Affairs it will be a Civil Union out of community of property, otherwise it will automatically be in community of property.

#### **9. Partners in terms of a registered partnership**

If the partnership is registered with the Department of Home Affairs, it will be automatically out of community of property unless the partners make the partnership in community of property.

#### **10. Common law spouse?**

No recognition is granted in SA law to the existence of a de facto common law partnership. This means that no amount of time spent living with another person will convert a cohabitation relationship into a marriage.