

THE MATRIMONIAL PROPERTY SYSTEMS



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INTRODUCTION

Matrimonial property regimes

It is extremely important that both parties wishing to marry understand the implications of the type of matrimonial property regime they are about to enter into. Unfortunately, couples focus so much on the marriage ceremony itself that they completely forget the implications of neglecting to make an informed decision regarding the marriage regime, in the unlikely event that they do divorce.

In accordance with the Matrimonial Property Act 88 of 1984, which came into operation on 1 November 1984, there are three forms of matrimonial property regimes in South Africa, namely:

1. Marriages in community of property
2. Marriages out of community of property without accrual
3. Marriages out of community of property with accrual

MARRIAGES IN COMMUNITY OF PROPERTY

Marriage in community of property is undoubtedly the cheapest and most popular form of all the matrimonial regimes, although deeply flawed. No antenuptial contract is required, so if you marry without an antenuptial contract, you will by default be married in community of property. In this form of marriage, the spouses' estates (what they own/assets and any debt/liabilities) are joined together and each has the right of disposal over the assets; they are equal concurrent managers of the joint estate. Each has an undivided or indivisible half share of the joint or communal estate.

Assets

All assets belonging to the spouses prior to getting married and all assets that they may accumulate during their marriage will fall into the joint or communal estate. There are a few exceptions, where certain assets may not be included in the joint estate. For example, if a will stipulates that an inheritance should not form part of the joint estate, then that inheritance cannot become part of the joint estate.

Liabilities

All liabilities incurred by both spouses prior to and during the marriage are considered liabilities of the communal estate. So, if one spouse comes into the marriage with a lot of debt, his/her debt will then form part of the communal estate. Such debt may include contractual debt, maintenance payable to an ex-spouse from a previous marriage and even maintenance payable to extramarital children.

Each spouse has the capacity to bind the joint estate through their actions. For example, if a spouse has his/her own business and applies for an overdraft, and the business fails to pay the overdraft, a claim can be made against the joint estate. However, there are circumstances where a spouse must first obtain the consent of the other spouse before he/she can bind the communal estate. Where a spouse binds his/her separate estate, such as a car or business in his/her name, through a debt, the creditor can lay claim against the private estate of that spouse. If that spouse's private estate has insufficient assets to satisfy the creditor's claim, only then can the creditor lay claim against the communal estate.

Insolvency

One of the most devastating consequences of a marriage in community of property is that when one spouse becomes insolvent (cannot pay his/her debts), both spouses will be declared insolvent, because there is one communal estate. If there is a court order against either one of the spouses, the communal estate can be lost.

Managing the joint estate

Each spouse has equal management of the joint estate; however, the consent of the other spouse is needed for certain transactions. Although you have to acquire the consent of the other spouse to alienate joint assets of the estate, written consent is only required in certain instances.

Examples of instances where no consent from the other spouse is needed, i.e. where one spouse may act independently, to perform acts binding on the joint estate, include:

- making deposits at a banking institution;
- making donations to third parties that do not prejudice the other spouse;
- forming a company or trust;
- entering into a transaction on the stock exchange;
- entering into a contract in the ordinary course of his/her business;
- selling certain movable assets, such as a car; and
- performing transactions in the course of his/her business, trade or profession.

The Matrimonial Property Act categorises acts where a spouse needs the consent of the other spouse to enter into a valid transaction under the following types of consent:

Informal consent

In certain instances, only informal consent from the other spouse is required. In these instances, oral consent is sufficient. The following types of transactions fall into this category:

- receiving money that is due to the other spouse, from sources such as:
 - an inheritance, donation or prize;
 - remuneration, bonuses, allowances, earnings, a pension, a gratitude for services rendered or by virtue of their profession, trade or business, or damages awarded for the loss of income from any of the aforementioned sources;
 - income from his/her separate property, for example rent money earned from renting an immovable property;
 - dividends or interest on investments in their name; and
 - the proceeds of an insurance policy;
 - the alienation or burdening (i.e. selling and pledging) of common household furniture, such as washing machines, stoves, bicycles or pets; and
 - donating from the joint estate where the donation unreasonably prejudices the interests of the other spouse, such as donating furniture from the common household.

Written consent

The following acts may only be performed with the written consent of the other spouse:

- alienating or burdening assets of the joint estate, kept mainly for investment purposes, such as stamps, works of art, jewelry or coins;
- alienating, ceding or burdening insurance policies, mortgage bonds, fixed deposits, shares, stocks or any of the other spouse's investments at any financial institution; and
- withdrawing money from any account held in the name of the other spouse.

Written consent with two witnesses

The following acts may only be performed with the written consent of the other spouse, signed by two witnesses:

- alienating immovable property, such as a house, townhouse or farm, belonging to the joint estate;
- entering a credit agreement in terms of the National Credit Act 34 of 2005; and
- entering into a contract to purchase immovable property.

Prior written consent with two witnesses

In some instances, a spouse must give his/her consent prior to the transaction. It cannot be ratified later. The following acts may only be performed with the prior written consent of the other spouse, signed by two witnesses:

- entering into a contract of surety, where one spouse binds the communal estate as a surety for debt of a third party; and
- the actual alienation or burdening of immovable property belonging to the communal estate or the actual granting of the rights (selling or giving a third party a share in the property) over such immovable property.

When a spouse enters into a transaction requiring consent without the consent of the other spouse, our law favours the rights of the third party with whom the spouse contracted. If the third party doesn't know or can't reasonably have known that consent wasn't given, then the transaction is valid. The innocent spouse is, however, given some protection. When the communal estate is divided at the end of the marriage, the court will make an

Advantages of marriage in community of property

- You don't have to enter into a special contract before being able to get married.
- When you are the financially weaker spouse, you get to share in the assets of your spouse.

Disadvantages of marriage in community of property

- When you are the economically stronger spouse, you have to share your assets with your spouse.
- You are jointly liable for each other's debts. This is particularly problematic on insolvency.
- The joint administration of the estate is rather complicated.
- When a marriage starts to fail, it can become difficult to obtain joint consent.

Suing for damages

Spouses married in community of property cannot sue each other for damages. It would be pointless as money taken from the joint estate to pay the one spouse will simply fall back into the joint estate.

There is an exemption to this rule. A spouse can sue the other for non-financial loss arising out of bodily injuries caused by the other spouse.

For example, if the wife is a passenger in a car driven by her husband, and because of his negligent driving they are involved in a car accident, she can sue him for her pain and suffering because it is a non-financial loss. She can't sue him for her medical expenses, since they are considered a financial loss. Damages that she recovers in respect of the non-financial loss (damages paid to her for pain and suffering) will fall into her own estate, outside the joint estate.

The consequences of divorce when married in community of property

Upon divorce, the assets of the joint estate as at the date of divorce will be divided equally between the parties, unless a spouse claims forfeiture and the court grants such a forfeiture order. A forfeiture order cannot be granted automatically and must be specifically requested in the summons.

Prior to the introduction of the Divorce Act, a forfeiture order was based on the principle that no one ought to benefit financially from a marriage that he/she wrecked. Under our current Divorce Act, conduct of the parties is but one of the factors that a court will consider when deciding to grant a forfeiture order. Our courts have moved away from singling out fault or conduct as the main reason for a forfeiture order. In terms of the Act, the court has discretion when granting a divorce on grounds of irretrievable breakdown for a marriage in community of property to order that the patrimonial benefits of one party be forfeited in favour of the other. A gift received during the marriage does not fall within the assets that a party can forfeit and a spouse cannot forfeit assets that he/she brought into the joint estate. Forfeiture may be either wholly or partially in favour of a party.

In order to determine whether to grant a forfeiture order, the court will take into account:

- the duration of the marriage;
- the circumstances leading up to the breakdown; and
- if applicable, any substantial misconduct by one or both of the parties.

The court's discretion is restricted to the above criteria alone and no other factor may be taken into account when determining whether or not to grant a forfeiture order. In a reported judgment, the court granted a forfeiture order in favour of a husband where the parties had been married for 22 years and the wife had been away from the matrimonial home overnight on 73 evenings and had been intimate with other men.

A classic example of when a court may decide to grant a forfeiture order is when an 80-year-old man with an estate of R10 million marries a 20-year-old woman with an estate of zero who he met online, and it emerges after a month or two that she is a kleptomaniac who abused him physically before filing for divorce to gain half of his estate. In these circumstances, a court may find that the woman will unduly benefit if she receives half of his estate and may well grant a forfeiture in favour of the husband, based on the length of the marriage, the circumstances that lead to the breakdown, and the misconduct.

When spouses are married in community of property, their assets are tied up in the joint estate and, when a court grants a decree of divorce, the assets must be divided. Where the spouses agree on a division of the joint estate, a settlement agreement may be drafted to be incorporated in the decree of divorce and made an order of the court. Where spouses do not reach an agreement on how to divide their joint estate (as often happens), the court has the power to appoint a receiver or liquidator to realise and divide the assets of the joint estate on its behalf.

In exercising its discretion to appoint a liquidator, the court will look at various factors such as the size, nature and value of the joint estate. The liquidator's fees are then paid from the joint estate.

There is always a risk that one spouse in a marriage in community of property may jeopardise the other spouse's interest in the joint estate pending divorce. Our law protects the one spouse against the reckless or intentional behaviour of the other spouse during divorce proceedings. An example would be where a spouse sells a car worth R300 000 for R50 000 without the consent of the other spouse. Such a transaction will be to the detriment of the communal estate. In such a case, upon division of the joint estate at divorce, the so-called innocent spouse will have a claim for half the damages, i.e. R125 000, sustained by the joint estate and the court will normally make an adjustment when the estate is divided.

Where one spouse is acting in a negligent or reckless manner and alienates assets of the joint estate pending divorce, the other spouse may lodge an application to the court to suspend his/her spouse's capacity over the joint estate. When the court grants such an order, the spouse who brought the application may then control the estate without the other's consent.

MARRIAGES OUT OF COMMUNITY OF PROPERTY

This matrimonial property regime involves an antenuptial contract (i.e. an agreement entered into before the marriage) where community of property and profit and loss are excluded. There is no joining of the spouses' estates into one joint estate. Each spouse has his/her own separate estate, consisting of his/her premarital assets and debts, and all the assets and debts he/she acquires during the marriage. They each administer their own separate estates and have full and exclusive control over their own property. By marrying out of community of property, the spouses choose to keep their estates separate and whatever assets and liabilities they individually had before the date of marriage will remain part of their separate estates. The spouses can, however, agree to include the accrual between them so that both spouses will share equally in the growth during the marriage of each other's separate estates.

A marriage out of community of property is achieved by drawing up an antenuptial contract (ANC). The ANC will be the most important contract that a married couple will sign in their lifetime. Entered into before marriage, the purpose of the contract is to change some or all of the automatic financial consequences of marriage. The ANC allows the husband and wife to tailor-make their very own matrimonial property regime. They can include any provisions they like in their ANC, as long as the provisions are not against the law, good morals or the nature of marriage. ANC's are problematic to change as they dictate the financial and proprietary consequences of the couple's future and can affect the rights of the couple's creditors.

Couples may enter into one of two types of ANC:

- an ANC that excludes community of property, community of profit and loss, and the accrual system; or
- an ANC that excludes community of property and community of profit and loss, but includes the accrual system.

The 'accrual' is the extent to which the husband and wife have become richer by the end of the marriage, in other words, the amount by which the spouses' joint wealth has increased over the period of the marriage. When married according to the accrual system, each spouse acquires a certain right to the other's property on divorce. Neither system is superior to the other. The marital property regime chosen (i.e. with or without accrual) must suit the couple's relationship dynamic and specific needs. Note that the ANC is a normal contract, so all the rules as to fraud, duress and mistake apply.

Registration of the ANC

Only an attorney who is a notary public may execute an ANC. It is important that both parties consult with the notary public beforehand and request an explanation of the various marital regimes, and the implications of each on divorce. It is important to properly understand the implications. In fact, it is desirable that the parties obtain independent and separate legal advice before committing to the terms of an ANC.

Once the ANC has been drafted, both parties and the notary public must sign it in duplicate prior to the marriage. The ANC will then be forwarded to the deeds office in the area where the parties reside to be registered. Registration must be affected within three months of the date it was signed by the notary public. Apart from the usual fees, a prescribed fee is payable to the deeds office upon registration of the contract.

In the event that the ANC is not signed or registered timeously, the couple can approach the High Court in terms of the Deeds Registries Act 47 of 1937 by means of a joint application to grant condonation for the late signing and/or registration of the ANC after the conclusion of the marriage. The application must be made within a reasonable time after it was discovered that the contract was not properly registered. Notice must also be given to the registrar of deeds of the applicants' intention to bring such an application.

MARRIAGES OUT OF COMMUNITY OF PROPERTY WITHOUT ACCRUAL

In this system, when couples marry each spouse keeps a separate estate and whatever assets and liabilities they individually had before the marriage form part of their separate estates. Furthermore, assets and liabilities acquired by each during the marriage also fall within their separate estates. This system gives each spouse absolute independence of contractual capacity and protects each spouse's estate against claims by the other spouse's creditors.

A marriage is out of community of property if it falls within one of the following categories:

- the parties entered into a valid ANC prior to their marriage that excludes community of property;
- the parties changed their marital regime by way of a court application from in community of property to out of community of property;
- the parties are black South Africans who married prior to 2 December 1988 without entering into an ANC; or
- the legal system of the country in which the husband was domiciled at the time of the marriage dictates that the parties will be married out of community of property.

Before 1 November 1984

Marriages out of community of property concluded before 1 November 1984 are based on the principle that each spouse has his/her own separate estate. Prior to 1984, spouses either entered into in community of property or out of community of property marriages. The accrual system only came into operation on 1 November 1984.

The consequences of divorce when married out of community of property before 1 November 1984

A 'redistribution of assets' section was introduced in the Divorce Act to assist spouses who married out of community of property prior to the enactment of the Matrimonial Property Act 88 of 1984. Although this section may only apply to a relatively small number of marriages, it is important to a particularly vulnerable class of women, namely older women who are less likely to find employment upon divorce and who do not qualify for either child-support grants (as their children would be older) or state pensions.

This reforming and remedial measure applies to marriages out of community of property entered into between whites, coloureds and Asians before 1 November 1984, and to black people married out of community of property in terms of the old Black Administration Act 38 of 1927, prior to the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. It was introduced to redress the financial imbalance invariably suffered by the wife on termination of the marriage by divorce.

In the absence of a divorce settlement agreement between the spouses, they retain their own separate estates and there is no sharing of assets on divorce, unless the court granting the decree of divorce orders a redistribution of assets between the parties in terms of Section 7(3) of the Divorce Act. A pension interest forms part of the spouse's estate and will form part of the assets if redistribution is ordered. The parties may also agree to share the pension interest.

The court will not grant a redistribution order unless it is satisfied that it is equitable and just to do so. Apart from contributions made by the party concerned, the court will also take into account, among other things, the existing means and obligations of both parties. The Act sets out two requirements that must be met if the court is to consider granting a redistribution order:

- the spouse seeking the order must have contributed directly or indirectly to the maintenance or the increase of the other spouse's estate during the marriage; and
- the court must be satisfied that by reason of such a contribution, it would be equitable and just to make a redistribution order.

Although the law allows either spouse to apply for a redistribution order, in practice this section has largely been used by women. In past cases, the courts have:

- specifically considered the historical gender imbalance that made it more difficult for women to access the labour market;
- acknowledged that wives' household duties should not be viewed as of less value than the employment duties of the husband;
- noted that the Act is sufficiently worded to cover any contribution a spouse makes, including the ordinary duties of a wife; and
- found that it is not always necessary for an applicant to show which assets he/she contributed to, but merely to prove that a contribution was made to the other spouse's estate.

The court is thus enjoined to apply discretion, justice and equity in coming to the assistance of the financially disadvantaged spouse.

The consequences of divorce when married out of community of property without the accrual after 1 November 1984

In a marriage out of community of property without the accrual contracted after 1 November 1984, there can be no claim for a transfer of assets. The argument is that there are now three matrimonial property regimes to choose from, and if the parties willingly decided to marry out of community of property and without the accrual system, one of the parties cannot later request a redistribution of assets. In such a regime, upon divorce, each party will retain their separate estates, i.e. what they had upon marriage and including all growth to the separate estate that occurred during the marriage, minus any losses that may have been sustained. For example, if the husband came into the marriage with R10 000, he would leave with R10 000 + profits - losses.

A spouse who contributed to the other spouse's estate, whether in cash or otherwise, will have a difficult time proving that he/she is entitled to anything from their ex's estate on divorce as contributions play no role if the parties are married without the accrual. If, for example, the wife stays home to raise the children and does not contribute financially towards the marriage and the other spouse works and accumulates assets, the wife may find herself with nothing and no claim to her husband's assets.

It is not uncommon in marriages out of community of property for the parties to jointly own property. No joint holder can be forced against his/her will to retain his/her undivided half share in a property. If the parties cannot agree amicably on how to terminate their joint ownership, either of them may apply to a court for a directive as to how the joint ownership is to be terminated and may apply for the appointment of a receiver who will dispose of the property and distribute the proceeds among the parties.

Sometimes spouses advance each other money from time to time. Such transactions can be regarded as pure money-lending with the result that a spouse can institute a claim against the other for repayment of such a loan as part of the divorce proceedings.

Insolvency

Spouses who are married out of community of property have separate estates and are not liable for each other's debts. Assets that will be excluded from insolvency are assets that belonged to the solvent spouse before the marriage, assets given to the solvent spouse by his/her spouse in the ANC, assets acquired by the solvent spouse during the marriage from his/her own income or from a person other his/her spouse, and certain insurance policies.

Advantages of marriage out of community of property without the accrual

- Each spouse keeps his/her own assets and is free to deal with his/her own estate as he/she likes.
- Spouses are generally not liable for each other's debts. Thus, if one spouse becomes insolvent, creditors cannot touch the assets of the other spouse.
- The financially stronger spouse does not have to share his/her estate with the weaker spouse. This is subject to judicial discretion and forfeiture of benefits.

Disadvantages of marriage out of community of property without the accrual

- The economically weaker spouse, traditionally the woman, does not get to share in the estate of the stronger spouse, even though she may have indirectly contributed to the estate by running the household and looking after the children. This is subject to judicial discretion and forfeiture of benefits.
- An ANC has to be entered into in order to marry out of community of property. This costs money, and the parties must pay the fees of a notary and costs of registration.

MARRIAGES OUT OF COMMUNITY OF PROPERTY WITH ACCRUAL

After 1984, anyone entering into an ANC that excludes community of property and community of profit and loss is automatically married under the accrual system. Spouses may, however, exclude the accrual system in their ANC, but if they do not do so expressly, the accrual applies. When the accrual is included, a spouse will be entitled to share in the growth of the two estates at divorce.

This is surely the most appropriate and ideal way to marry. All the assets that each party owns prior to the marriage can either be excluded or included in the accrual. If no assets are excluded in the ANC, the value of each party's estate at the commencement of the marriage is deemed to be nil.

The consequences of divorce when married out of community of property with the accrual

Accrual is a way to ensure that both spouses in a marriage gain a fair share of the estate once the marriage comes to an end. The accrual system does not apply automatically to all marriages out of community of property. For the accrual system to apply, the ANC must be drafted in a certain way. The accrual system incorporates a calculation that is applied when the marriage is dissolved by divorce. The spouses will share the assets during the course of their marriage based on a particular calculation when the marriage is terminated.

The term 'accrual' is used to denote the net increase in value of a spouse's estate since the date of marriage. In other words, what was yours before the marriage remains yours, and what you have earned during the marriage belongs to both of you. Because the right to share in accrual is exercisable only upon dissolution of the marriage, such a right is not transferable and cannot be attached by creditors during the subsistence of the marriage.

The following assets are not taken into account when determining the accrual (are not included in the net value of the estate):

- 1 Any asset excluded from the accrual system under the ANC, as well as any other asset that the spouse acquired by virtue of his/her possession or former possession of such asset.
- 2 Any inheritance, legacy, trust or donation received by a spouse during the marriage from any third party, as well as any other asset that the spouse has acquired by virtue of his/her possession or former possession of the inheritance, legacy, trust or donation, unless the spouses have agreed otherwise in their ANC or the testator/trix or donor has stipulated otherwise.
- 3 Any donation between the spouses.
- 4 Any amount that accrued to a spouse by way of damages (e.g. slander), other than damages for patrimonial loss or the proceeds of an insurance policy in respect of a dread disease.

The mere fact that the assets of a trust are vested in the trustee does not per se exclude them from consideration when determining what must be taken into account when making a redistribution order or considering an accrual claim. Where a spouse has transferred assets in his/her name into a trust, in order for the court to take such assets into account, there must be evidence first that the party in question controlled the trust, and second that, but for the trust, he/she would have acquired and owned the assets in his/her own name.

Commencement values and accruals

Where parties wish to enter into an ANC with the accrual system, they must make sure that the commencement values of their respective estates (i.e. how much their estates are worth at the time of marriage) have been verified and accepted by both parties. It often happens in divorce matters that one party will allege that the other's commencement value was inflated or completely inaccurate.

Upon the dissolution of the marriage by divorce, the net estate value (assets less liabilities less excluded assets and/or commencement values) of each estate is determined separately. The larger estate must then transfer half of the difference to the smaller estate. Putting it another way, the smaller estate must claim for an amount equal to half of the difference between the accruals of the respective estates. The right to share in the accrual only commences upon dissolution of the marriage by divorce.

The commencement value to be subtracted from the current value of the estate must be adjusted with the consumer price index (CPI) to make provision for any change in the value of money. To calculate the adjustment, go to www.statssa.gov.za and click on 'Historical CPI' and then on 'Key indicators'. The factor by which the commencement value must be multiplied to get to the adapted value is calculated by dividing the value for the month of the dissolution of the marriage by the value for the month in which the parties were married.

For example:

Mr and Mrs Cruise were married in May 1990, and divorced in March 2012. In May 1990, Mr Cruise had a commencement value of R10 000. According to the CPI table:

May 1990 = 26.1

March 2012 = 120.9

Thus: $120.9 \div 26.1 = 4.6321$

$R10\ 000 \times 4.6321 = R46\ 321$ (adapted value)

This adapted commencement value will be deducted from Mr Cruise's assets.

Determine the each estate's accrual as follows:

1. Draft a list of all the assets, such as immovable property, furniture, vehicles, pension interest, annuities, policies, investments, bank accounts and interests such as shares and loan accounts in companies/partnerships/trusts or any other form of business, etc. obtained during the marriage at the present day values.
2. Deduct the assets that were excluded in the ANC, as well as any other assets acquired by virtue of the possession, or former possession, of the excluded assets.
3. Deduct inheritances, legacies or donations, as well as any other asset acquired by virtue of the possession, or former possession, of the inheritances, legacies or donations.
4. Deduct any debts and liabilities.
5. Deduct the commencement value, as stated in the ANC and adjusted by CPI.
6. The net result will be the accrual in the estate.

The initial value of a spouse's estate must be declared either in the ANC or a separate statement made not later than six months after the marriage, failing which the initial value will be deemed to be nil.

Forfeiture

The possibility of a forfeiture of patrimonial benefits discussed on page 00 is also applicable to marriages out of community of property with the accrual. The test is whether one of the spouses will unduly benefit if he/she shares in the accrual or the right to claim a donation that was agreed upon in an ANC.

Advantages of marriage out of community of property with the accrual

- The spouses share the increase in their assets accumulated during the marriage and the economically weaker spouse benefits.
- The spouses do not share their assets acquired before their marriage (but only if excluded in the ANC or included in the commencement values of the parties' estates). The accrual system appeals to people who are already wealthy at the time of marriage.
- During the course of the marriage, each spouse manages his/her estate at will. There is no complex joint or equal administration.
- The spouses are not liable for each other's debts. All that they share is their net assets. Thus, if one spouse becomes insolvent, the other spouse is protected against creditors.

Disadvantages of marriage out of community of property with the accrual

- The economically stronger spouse has to share the profits that he/she made during the marriage.
- One has to enter into an ANC in order for the accrual system to apply.
- The calculation of accrual at the end of the marriage can be a bit complex.

Changing matrimonial property regimes

The Matrimonial Property Act provides that a husband and wife may apply jointly to the High Court for leave to amend their matrimonial property regime if the following requirements are met:

- There must be sound reasons for the proposed change.
- Notice of the intention to change must be given to the Registrar of Deeds, must be published in the Government Gazette and two local newspapers at least two weeks prior to the date on which the application will be heard, and must be given by certified post to all known creditors. The draft notarial contract, which the parties propose to register, must also be annexed to their application.
- No other person will be prejudiced by the proposed change.
- The rights of creditors must be preserved in the proposed contract.
- The application must contain sufficient information about the parties' assets and liabilities to enable the court to ascertain whether or not there are sound reasons for the proposed change and whether or not any particular person will be prejudiced by the change.

When the court is satisfied that the requirements have been met, it will order that the existing matrimonial property regime no longer applies to the marriage and authorise the couple to enter into an ANC by which their future matrimonial property regime will be regulated. Note that such an application is expensive.

Division of assets at divorce of foreign marriages

The proprietary consequences of a marriage are governed by the *lex domicilii matrimonii*, the laws of the country where the husband was domiciled when the marriage was concluded, even if the husband subsequently acquires a new domicile. If, for example, the husband was domiciled in England at the time of the marriage and no ANC was entered into in South Africa, the marriage will be out of community of property in terms of English law, which is the English law default position. Should the parties later immigrate to South Africa, the marriage will remain out of community of property. Thus, in a contested divorce, a South African court will be obliged to apply English law in respect of the patrimonial consequences of the divorce, which is similar to our redistribution laws for out of community of property marriages entered into prior to 1984. Aspects surrounding the children like maintenance, care and contact will be dealt with in terms of South African law as will all questions of spousal maintenance.