

HOW ON EARTH DID I GET MARRIED? KNOW YOUR MARITAL POSITION.

It is usually long after the ring of the wedding bells has faded that couples are required to consider the property regime under which they are married. This may arise when they look to buy property, borrow money or sadly - on death or divorce. Many couples do not know how they are married nor do they appreciate the consequences.

The law in Botswana was clarified by the Court of Appeal in August 2013 when the Judge President set out the three possible regimes for couples domiciled in Botswana. First, is marriage in community of property, profit and loss. This was the default regime for marriages prior to 1st January 1971, and could, up to that date, be varied by Ante Nuptial Contract (ANC). The second is the customary law regime, which is available to tribes people. The third is marriage out of community of property which is, since that date, the default regime for non-tribesmen.

The registration of an ANC allows couples to set their own terms and conditions on assets and liabilities and may provide for a hybrid of the “in” and “out” regimes and for accrual post marriage.

WHAT DO THE VARIOUS REGIMES MEAN?

A marriage in community of property means that upon marriage the spouses put all they have in one pot. Everything acquired by either spouse after marriage also goes into that pot. It is important to note that both assets and liabilities go into the pot. On termination of the marriage, by death or divorce, the assets and liabilities are divided equally.

A marriage out of community means that each spouse keeps what he or she owned or owed before the marriage. Post marriage assets and liabilities accrue to each spouse separately unless they are jointly acquired.

Most customary marriages are out of community.

DOMICILE

Unless a couple has a registered ANC the property regime governing the marriage depends on the husband's domicile at the time of marriage. This principle prevails in most jurisdictions. Domicile is where the husband, at the time of marriage, considered home and where he intended, at that time, to remain permanently. Where the marriage is celebrated is of no consequence. So, for example a man of South African nationality moves to Botswana, falls in love with the country and decides “*This is where I want to be for the rest of my life.*” He then falls in love with a woman. They marry in South Africa because that is where most of their relatives are. That couple, because of the husband's domicile at the time of the marriage, would be married in terms of Botswana law and so out of community of property. If the husband subsequently changes his mindset and chooses to revert to his South African domicile, that would not impact on the regime.

YOUR CONTRIBUTION TO YOUR SPOUSE'S ASSETS

If you are married out of community but have contributed to your spouse's assets all is not lost. You may claim your contribution but must prove it if there is a dispute. For example, if you are married “out” and one of you has a business to which the other has contributed money, labour or expertise you may be eligible to claim an “Economic Partnership” in terms of which you may be entitled to make a claim.

I WANT TO CHANGE MY REGIME

Since 2014 it has become possible to change your property regime under the revised Married Persons Property Act. You must show good reason and be in good faith especially as regards your creditors.

YOUR “TO DO LIST”

If you are planning on getting married talk to your attorney so that you fully understand the impact of your chosen regime.

If you are already married, check with your attorney so that you understand your position.

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