

MARRIAGE AND MONEY

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COX YEATS
Attorneys
Durban

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COX YEATS
for its clients and staff

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MATRIMONIAL PROPERTY SYSTEMS

1. Marriages in Community of Property

If prospective marriage partners do not execute an antenuptial contract, their marriage will be in community of property. The assets which a husband and his wife bring into the marriage are pooled and jointly owned in equal shares. Similarly, with certain minor exceptions¹, all additional assets acquired during the marriage and any losses suffered during the marriage are shared jointly.

A husband and wife have equal rights to deal with their joint assets, save that a number of specified transactions² cannot be concluded without the consent of both husband and wife. Neither spouse may sign a deed of suretyship without the written consent of the other.

If one of the marriage partners in a community marriage gets into financial difficulties, his or her creditors can look to the assets of the joint estate for the satisfaction of their claims.

Upon the death of the first dying of spouses married in community of property, the joint estate is divided into two equal parts. The survivor takes his or her share and the deceased's half share falls to be dealt with in terms of his or her Will, or if there is no Will, in terms of the law governing intestate succession.

2. Marriages Out of Community of Property

Marriages out of community of property are concluded by the prospective spouses executing an antenuptial contract before they marry. Antenuptial contracts must be signed before a notary public. We have a number of notaries in our firm.

The accrual system will apply to a marriage out of community of property unless there is a specific stipulation in the antenuptial contract to the effect that the accrual system is not to apply.

The effect of the accrual system is to bring about a pooling of the growth in the value of the estates of the spouses occurring during the marriage and to divide that growth in wealth equally, unless otherwise agreed, between them upon the dissolution of marriage by death or

¹ Assets that do not fall into the joint estate are gifts and bequests made subject to the proviso that they are to be excluded from the community estate, assets which are excluded by antenuptial contract, rights and property which are of a personal nature such as a usufruct, damages for non-patrimonial loss and certain insurance policies.

² The transactions which cannot be concluded without the mutual consent of the spouses are set out in Section 15 of the Matrimonial Property Act, 1984. They include the alienation of immovable property, investments including shares and fixed deposits, jewellery, furniture and household effects.

divorce. Subject to certain exceptions inheritances, legacies and donations are excluded from the calculation³. The accrual is determined by deducting from the net value of the separate estates of the husband and wife at the dissolution of the marriage, an amount equal to the value of those estates at the commencement of the marriage adjusted for inflation.

Example:

At the time of his marriage John's estate had a net value of R5 000,00 and his wife Mary's estate had a net value of R10 000,00. Their marriage was subject to the accrual system.

After a long and happy marriage John predeceased Mary. At the time of his death his estate had a net value of R2 000 000,00 and Mary's estate had a net value of R200 000,00.

The adjusted value of John and Mary's assets at the time of their marriage, after making allowance for the decline in the value of money which had taken place between the date of marriage and the date of John's death, was R40 000,00 in respect of John's assets and R80 000,00 in respect of Mary's assets. The accruals in the estates of John and Mary were calculated as follows:

	John	Mary
Estates at John's death	2 000 000,00	200 000,00
Adjusted estate values at marriage	40 000,00	80 000,00
	R1 960 000,00	R120 000,00

Mary's claim against John's estate was for an amount equivalent to one half of the difference between the accrual which had taken place in her estate and the accrual which had taken place in John's estate.

Accrual in John's estate	R1 960 000,00
Accrual in Mary's estate	120 000,00
Net accrual	R1 840 000,00
Mary's half share	R920 000,00

If Mary had died before John the executor of her estate would have had a claim against John for R920 000,00. If Mary had left the whole of her estate to her children in her Will, the consequences for John could have

³ Inheritances, legacies and donations will form part of the accrual in the recipient's estate only if there is an agreement to that effect in the antenuptial contract or if the testator or donor has stipulated that the bequest, legacy or donation is to be brought into account for the purpose of calculating the accrual. A donation between spouses, other than a donation which is stipulated to take effect on death, will not be brought into account either as part of the estate of the donor or as part of the estate of the donee.

been awkward in the example quoted above. He might have been obliged to sell his house or business in order to discharge his debt to Mary's estate. Another point to notice is that for the purposes of estate duty the dutiable amount of Mary's estate was increased by R920 000,00 and the dutiable value of John's estate was reduced by the same amount.

If the prospective spouses wish to exclude the accrual system they will usually record in their antenuptial contract that each of them will retain exclusive ownership of his or her assets irrespective of whether those assets are acquired before or after marriage and that there will be no accounting between them for profits and losses occurring during the marriage.

EXISTING MARRIAGES

A husband and wife can at any time:

- (a) Apply to Court for authority to change from one marriage regime to another, provided that the husband and wife are able to satisfy the Court that no prejudice will result and that sound reasons exist for making the change.
- (b) If the marriage is in community of property either spouse can apply to Court for an immediate division of the joint estate if his or her interest in the joint estate is seriously prejudiced by the conduct of the other spouse.
- (c) If the marriage is out of community, but subject to the accrual system, either spouse can apply to Court for an immediate division of the accrual if his or her right to share in the accrual of the estate of the other spouse is being or will possibly be seriously prejudiced by the conduct or proposed conduct of the other spouse.

DONATIONS

Donations between husband and wife do not attract donations tax. Other donations in excess of R100 000,00 in any one tax year do attract donations tax. Currently this tax is levied at 20% of such excess. Thus there is no limit on the amount of the donation which one spouse may make to the other but the amount which a husband and wife can donate to their children or other persons free of donations tax is limited to R100 000,00 each, that is a total of R200 000,00 in any one tax year provided that they are married out of community of property. If they are married in community of property the donation is deemed to have been made in equal shares by the husband and wife. For example a donation of R50 000,00 made by a wife to one of her children will be deemed to be a donation of R25 000,00 by the wife and a donation of R25 000,00 by the husband. Where a donation is made of property excluded from a joint estate where the parties are married in community of

property, the donation will be treated as being made solely by the person making the donation.

Income derived as a consequence of a donation received from a spouse will be taxed in the hands of the marriage partner who made the donation if the main purpose of the donation was the reduction, postponement or avoidance of the donor's liability for tax.

Income received by a minor child as a result of a donation made by that child's parent will be taxed in the hands of the parent who made the donation.

Capital gains arising from the disposal by the donee of the subject matter of a donation made by one spouse to the other, or by a parent to a minor child, will be brought to account and taxed in the hands of the donor.

INTESTATE SUCCESSION

The consequences for a husband or wife whose spouse dies without a valid Will are determined by the law of intestate succession. The consequences vary according to whether the marriage is in or out of community of property.

If a marriage is out of community of property and there are children, the estate will be divided equally between the children and the surviving spouse, subject to the proviso that the surviving spouse's share is not to be less than the amount fixed by the Minister of Justice, currently R125 000,00.

Example:

A wife dies intestate leaving a husband, two children and a brother surviving her. The marriage was out of community of property and the accrual system does not apply. The net value of the estate is R180 000,00, the only asset in the estate of any significant value being the house. The estate is divided equally between the surviving husband and the two children. A third share in the estate amounts to R60 000,00 and as the sum of R60 000,00 is less than the sum of R125 000,00, the husband will receive R125 000,00 and each of the children will receive the sum of R27 500,00.

If there were no surviving children or grandchildren, the husband would take the whole of the estate, namely R180 000,00.

If there were children but no surviving spouse, the children would take the whole of the estate in equal shares.

If the marriage was in community of property, the joint estate would be divided in half. The survivor would take his or her half share and the deceased's half would devolve in the manner described above.

ESTATE PLANNING

1. Estate Duty

Estate duty is calculated at the rate of 20% of the amount by which the net value of an estate exceeds the sum of R3 500 000,00. Various deductions are allowed in order to determine the net value of an estate. The most important of these deductions is the deduction granted in respect of bequests to a surviving spouse.

The first dying spouse can eliminate any liability for estate duty in his or her estate by making a suitable bequest to the surviving spouse.

Example:

A husband dies leaving a wife and two children and an estate with a dutiable value of R4 400 000,00. In his Will he leaves his estate to his children. The estate duty abatement is R3 500 000,00.

After deducting the abatements the dutiable value of the estate is R900 000,00. Estate duty on R900 000,00 amounts to R180 000,00.

If the husband had bequeathed an amount of R3 500 000,00 to his children and the remainder to his wife, no estate duty would have been payable.

Value of estate		4 400 000,00
Less abatement	3 500 000,00	
Bequest to spouse	<u>900 000,00</u>	
		<u>4 400 000,00</u>
 Dutiable value		 Nil

The effect of a bequest to a surviving spouse may only be to postpone liability for estate duty. When the surviving spouse dies estate duty will have to be paid on his or her estate to the extent that the dutiable amount exceeds R3 500 000,00.

For the purpose of taxing capital gains a deceased person is treated as having disposed of his or her assets at their market value at the date of death and the deceased estate is treated as having acquired those assets at a cost equal to their market value. An exemption exists in respect of assets which are to be transferred to a surviving spouse. Assets bequeathed to a surviving spouse are deemed to have been acquired by the surviving spouse at their base cost, with the result that there can be no capital gain.

2. Changes in Marital Regime

Spouses married by antenuptial contract can apply to Court for leave to

change their marital regime to a marriage in community of property or to the accrual system. The effect of changing to a marriage in community of property will be to create a joint estate in which husband and wife have equal shares. If the husband has substantial assets and his wife has no assets the effect of the change to a community marriage will be to halve the value of the husband's estate.

Example:

The net value of the husband's estate is R4 400 000,00. On his death the liability for estate duty will be:

Net value of estate	4 400 000,00
Less abatement	<u>3 500 000,00</u>
Dutiable value of estate	R900 000,00

Duty on R900 000,00 is 20%, that is R180 000,00.

If the marriage was changed to a marriage in community of property and the wife had no assets, the value of the husband's estate would be reduced to R2 200 000,00 and no estate duty would be payable. Exactly the same result would, however, be achieved if instead of converting to a community marriage, the husband left half his estate to his wife in his Will. It is unlikely that many people will elect to change to an accrual system or to a marriage in community of property for fiscal reasons. A change to community of property or to an accrual system is most likely to occur in circumstances in which a spouse wishes to obtain protection against the prejudice which could result from an alienation of the affections of the wealthier partner in the marriage.

3. Donations

An adjustment between the respective values of the estates of a husband and wife in order to reduce a liability for estate duty can also be brought about by means of a donation. If, for example, one of the spouses has no assets, the other spouse could make a donation of up to R3 500 000,00. There will be no liability for estate duty in the donee's estate if the donee is the first dying because the donee will be entitled to claim an abatement of R3 500 000,00.

WILLS

The importance of making a valid Will which is carefully thought out so as to meet the needs of one's family and dependants cannot be over emphasised. Both of the partners to a marriage should make a Will. Even if the wife has no assets she should have a Will. She and her husband might, for example, be involved in an accident. The husband could be killed instantly and the wife could survive in an unconscious state for hours, days or weeks. If she was the heir to her husband's estate she would inherit that estate by reason of the fact that she has survived her husband. On her death, without a Will, her estate

would be distributed in accordance with the laws relating to intestate succession and this might produce a result quite contrary to her wishes and to her husband's intentions.

A carefully drawn Will can result in a saving in estate duty and taxable capital gains and also in a saving in the amount of income tax which your family will have to pay after your death.

COX YEATS

Partners

Graham Campbell Cox
Roger Stanley Green
Alastair Ian Hay
Michael William Hector Posemann
Peter Jeremy Nel
Ian Andrew Cox
Michael Llewellyn Jackson
Peter Frank Feuilhaerde
Richard Trelawney Hoal
Andrew Craig Clark
Helen Margaret Jackson
Robin Peter Westley
Stuart James Fourie

12th & 13th Floors, Victoria Maine
71 Victoria Embankment
Durban 4001
Republic of South Africa

P O Box 3032, Durban 4000

Telephone 031-3042851

Fax 031-3013540
031-3043204

Internet address - coxyeats@coxyeats.co.za
Website - <http://www.coxyeats.co.za>