

MATRIMONIAL PROPERTY IN CIVIL & CUSTOMARY MARRIAGES

What is a Civil Marriage?

This is a marriage in terms of the Marriage Act No 25 of 1961 and the Matrimonial Property Act No 88 of 1984.

How do you marry in civil law?

A marriage officer, i.e. a priest or magistrate, performs the ceremony. The couple signs a register. Each spouse receives a copy of the marriage certificate.

How many wives can a man have in a civil marriage?

A man can only have one wife in a civil marriage.

How is a civil marriage ended?

It is ended by divorce, death or by annulment (a court of law declares that there never was a marriage).

How many wives can a man have in civil law?

A man can only have one wife in civil law. This is called a monogamous marriage. He can only marry a second wife if the first wife dies or if the marriage is ended by divorce.



How do you marry in customary law?

- Couples marry according to the customs and usages traditionally observed among indigenous peoples of South Africa and which form part of the culture of those peoples.
- Since the commencement of the Recognition of Customary Marriages Act No 120 of 1998 on the 2 December 1998, persons who marry in customary law must do so according to the Act which lays down obligations and rights for spouses - Age of persons who marry, consent to marry, equal capacity regarding the joint property, registration of the marriage.
- The marriage(s) must be registered at the Department of Home Affairs, and this can be done by the wife/wives or the husband.



How many wives can a man have in customary law?

A man can have many wives in customary law. This is called a polygamous marriage.

What is the matrimonial property system in a civil marriage?

There are three matrimonial property systems to choose from in a civil marriage.

1. Marriage Out of Community of Property in Civil Law

- Before getting married, the couple sign an ante nuptial contract. In the contract they agree that each of them will keep their own property and anything that they earn or save during the marriage. Each of them will pay their own debts.
- If the marriage ends in divorce each spouse keeps all property and money that he/she owned before the marriage and all property that he/she bought during the marriage, as well as all money that he/she saved during the marriage.



How do you enter into a valid ante nuptial contract?

An ante nuptial contract is drawn (written) for the couple by an attorney who is also a notary. The contract will have a clause that excludes accrual so that each spouse owns his/her own property and does not owe the other anything if the marriage ends in divorce. The couple have to sign the contract in the notary's presence. The notary registers the ante nuptial contract in a deeds

registry office. The couple will have to pay the attorney for the service and pay for revenue stamps and a deeds registry fee.

Problem: If the couple marry after the commencement of the Matrimonial Property Act i.e. after 1 November 1984, the spouse who paid more for household necessities for the joint household, cannot claim the amount that the other spouse should have paid, unless they made an agreement that the spouse who paid more can claim from the spouse who paid less.

2. Marriage Out of Community of Property in Civil Law, with Accrual

Every marriage out of community of property in terms of an ante nuptial contract entered into after the commencement of the Matrimonial Property Act No 88 of 1984, (i.e. 1 November 1984), automatically includes accrual.

What is accrual?

Accrual is the amount by which the spouses are richer at the end of their marriage than they were at the beginning of their marriage.

What is the effect of accrual on a marriage?

Spouses whose marriage is subject to accrual do not share their property during the marriage, but if the marriage ends, the couple has to share the amount by which they became richer during the marriage. For example, if the husband saved R20 000 during the marriage and the wife saved R10 000 during the marriage, he must give her R5 000 so each gets half of the total amount i.e. R15 000.

When does the right to claim a share of the accrual arise?

The right to claim a share of accrual arises if the marriage is ended by divorce or by death of one of the spouses.

Who has the right to claim a share of the accrual?

The spouse with the smaller accrual may claim from the spouse with the larger accrual, or from his/her deceased estate.

3. Marriage in Community of Property in Civil Law, and marriage in Customary Law after the commencement of the Recognition of Customary Marriages Act No 120 of 1998 - date of commencement 1 December 1998

What is the joint estate in community of property?

- The joint estate in a marriage in community of property, is that property, which is owned by both spouses, jointly.



- When spouses marry in community of property, any money or possessions belonging to either spouses at the time of the marriage, or acquired afterwards, become part of the joint estate, which is owned by the spouses in equal, undivided shares.

What does not form part of the joint estate?

- Certain items can be excluded from the joint estate and become the sole property of one of the spouses, for example, money or property inherited by one of the spouses where the testator has stated in the will, that it shall not become part of the joint estate. Goods bought with the inherited money, for example, do not become part of the joint estate.
- Interest earned on such inherited money, or income from such property, will normally become part of the joint estate, unless the testator has stated in the will that it shall not become part of the joint estate.
- Engagement and wedding gifts, generally do not form part of the joint estate.

The equal powers of spouses to deal with the joint estate

There are powers that each spouse has equally with the other, to deal with the joint estate. Each spouse in a marriage of community of property has the same power to:

- Dispose of the assets in the joint estate;
- Contract debts payable by the joint estate; and
- Manage the joint estate

But

This power is limited by the requirements of written consent, and consent, of the other spouse in dealing with certain property in the joint estate. This means that for certain acts, a spouse needs either the written consent, or, the consent, of the other spouse.

Interpretation: The limitations which the Matrimonial Property Act No 88 of 1984, places on the powers of the spouses to deal with the property in the joint estate protects the interests of each spouse in the joint estate.

The Act ensures that the spouses administer the joint estate equally and together except in special circumstances.

Note: The limitation of powers of the spouses to deal with the property in the joint estate relates to assets in the joint estate: Such as, fixed property (land/ buildings); money; investments; valuable assets; credit agreements; payment of debts for another person; inheritance.)

Customary Marriages entered into before the commencement of the Recognition of Customary Marriages Act No 120 of 1998: Date of commencement – 2 December 1998

Are these marriages valid?

All marriages which were valid in customary law, before the commencement of the Recognition of Customary Marriages Act No 120 of 1998;

And

If these marriages existed at the time of the commencement of the Act, they are for all purposes recognised as marriages.

What is the status and capacity of spouses?

A wife (wives) in a customary marriage has full status and capacity, on the basis of equality with her husband.

A wife's status and capacity include the capacity to:

- Acquire assets (buy);
- Dispose of assets (sell, donate);
- Enter into contracts;
- Litigate (bring an action in a court of law);

And

The wife also keeps any rights and powers that she might have at customary law.

However:

The wife's equal status and capacity is subject to/(limited by), the matrimonial property system (agreement about property) governing the customary marriage.

Interpretation: Equal status and capacity of spouses - The Act does not state that the customary marriage has to be registered for the spouses to have equal status and capacity.