**CAN YOU CHANGE YOUR MARITAL REGIME AFTER MARRIAGE?**

“A journey is like marriage. The certain way to be wrong is to think you control it” (John Steinbeck)

One of the most important decisions you must make before you marry is what “marital regime” (“matrimonial property system”) you want to apply to your marriage.

To recap, you have three choices –

1. Marry in community of property: This is the default in South Africa if you don’t sign an antenuptial contract (“ANC”) before you marry. All your assets and liabilities (with a few specific exceptions) are pooled in one joint estate. It’s probably not the best choice for most couples - you don’t for example want to be lumbered with a poor credit record (and a bank rejecting your bond application for example) or even with a sequestration application because of a spouse’s debts. But as the old saying goes, “it depends…”
2. Marry out of community of property with accrual: The most popular option with couples these days, under this regime you keep as your own separate property whatever you brought into the marriage, but in the event of divorce or death you share equally in any subsequent “accrual” (growth in asset value built up during the marriage). You must specify accrual in your ANC, otherwise “without accrual” (as below) will apply.
3. Marry out of community of property without accrual: As the name suggests, under this regime you have your own separate estates, and there is no sharing of accrual. The best choice for some couples in some cases, but probably not for most.

***“Oops, we made the wrong choice; what now?”***

A surprising number of couples tie the knot without any thought for the legal consequences, and only later do they learn that because they had no ANC they are married in community of property with all that that entails.

Or perhaps they did think it through but made the wrong choice at the time. For example, you could find yourself needing to improve your personal credit record, perhaps after applying to a bank for a mortgage bond and being rejected because of your spouse’s debts.

The good news is that all is not lost – you can still change regimes with a “postnuptial contract”. The bad news is that we are talking an expensive application to court here, and there are various requirements which may frustrate your application.

**A court order is essential**

The Matrimonial Property Act specifically allows a married couple to “jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage”.

You will have to satisfy the court of three things, namely that

1. there are sound reasons for the proposed change;
2. sufficient notice of the proposed change has been given to all the creditors of the spouses; and
3. no other person will be prejudiced by the proposed change.

**The couple who didn’t get court authority**

* A couple had married out of community of property excluding accrual.
* Thereafter, the wife drew up an agreement as “an ‘insurance policy’, to allay her fears of insecurity in the event of a divorce”. The husband agreed to set aside his marriage contract, specifying that his wife was entitled to half of his estate.
* After some hesitation the husband signed this agreement, but critically it was never sanctioned by a court as required and was merely handed to friends for safekeeping.
* During subsequent divorce proceedings, the wife was forced to abandon her main claim (that the agreement was valid and binding) precisely because of her failure to obtain a court order as set out above.
* She also tried another tack, namely that the agreement was enforceable as an agreement “in anticipation of divorce”. This was rejected by the Supreme Court of Appeal on the facts, finding that the parties had had a “normal marital relationship” after the signing of the agreement, and that the wife had accordingly failed to prove that divorce “was in the parties” contemplation when the agreement was concluded”.
* The Constitutional Court cemented her defeat in this regard by refusing its leave for her to appeal the SCA decision.

Ask your lawyer before you marry which marital regime is best for you. And if you didn’t do that, or if you change your mind later, you must ask a court to authorise your change of regime.