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Matrimonial Property Systems

In community of property (in COP):

- Absence of an antenuptial contract
- Default position in South Africa
- In the case of death of one spouse and nothing is left to the surviving spouse or in the event of the first-dying not having left a will, what happens?
- By way of example: A and B are married to each other in COP. A joint estate of R2 000 000 and A passes away with B being disqualified from inheriting.
- Example 2: Same facts as above, but A leaves behind no will and 3 children.
- In the event of fixed property forming part of the assets, a section 45 endorsement is to be done on the title deed. If this has not been done, any onward sale is not possible without the executor's assistance – even years later. Remember the bond (if applicable) as the surviving spouse must qualify. If the surviving spouse remarries, several scenarios could apply:
- First-dying died without a will and 3 children which means future marriages in COP not excluded.
- First-dying died with a will which specifically excluded future marriages in COP.
- Agents need to check the deed search for the involvement of estates or divorce orders.
- Who signs the deed of sale in case of a divorce where the property was awarded to the one spouse in the divorce order? Often the ex-spouse does not want the other ex to see the selling price.

Accrual system:

- Out of community of property, must have an antenuptial contract
- The difference in growth is shared. By way of example:
- A and B are married to each other out of COP with the accrual system applicable. At commencement their estates have nett worth of R500 000 and R100 000 respectively. The marriage lasts 20 years during which A elected to stop working and B raised children. At dissolution their respective estates are worth R100 000 and R400 000. Who must pay and how much?
- Out of community of property without the accrual system:
 - Divorce
 - Death

Customary Marriages in South Africa

- Prior to 15 November 2000
- Both spouses have full capacity to act – acquire and dispose of property as they choose.
- Marriages had to be registered with Home Affairs within 12 months – non registration does not affect validity.
- Recognition of Customary marriages came into operation on 15 November 2000.
 - Marriage is regarded as in community of property unless they sign an ANC.
 - May enter into a civil marriage only if neither spouse is married to another person in terms of a customary marriage.

Civil Unions

- 1 December 2006 – Civil Unions Act came into operation.
- Marriages have same legal consequences as civil marriages governed by Marriages Act of 1961.

Muslim Marriages

- Initially not recognised as a civil marriage under the Marriages Act of 1961.
- Had to conduct a separate civil ceremony.
- From 30 April 2014 Muslim marriages are recognised as civil marriages.

Hindu Marriages

- Marriages according to Hindu religious rites not yet recognised

Estate Late transactions

- Section 14 of Deeds Registries Act – “transfers of land... shall follow the sequence of the successive transactions in pursuance of which they are made...”
- In case where husband passed away – never transferred to wife – no transfer duty
 - Called a S45(1) endorsement.
 - Cannot take mandate from Executor of Estate until such time as Letter of Executorship has been issued by the Master.

Unmarried couples co-owning property:

- Young couples must remember the principle of joint and several liability.
- If they get married, what must be done to the title deed?
- If they split up before getting married? Important to have a property co-owning agreement.

Farm property cannot be owned by more than one person

- How do you get around this if 2 spouses married out of COP want to buy?

THE IMPLICATIONS OF DEATH ON PROPERTY RELATED AGREEMENTS – SALE AND LEASE

- The sale or purchase of immovable property can quite often be described as the most financially and emotionally taxing transaction any individual can experience in their life time. In addition to the complex procedure and numerous obstacles, one such obstacle that can arise unexpectedly is the death of a party to a property related agreement.
- In instances where:
 - the agreement has not been concluded or signed; or
 - the agreement has been concluded and transfer has already taken place,
- the implications of death of either party is minimal and the consequences are straight forward. However, the same cannot be said in situations where either party dies after conclusion of the agreement but prior to transfer.
- To simplify the ramifications of the above, the detail will be discussed under the headings below.

AGREEMENTS OF SALE

1. DEATH OF THE SELLER

- The sale agreement remains valid and enforceable. The inevitable consequence however is that there will be a delay in transfer which cannot be given an estimated time due to the many variables at play.
- The Power of Attorney signed in favour of the transfer attorneys will fall away where such attorneys will now require the executor's signature. Should the document already have been lodged with the Deeds Office, it will have to be withdrawn and the newly signed document will have to be lodged. It is important to note that the Power of Attorney must be endorsed by the Master of the High Court which will in and of itself cause further delays.
- The various delays can often influence the relevant parties involved to consider it impractical to continue with the agreement.
- Where the seller sold during his lifetime, the heirs will not have to consent to the sale.

2. DEATH OF THE PURCHASER

- In cases where the purchaser required finance from a bank, the bank would withdraw the bond upon death of the purchaser, which would render it impossible to proceed with transfer. The agreement thereafter would be cancelled depending on the wording of the clause stipulating bond approval.
- Should the agreement be a cash transaction, the executor of the purchaser's estate would be obliged to fulfil the purchaser's obligations in terms of the agreement and pay the purchase price.
- However, as stated above, the parties involved could quite possibly consider it impractical to continue with the agreement.
- In addition to sale agreements relating to property, death can further impact an agreement of lease for property between a landlord and tenant. As done above, the impact will briefly be explained under the headings below

AGREEMENTS OF LEASE

1. DEATH OF THE LANDLORD

- The agreement remains valid and enforceable. The executor of the landlord's estate will take on the responsibility of making decisions regarding the lease and can exercise the rights afforded in terms of the lease. The executor will therefore need to make contact with the managing agent or the tenant to arrange where rental is to be paid and whether the executor intends on renewing the lease or not.

2. DEATH OF THE TENANT

- Should the tenant die during the period of tenancy, the executor of the tenant's estate will continue in terms of the agreement that was signed and will accordingly exercise the tenant's rights under the agreement. The executor may opt to cancel the agreement by giving written notice and the estate thus paying the possible penalties for early termination.
- To conclude, upon the death of a party to a contract relating to the sale or lease of property, an executor of the deceased's estate will be appointed. Such executor will step into the shoes of the deceased's contractual obligations and will thus make decisions for the estate.

TRUSTS

- Trust deed, Letters of Authority
- Trustees must sign resolution
- Cannot act on behalf of a trust to be formed.
- Suggested clause: The purchaser is in the process of forming a trust. The parties agree that should the trust be formed in 60 days hereof, this agreement will be cancelled and the seller will enter into a new agreement with the trust on the same terms and conditions contained herein. The purchaser will remain bound to this agreement until the trust has met all its obligations in terms of the new agreement.
- Law of Trusts is not contained in a single set of legislation
- Trust is not an independent entity or juristic person, cannot be owned, sold or transferred like company or closed corporation.
- Trusts cannot own property – property held in trust is held by trustees in their capacity as trustees.
- Trusts does not have legal personality but have a separate legal identity
- Trustees must be a natural person
- Beneficiaries may be juristic person e.g. company

COMPANIES

- Directors sign the resolution
- CIPC documentation
- Shareholders must only consent if the asset comprises more than 50% of total company assets
- S69(7) of Companies Act states expressly a juristic person may NOT act as Director
- Can Trust be a shareholder?
- Yes – however shares should be held by Trustees in their capacity
- *Blue Square Advisory Services v Pogiso* problems arose when veracity of resolution to fire company directors was questioned – Court held Company was not permitted to go beyond share register i.e. could not establish Trustees and who had voting rights.

Closed Corporations

- CK1/CK2
- Resolutions
- Can a Trust be a member?
- Inter vivos trusts can hold membership provided NO juristic person is a beneficiary AND number of beneficiaries in an Inter Vivos Trust PLUS other members do not exceed 10 members
- Once it exceeds 10 – Inter Vivos Trust can no longer be a member of the CC
- Can a Company be a Member?
- NO – only inter vivos trust/Testamentary trusts and natural persons can become members