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Changing your matrimonial property regime from In Community of Property to Out of Community of Property

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Are you married "In Community of Property" and want to change your matrimonial property regime to "Out of Community of Property"? Did you not know that a marriage Out of Community of Property was possible when getting married? There is relief for you and your spouse.

All civil marriages are automatically In Community of Property meaning that there is one estate shared between wife and husband. Therefore, if any one of the spouses incurs a debt, that debt belongs to both of them.

The other option is to get married Out of Community of Property. This means that there are two separate estates and each party is responsible for his or her own debt. For some people this would be a better option, especially if you are a business person.

The usual process to be married Out of Community of Property is to enter into an ante nuptial contract before the marriage.

The contract will have clauses in it stating:

That there shall be no community of property;

That there shall be no community of profit or loss; and

That the accrual system provided for in Chapter 1 of the Matrimonial Property Act, no 88 of 1984 is expressly excluded from the marriage.

However, if you did not do so, there is a way of changing your matrimonial property regime from In Community of Property to Out of Community of Property. For this, you need the consent of the High Court. Here you will make use of section 21 of the Matrimonial Property Act 88 of 1984.

Getting the High Court's Consent

Once you and your spouse have decided to change your matrimonial property regime to Out of Community of Property, you would need to approach the High Court in your area for consent. If you know the law, legal process, Court rules and procedure, you and your spouse can do it on your own. If you cannot do it on your own, an attorney would be able to do it for you with or without the assistance of an Advocate. What they do is draft a post-nuptial contract for you which would

outline what matrimonial property regime you want and also how the joint estate should be divided. Then they draft a Notice of Motion (notifying the Court what you want) and Founding Affidavit (your affidavit outlining your case etc.). Your case must satisfy the Court that:

there are sound reasons for the proposed change of the matrimonial property regime;

there has been sufficient notice to creditors regarding the proposed change;

no other person will be prejudiced by the proposed change.

If however you cannot make a case for the above, your application may be unsuccessful.

Costs involved in changing your matrimonial property regime

As stated, you have to approach the High Court for consent to change your matrimonial property regime. There would therefore be costs of an attorney who may instruct and advocate, and further costs in drafting and registration of the post nuptial contract. Furthermore there is advertisement cost involved as you would have to give notice in the Government Gazette and in one or two local newspapers. You would further have to serve your application on the Registrar of Deeds and give notice to your creditors via registered mail. The total costs may range from R 15 000 – 00 should your matter be straight forward to R 20 000 – 00 should it be more complicated. Complicated would mean the joint estate has many creditors and further, there may be many assets in the joint estate that needs to be divided, especially if they are not easily describable. The above mentioned fee is obviously dependant on your application not being opposed by any interested party. One reason for opposing the application could be that the Joint Estate is deeply indebted to a creditor and she feels that her claim would be prejudiced by the proposed change. Should your application be opposed for any reason, many more hours will be spent fighting for the success of your application which could cost you a small fortune and you may even be ultimately unsuccessful. Therefore, you would need to advise your legal team of all relevant facts before the application is made.

Time estimates

The estimated time in preparing your application, your post nuptial contract and ultimately obtaining consent from the High Court is about 4 weeks. This is also dependent on whether or not the High Court is in sitting within 4 weeks after the drafting of your application. If the High

Court is in recess, a few extra weeks may apply. The Court may also want a report from the Registrar of Deeds which could cause delays.

Once your application is successful and the High Court therefore gave consent, you will usually have 3 (three) months to register the post nuptial contract. So once consent is granted, you need to see a Notary Public before whom you will sign your post nuptial contract and then have it registered. This therefore needs to be done within the three months of obtaining the consent of the High Court.

If you would like to be referred to an attorney to assist you in changing your matrimonial property regime, feel free to send an email by clicking here (info@ourlawyer.co.za).

Kind regards,

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