
AN OVERVIEW

MATRIMONIAL PROPERTY LAW IN SA

The logo for Vermeulen Attorneys is located in the bottom left corner. It consists of the text "VERMEULEN ATTORNEYS" in a white, sans-serif font, centered within a circular emblem. The emblem is formed by several concentric, slightly irregular white lines that create a sense of depth and movement.

VERMEULEN
ATTORNEYS

AGENDA

Overview of Matrimonial Property Regimes
in SA

Marriages in Community of Property

Marriages out of Community of Property

Marriages Excluding the Accrual

Marriages Including the Accrual

Proprietary Rights of Unmarried Persons –
Universal Partnership

Forfeiture of Patrimonial Benefits

Q&A

House Rules and Etiquette

Please use your real name for register purposes

Please feel free to type questions / comments in the chat box at any time; we will deal with as many as possible

Respectful discussion, dissent and comments are welcomed. All attendees are family law professionals working in different capacities, and have a wealth of information to share.

Please keep discussion respectful and avoid hate-speech, victimisation, or belittling attendees. We are all here to learn.

Please do not record the sessions or distribute the content to persons who did not attend. We spent many hours developing this course for the benefit of attendees, and unlawful distribution impedes our ability to feasibly present this course again.

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LET'S TALK ABOUT POTS

MARRIAGE IN COMMUNITY OF PROPERTY



MARRIAGE OUT OF COMMUNITY OF PROPERTY – NO ACCRUAL



MARRIAGE OUT OF COMMUNITY OF PROPERTY – ACCRUAL



MARRIAGE IN COMMUNITY OF PROPERTY



Community of Property

- All assets and liabilities form part of one communal estate.
- Both parties are co-owners in undivided and equal half-shares of all assets in the joint estate.
- Both parties are jointly responsible for the liabilities of the joint estate

Co-Administration of the Joint Estate

- The parties are both co-administrators of the joint estate

Default Position

- No Antenuptial Contract Required



Characteristics

Important Notes

These Assets are EXCLUDED from a COP Estate

- Claims for damages (excluding patrimonial loss) – Section 18(a) Matrimonial Property Act, 88 of 1984 (“MPA”)
- Benefits under a will where the testator specifically stipulated that such benefit should not form part of a joint estate / accrual claim



MARRIAGE IN COMMUNITY OF PROPERTY



PROHIBITED TRANSACTIONS

MARRIAGE IN COMMUNITY OF PROPERTY



...a spouse shall not without the written consent of the other spouse

(a) **alienate, mortgage**, burden with a **servitude** or **confer** any other **real right** in any **immovable property** forming part of the joint estate;

(b) **enter into any contract** for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate;

(c) **alienate, cede** or **pledge** any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate;

(d) **alienate** or **pledge** any jewellery, coins, stamps, paintings or any other assets forming part of the joint estate and held mainly as investments;

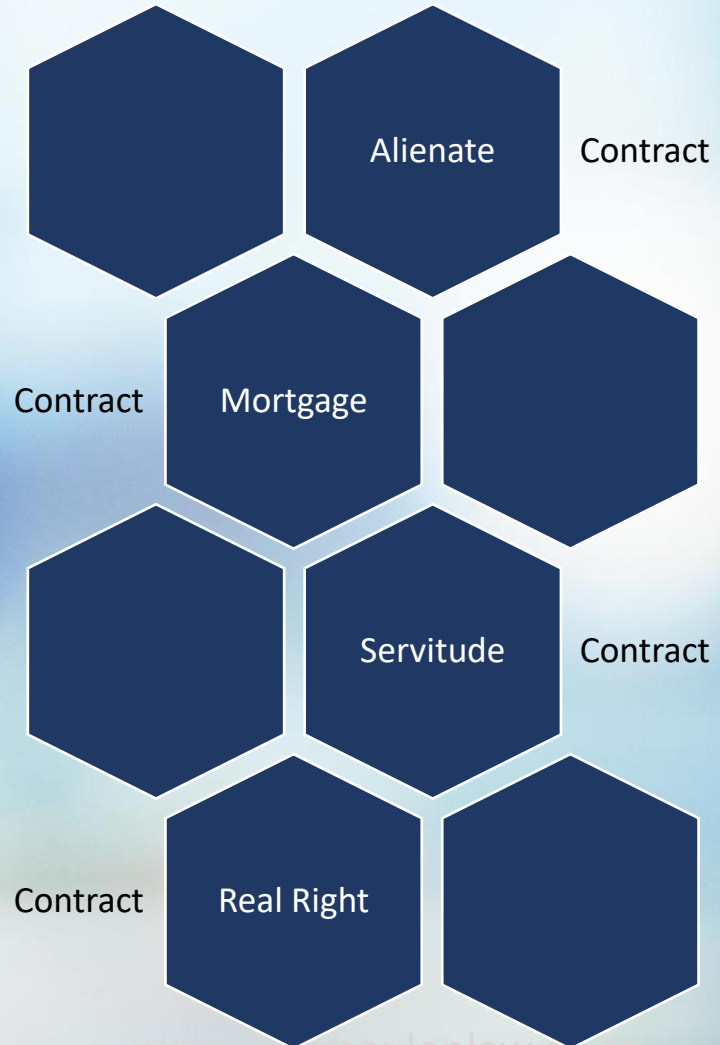
(e) **withdraw money** held in the name of the other spouse in any account in a banking institution, a building society or the Post Office Savings Bank of the Republic of South Africa;

(f) enter, as a consumer, into a **credit agreement** to which the provisions of the National Credit Act, 2005 apply, as "consumer" and "credit agreement" are respectively defined in that Act, but this paragraph does not require the written consent of a spouse before incurring each successive charge under a credit facility, as defined in that Act;

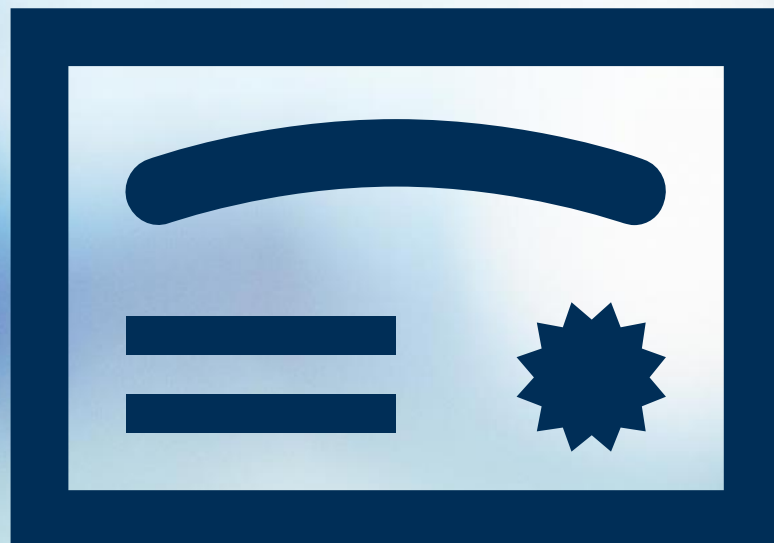
Section 15(2) MPA

MARRIAGE IN COMMUNITY OF PROPERTY

Immoveable
Property



MARRIAGE IN COMMUNITY OF PROPERTY



MARRIAGE IN COMMUNITY OF PROPERTY

Coins, Jewellery, Stamps,
Paintings, or any other assets
held mainly as investments

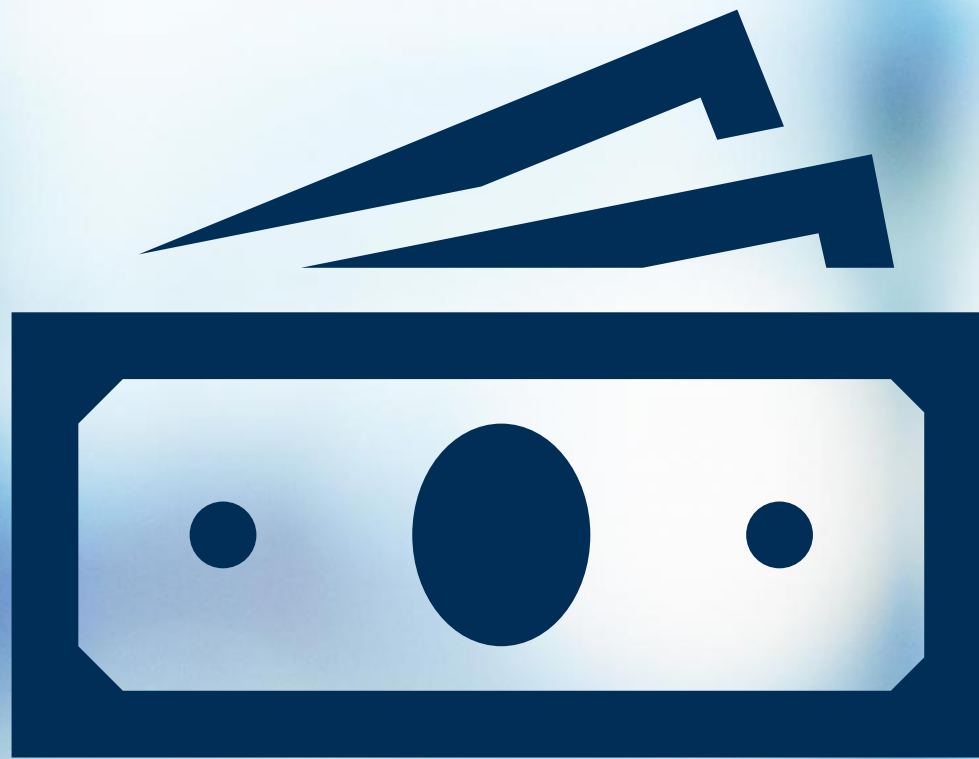


Alienate

Pledge

MARRIAGE IN COMMUNITY OF PROPERTY

Withdraw



Money in Spouse's
Bank Account

MARRIAGE IN COMMUNITY OF PROPERTY

Credit Agreements under NCA
i.e incur DEBT

Conclude
Agreement



MARRIAGE IN COMMUNITY OF PROPERTY



A spouse shall not without the **consent** of the other spouse

(a) **alienate, pledge** or otherwise **burden** any furniture or other effects of the common household forming part of the joint estate;

(b) **receive any money due or accruing to that other spouse** or the joint estate by way of

(i) remuneration, earnings, bonus, allowance, royalty, pension or gratuity, by virtue of his profession, trade, business, or services rendered by him;

(ii) damages for loss of income contemplated in subparagraph (i);

(iii) inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse;

(iv) income derived from the separate property of the other spouse;

(v) dividends or interest on or the proceeds of shares or investments in the name of the other spouse;

(vi) the proceeds of any insurance policy or annuity in favour of the other spouse;

(c) **donate** to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate, and which is not contrary to the provisions of subsection (2) or paragraph (a) of this subsection.

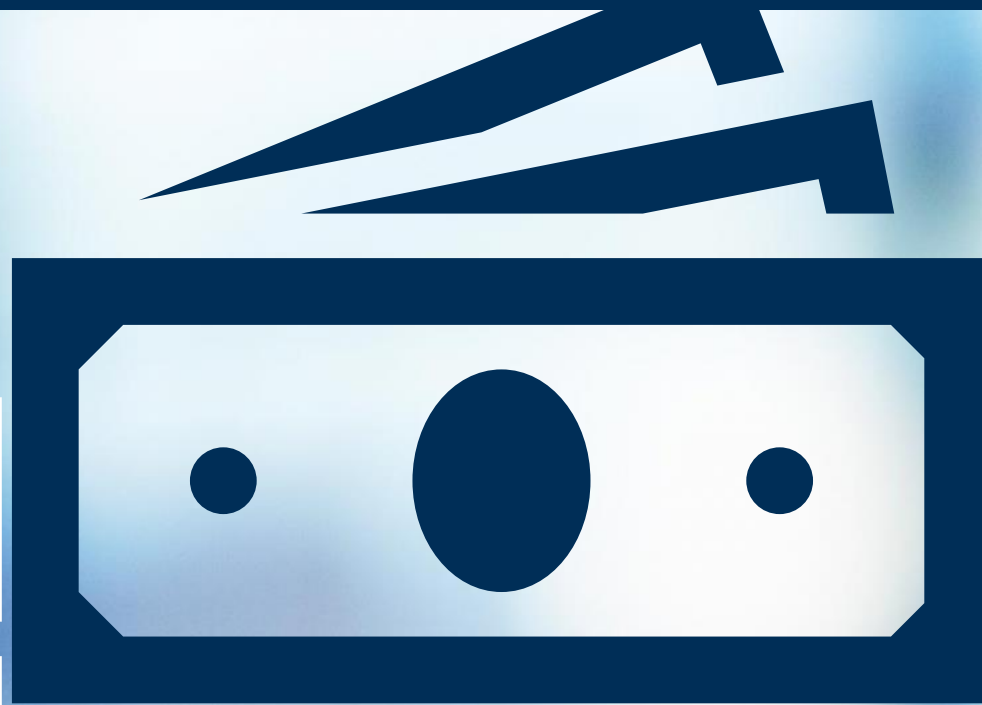
Section 15(3) MPA

MARRIAGE IN COMMUNITY OF PROPERTY

Furniture &
Household Effects



MARRIAGE IN COMMUNITY OF PROPERTY



Receive money
accruing to other
spouse

Remuneration

Damages –
Loss of Income

Inheritance,
Donation,
Bursary

Income derived
from separate
property

Dividends /
Interest

Proceeds of
Insurance /
Annuity

MARRIAGE IN COMMUNITY OF PROPERTY

Donations without value



MARRIAGE IN COMMUNITY OF PROPERTY



REMEDIES

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MARRIAGE IN COMMUNITY OF PROPERTY



(9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), **and**

(b) that spouse **knows or ought reasonably to know** that he will **probably not obtain the consent** required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case may be, **and the joint estate suffers a loss** as a result of that transaction, an **adjustment shall be effected** in favour of the other spouse upon the division of the joint estate.

Section 15(9)(b) MPA

(2) If a court is satisfied that it is **essential** for the **protection of the interest** of a spouse in the joint estate, it may on the **application** of that spouse **suspend** for a definite or an indefinite **period any power which the other spouse may exercise** under this Chapter.

Section 16(2) MPA

MARRIAGE IN COMMUNITY OF PROPERTY



- J/E has suffered loss
- Knowledge of improbable consent

Adjustment
S15(9)

Retroactive
Relief

Suspension of
Powers
S16(2)

Proactive
Relief

- Essential for protection of the interest of the spouse in the J/E

MARRIAGE OUT OF COMMUNITY OF PROPERTY – NO ACCRUAL



No Community of Property

- Each party's assets and liabilities form part of their own separate estate.
- Neither party has any claim to the assets of the other, nor are the parties liable for the debts incurred by the other.

Independent Administration of Separate Estates

- Each party is the sole administrator of their estate

Non-Default Position

- Antenuptial Contract Required

IMPORTANT TO NOTE

- A marriage out of community of property without accrual does not preclude spouses from buying assets together
- Authority suggests that parties can still allege and prove a Universal Partnership *RD v TD 2014 (4) SA 200 (GP)*



Characteristics

ESTATE PLANNING IN DIVORCE

Panel Discussion



Online via
MS Teams
FREE

18 FEBRUARY 2022
9:30 - 12:30

TOPICS OF CONVERSATION

- Basic Principles in Estate Planning
- Collaborative Estate Planning in Divorce
- Pension Funds
- Trusts and Divorce
- Last Wills and Testaments in Divorce
- Frequently Encountered Pitfalls

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PRESENTER



Mervyn Vermeulen (Attorney)

Mervyn is an attorney in active practice, and a family law and divorce mediator. Mervyn is the managing director of Vermeulen Attorneys.

PANELISTS



Seugnette Schwim (Attorney)

Seugnette is a director of Schwim Venter Inc, and a franchise owner at Wealth Succession (Pty) Ltd. Seugnette specializes in the legal aspects surrounding estate planning and management.



Theresa Luyt (Mediator / CFP® - non-practicing)

Theresa is a mediator and restorative justice practitioner in active practice. Theresa has substantial experience utilizing estate planning techniques in divorce mediation.



Jacques Theron (CFP® / 2One2 Bluestar)

Jacques is a Certified Financial Planner and senior member of the 2One2 Bluestar team, specializing in retirement and pension fund matters, as well as risk covered estate planning



Services

DIVORCE

- Uncontested Divorce
- Contested Divorce
- Finalisation of Mediated Divorce
- International Divorce



CHILDREN'S MATTERS

- Children's Court
- Parenting Plans
- Finalisation of Mediated Parenting Plans
- Care and Contact
- Termination and Acquisition of Rights
- Relocations



MAINTENANCE

- Child Maintenance
- Spousal Maintenance
- Arrears Maintenance
- Variation of Maintenance Orders



DOMESTIC VIOLENCE

- Protection Order Applications
- Variations



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MARRIAGE OUT OF COMMUNITY OF PROPERTY – ACCRUAL



MARRIAGE OUT OF COMMUNITY OF PROPERTY – ACCRUAL

No Community of Property

- Each party's assets and liabilities form part of their own separate estate.
- Neither party has any claim to the assets of the other, nor are the parties liable for the debts incurred by the other.

Independent Administration of Separate Estates

- Each party is the sole administrator of their estate, subject to the requirement that the parties must act in good faith.

Non-Default Position

- Antenuptial Contract Required

Accrual Sharing

- At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, **acquires a claim against the other spouse or his estate for an amount equal to half of the difference** between the accrual of the respective estates of the spouses = Section 3(1) MPA



Characteristics

MARRIAGE OUT OF COMMUNITY OF PROPERTY – ACCRUAL



ACCRUAL CALCULATIONS

MARRIAGE OUT OF COMMUNITY OF PROPERTY – ACCRUAL



(1) (a) The accrual of the estate of a spouse is the amount by which the **net value** of his estate at the **dissolution** of his marriage exceeds the net value of his estate at the **commencement** of that marriage.

(b) In the determination of the accrual of the estate of a spouse

- (i) any amount which accrued to that estate by way of **damages**, other than damages for patrimonial loss, is left out of account;
- (ii) an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as any other asset which he acquired by virtue of his possession or former possession of the first mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage;
- (iii) the net value of that estate at the commencement of his marriage is calculated with due allowance for any difference which may exist in the value of money at the commencement and dissolution of his marriage, and for that purpose the weighted average of the consumer price index as published from time to time in the Gazette serves as prima facie proof of any change in the value of money.

(2) The accrual of the estate of a deceased spouse is determined before effect is given to any testamentary disposition, donation mortis causa or succession out of that estate in terms of the law of intestate succession.

Section 4 - MPA

MARRIAGE OUT OF COMMUNITY OF PROPERTY – ACCRUAL



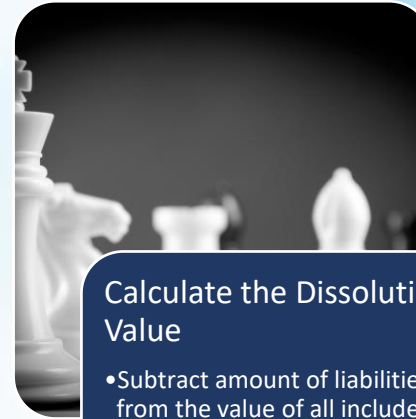
Ascertain the Commencement Value

- Usually contained in the ANC or in a Statement by the Parties
- If no commencement value stipulated, commencement is NIL – Section 6(4)(b)
- Adjust the commencement value by the weighted average of the Consumer Price Index – Section 4(1)(b)(3)



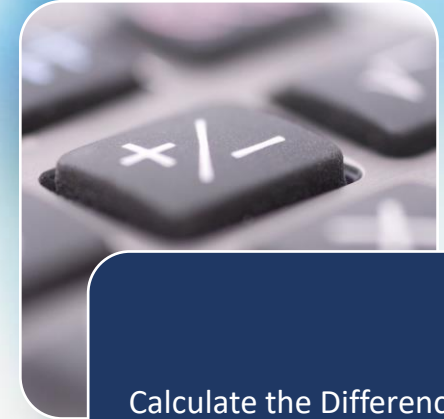
Disregard Excluded Assets

- Assets Excluded in the ANC – Section 4(1)(b)(ii)
- Damages – Section 4(1)(b)(ii)
- Inheritances, legacies and Donations – Section 5(1)
- Donations between spouses – Section 5(2)



Calculate the Dissolution Value

- Subtract amount of liabilities from the value of all included assets



Calculate the Difference Between the Commencement and Dissolution Values

MARRIAGE OUT OF COMMUNITY OF PROPERTY – ACCRUAL

R100 000.00

R10 000 000.00

November 2015

March 2019

R600 000.00

R2 000 000.00



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MARRIAGE OUT OF COMMUNITY OF PROPERTY – ACCRUAL



Accrual Calculation For Ms Jane Doe

Basic Information Summary

Date of Antenuptial Contract:	<u>2 November 2015</u>
Date of Calculation of the Accrual:	<u>As at March 2019</u>
Commencement Value:	R 600 000
Adjusted Commencement Value (calculation below):	R 708 000
Current Net Asset Value:	R 6 000 000

Accrual: R 5 292 000

Calculation of Adjusted CPI Figure

Historic CPI Headline Index Number as at November 2015:	<u>93.4</u>
Historic CPI Headline Index Number as at March 2019:	<u>111.0</u>
Adjusted CPI Value :	$111.0 / 93.4 = 1,188436830835118$
Adjusted CPI Rounded to two decimal values	= <u>1.18</u>

Calculation of Adjusted Commencement Value

Adjusted Commencement Value : $600\,000 \times 1.18 =$ R 708 000

Calculation of Accrual

Accrual : $R\,6\,000\,000 - R\,708\,000 =$ R 5 292 000

Accrual Calculation For Mr John Doe

Basic Information Summary

Date of Antenuptial Contract:	<u>2 November 2015</u>
Date of Calculation of the Accrual:	<u>As at March 2019</u>
Commencement Value:	R 100 000
Adjusted Commencement Value (calculation below):	R 118 000
Current Net Asset Value:	R 10 000 000

Accrual: R 9 882 000

Calculation of Adjusted CPI Figure

Historic CPI Headline Index Number as at November 2015:	<u>93.4</u>
Historic CPI Headline Index Number as at March 2019:	<u>111.0</u>
Adjusted CPI Value :	$111.0 / 93.4 = 1,188436830835118$
Adjusted CPI Rounded to two decimal values	= <u>1.18</u>

Calculation of Adjusted Commencement Value

Adjusted Commencement Value : $100\,000 \times 1.18 =$ R 118 000.00

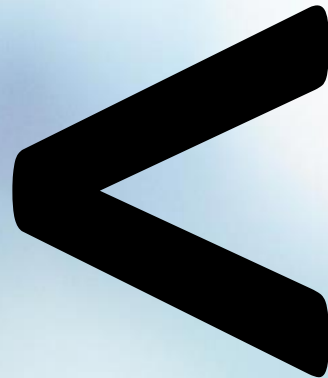
Calculation of Accrual

Accrual : $R\,10\,000\,000 - R\,118\,000 =$ R 9 882 000.00

MARRIAGE OUT OF COMMUNITY OF PROPERTY – ACCRUAL



R 5 292 000



R 4 590 000



R 9 882 000

MARRIAGE OUT OF COMMUNITY OF PROPERTY – ACCRUAL



R 7 587 000



R 2 295 000



R 7 587 000

UNIVERSAL PARTNERSHIP



[18] In this light our courts appear to be supported by good authority when they held, either expressly or by clear implication that:

(a) Universal partnerships of all property which extend beyond commercial undertakings were part of Roman Dutch law and still form part of our law.

(b) A universal partnership of all property does not require an express agreement. Like any other contract it can also come into existence by tacit agreement, that is by an agreement derived from the conduct of the parties.

(c) The requirements for a universal partnership of all property, including universal partnerships between cohabitees, are the same as those formulated by Pothier for partnerships in general.

(d) Where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement had been reached.

Butters v Mncora 2012 (4) SA 1 (SCA)

Existence

Universal Partnerships of all property which extend beyond commercial undertakings form part of our law

Can be TACIT

A universal partnership of all property does not require an express agreement

Requirements

1. Each of the parties brings something into the partnership or bind themselves to bring something into it
2. The partnership business should be carried on for the joint benefit of both parties
3. The object should be to make a profit

Test

The test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement had been reached.



FORFEITURE OF PATRIMONIAL BENEFITS



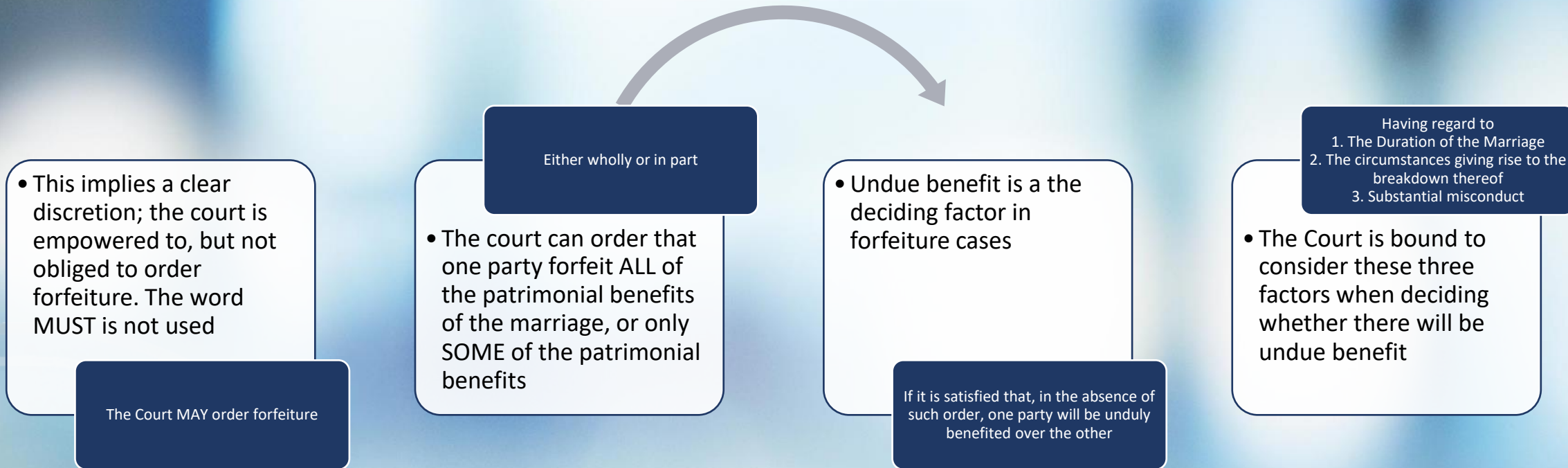
FORFEITURE OF PATRIMONIAL BENEFITS

When a decree of divorce is granted on the ground of the **irretrievable breakdown** of a marriage the court **may** make an order that the **patrimonial benefits of the marriage be forfeited** by one party in favour of the other, either wholly or in part, if the court, having regard to the **duration of the marriage**, the **circumstances which gave rise to the breakdown thereof** and any **substantial misconduct** on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be **unduly benefited**.

Section 9(1) Divorce Act, 1979



FORFEITURE OF PATRIMONIAL BENEFITS





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