

CHANGING YOUR MATRIMONIAL PROPERTY SYSTEM FROM BEING MARRIED IN COMMUNITY OF PROPERTY (COP) TO BEING MARRIED OUT OF COP BEWARE OF THE PITFALLS IF YOU OWN IMMOVEABLE PROPERTY

In certain limited circumstances parties married in community of property (COP) can apply to the High Court for an order to allow them to register a postnuptial agreement. In the vast majority of cases this agreement would change their married status from being married in COP to being married out of COP. This short article highlights one of the pitfalls that could arise from the process if one of the parties owned immovable property at the time of the original marriage.

If one of the parties owned immovable at the time of the marriage in COP, their spouse automatically became a joint owner of the property by virtue of the marriage. This is because when parties marry in COP their 2 estates become one, and this estate is then jointly owned by the married couple.

There is no need for the title deed of the property to be endorsed in the Deeds Office to reflect this joint ownership, but the parties can apply for this to be done if they so wish. This endorsement does not attract transfer duty.

What few people realise however is that if this couple then decide to alter their matrimonial property system to out of COP, and they agree that the property will remain jointly owned by the 2 of them, they need to apply to the Deeds Office to endorse the title deed. Such an endorsement would alter the title deed to reflect that the property is now owned by 2 separate individuals who are married out of community of property.

The problem with such an endorsement is that it will attract transfer duty. This transfer duty will be calculated on the value of the property at the time that court granted the order to allow the parties to register their postnuptial agreement.

If the parties ignore this process and don't have the title deed endorsed, either to save on the transfer duty, or because they are unaware of the need, when they eventually decide to sell the property the Deeds Office will require the title deed to be endorsed before the property can be transferred to the new owner. At that stage SARS will require the transfer duty to be paid, plus penalties at 10% per year calculated from a date 6 months after the court granted the order.

It is accordingly important to take proper legal advice when you contemplate changing your matrimonial property system, especially if there is immovable property involved, as the consequences of overlooking what might seem to be a minor point could turn into an expensive problem in the long run.