

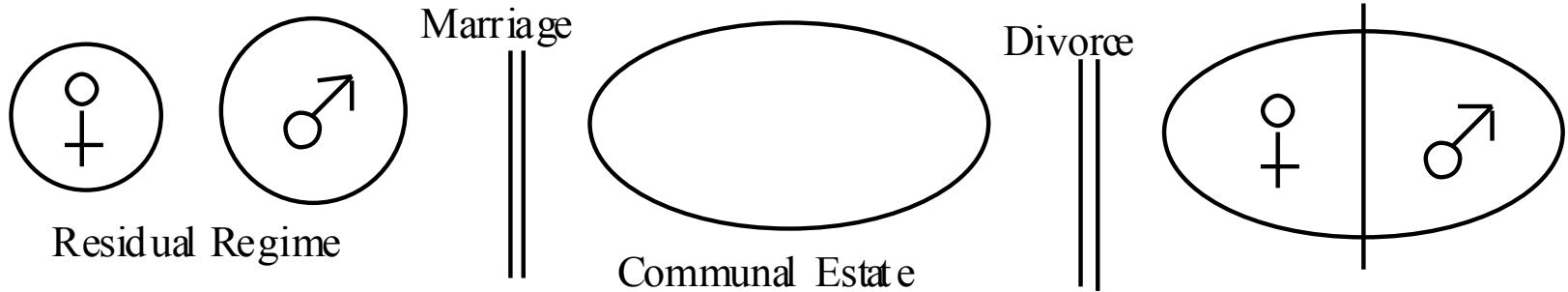
UNIT 4 – MARRIAGE IN COMMUNITY OF PROPERTY

- Cronjé & Heaton chapter 6
- *Van der Merwe v Road Accident Fund* 2007 (1) SA 176 (C)
- *Visser v Hull* 2010 (1) SA 521 (WCC)
- *Bopape v Moloto* 2000 (1) SA 383 (T)
- *Distillers Corporation Ltd v Modise* 2001 (4) SA 1071

OUTCOMES

- Identify which assets and which liabilities form part of the joint estate.
- Identify how the joint estate is managed and when consent of both spouses is required for a valid transaction.
- Explain what recourse is available to the other spouse & third parties where the above consent was not obtained.
- Explain how the spouses ability to litigate is affected by the marriage in CoP.
- **Calculate how a joint estate will be divided.**

MARRIAGE IN COMMUNITY OF PROPERTY TOPICS (as per outline)



- **Assets which form part of the joint estate**
- **Liability for debts**
- **Management of the joint estate**
- **Litigation by spouses**
- **Division of the joint estate**

Assets Included, Liabilities Included

- General rule: all assets & liabilities owned & acquired before and during the marriage fall within the communal estate.
- It is, however, possible for a married couple to have estates outside of the communal estates.

Assets excluded from the joint estate

- [s18 Matrimonial Property Act](#) – Amounts recovered by a spouse for non-patrimonial damages from 3rd party or other spouse.
- land burdened
- Inheritance or donations
- Assets excluded by ANC
- Jocalia (small gifts).
- Costs in matrimonial action (DEBT?)
- Proceeds excluded by a court ito the Prevention of Organised Crime Act
- CONSIDER REPLACEMENT ASSETS AND FRUITS OF THE ABOVE

Liabilities excluded from the joint estate

- s19 Matrimonial Property Act – delictual debts
 - a spouses' separate estate must be depleted first
 - in general spouses' cannot sue each other in delict, except ito of s18(b) for *bodily injuries*
- debts incurred by one of the spouses, who did not have permission to incur the debt (not had the capacity to do so)
- note: some uncertainty as to other separate debts

Management of the joint estate (read together with MPA)

- When is the permission of the partner needed?
- In principle: both spouses have control over the joint estate; exceptions [s15 MPA](#) => where both spouses' permission is needed (power of spouses).
- Different types of permission is needed:
 - (a) Prior Written Consent, attested by two witnesses, re each transaction separately;
 - (b) Written Consent, attested by two witnesses, re each transaction separately;
 - (c) Written Consent, no further requirements
 - (d) Informal Consent

Management of the joint estate

- Prior Written Consent, attested by two witnesses, re each transaction separately:
 - s15(2)(a) relates only to land: alienating or burdening immovable property.
 - suretyship

Management of the joint estate

- Written Consent, attested by two witnesses, re each transaction separately (i.e. Ratification possible):
 - s15(2)(f) buy something on higher purchase
 - s15(2)(b) contracting re to alienating or burdening immovable property
 - s15(2)(g) purchasing immovable property

Management of the joint estate

- Written Consent, no further requirements:
 - s15(2)(c) alienating or burdening shares, stock, etc.
 - s15(2)(d) assets held mainly as investments
 - s15(2)(e) withdrawing money in other spouses bank account
 - s17(1) instituting / defending certain legal action

Management of the joint estate

- Informal Consent
 - s15(3)(a) alienating or burdening furniture or effects of the common household
 - s15(3)(b) accept a salary etc. on behalf of the spouse
 - s15(3)(c) read together with subsection (8): donations which will cause prejudice to other spouse

Management of the joint estate

- Failure to get consent (Protection of spouses & third parties, where a spouse acts without consent)
- Third parties: s15(9)(a)
- Spouses: s15(9)(b)

Management of the joint estate

- **Van der Merwe v RAF 2007 CPD** - re claiming patrimonial damages for a motor vehicle accident against husband married in CoP. Sections declared unconstitutional.
- **Visser v Hull 2010** - effect where consent was not obtained to sell immovable property.
- **Bopane v Moloto 2000** - Spouses married in CoP. Bopane made donations to his mistress. Crt ordered that repayments had to be made.
- **Distillers Corporation Ltd v Modise 2001** - re a contract of suretyship. Was valid. Contradicts **Visser V Hull**

Management of the joint estate

VARIOUS:

- When a spouse refuses to give permission without reason or when a spouse in a comma - s16(1) MPA
- The High Court may also for a definite or indefinite period suspend any power which a spouse may have over the joint estate.
- The common law also affords protection, where one spouse intended to defraud the other spouse.

Litigation by Spouses, Against Each Other (s17 MPA)

- Generally – no claims against each other
- Except:
 - s18(b) bodily injuries – non-patrimonial loss (one spouse causes bodily injury to the other spouse)
 - Duty of support
 - Matrimonial dispute
 - In relation to separate estates

Litigation by Spouses, Against 3rd parties (s17 MPA)

- Generally – written consent from other spouse needed to institute & defend claims
- Except:
 - Non-patrimonial delictual loss
 - In course of business
 - In respect of separate property
- If no consent was obtained, proceedings are still valid, but costs are paid from separate estate or adjustment on dissolution

Division of the joint estate

- Death
- Divorce
- s20 division basic principle: each party entitled to half, adjustments allowed
 - Note: where the joint estate is not large enough to make sufficient adjustments, the innocent spouse is not protected sufficiently

Questions - Problem Solving

1. How are they married – accrual, in community, out of community and WHY ?
2. What falls in and what falls out & WHY ?
3. Then divide it up & determine who gets what.

OUTCOMES REVISITED

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