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# Marriage and your estate

# DIFFERENT OPTIONS: LIMITATIONS ON FREEDOM OF TESTATION CAN VARY

» Marital and other relationship regimes could limit a testator's ability to freely pass on wealth.

## Ingé Lamprecht

marriages, customary marriages and civil unions have, since 2006, all had the same legal consequences. Religious marriages and cohabitation arrangements aren't recognised as marriages under any legislation, except tax.

This is how each regime could affect testamentary freedom:

# In community of property

The biggest limitation on dealing with any asset in a will is in marriages in community of property. Both spouses own everything in equal shares, says Louis van

Vuren, CEO of the Fiduciary Institute of Southern Africa.

In practice, one party can't bequeath what belongs to a partner without that spouse's permission. Van Vuren says the "sting in the tail" is that these individuals will likely have a joint will and while they may bequeath their assets as they see fit, the surviving spouse still has the right to reject the will after their spouse dies.

On rejection, that spouse won't receive anything from the joint will but retains his or her half of all assets. "So, in that instance the joint will then becomes completely ineffective," he adds.

With no antenuptial contract, a marriage is automatically regarded as in community of property.

If would-be spouses decide to marry in community of property, they could still enter into an antenuptial contract and exclude certain assets from the joint estate.

Assets may also be excluded from the joint estate where one spouse receives a donation or inheritance subject to a condition

that it shouldn't form part of the joint estate.

#### Out of community of property

Marriages and civil unions are only out of community of property if an antenuptial contract exists in which community of property is excluded, Van Vuren says.

These marriages can be with or without the application of the accrual system.

#### With accrual

"The accrual system aims to equalise the increase in wealth of the two spouses to the marriage or union during the subsistence of the marriage, by giving a claim to the spouse with the smaller increase, or accrual, against the spouse with the bigger accrual," Van Vuren says.

On divorce or death, the increase in the real value (after inflation) of the estate of both spouses is added and divided by

enforcing the claim amounts to a donation and could

have donations tax implications.

Where the first dying party has the smaller accrual, the claim will be against the survivor who has to pay the claim unless they inherit more than the amount of the claim. If the entire estate is bequeathed to someone else, administration can be complicated if assets as they see fit. the surviving spouse doesn't have enough cash to settle the claim.

In a marriage out of community of property with the accrual system, legislation excludes all inheritances or donations received during the marriage from the accrual.

#### Without accrual

A marriage out of community of property without the accrual system is the most simplistic regime for estate administration, as there's no accrual claim. Parties will generally be able to dispose of their assets as they please.

One exception is where the survivor is left with insufficient support - then there may be a claim under the Maintenance of Surviving Spouses Act.

## Religious marriages

As religious marriages don't legally recognise partners in the relationship as spouses, there is no community of property and each party has the right to bequeath

Courts have extended the claim under the Maintenance of Surviving Spouses Act to religious marriage parties, Van Vuren says.

#### Cohabitation

Unless partners in a cohabitation arrangement had a formal agreement, there is no protection under law and the partners will not have a claim against each other's estates.

But there's an anomaly: because unmarried heterosexual couples do not qualify under the Maintenance of Surviving Spouses Act, it is unclear how a court will deal with one homosexual life partner disinheriting another in a will, Van Vuren says.