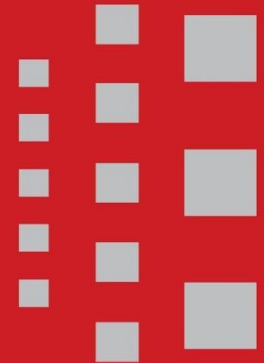


Ante-nuptial **contract** – or is it?



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



G v Minister of Home Affairs and Others

[2022] ZAGPPHC 311; [2022] 3 All SA 58 (GP); 11 May 2022

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August 2022

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- Matrimonial property regimes – a summary
- Section 7(3)(a) of the Divorce Act, 1979
- G v Minister of Home Affairs and Others
 - The parties
 - The facts
 - The argument
 - The judgement
- What does it mean?

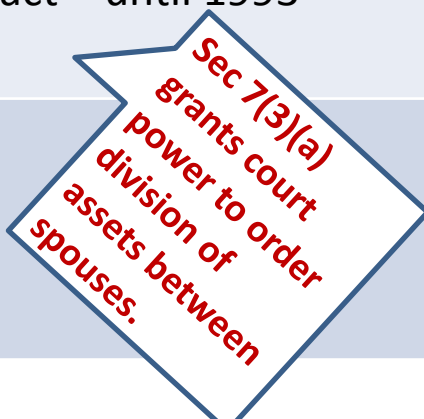
- Matrimonial property regimes amended in 1984
- Before that:
 - In community of property (with marital power)
 - Out of community of property (with or without marital power)
- After that:
 - In community of property
 - Out of community of property
 - With accrual
 - Without accrual



Marriage before 1 November 1984	Marriage after 1 November 1984
In community of property Includes marital power until 1993	In community of property Includes marital power until 1993
Out of community of property Marital power in or out depending on ante-nuptial contract – until 1993	Out of community of property Marital power in or out until 1993 Accrual included (default option)
	Out of community of property Marital power in or out until 1993 Accrual excluded



Section 7(3)(a) of the Divorce Act, 1979

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- 7(3) A court granting a decree of divorce in respect of a marriage out of community of property -
- a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded, or
 - b) ... (not important for our purposes)
- may, subject to the provisions of subsection (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.

The parties:

- Mrs G (Applicant)
- The Minister of Home Affairs (1st Respondent)
- The Minister of Justice and Constitutional Development (2nd Respondent)
- Mr G (3rd Respondent)
- The Pretoria Society of Attorneys (*amicus curiae*)

The facts:

- Mr and Mrs G married in March 1988, out of community of property without the accrual.
- They are apparently getting divorced.
- Mrs G brought the application that section 7(3)(a) is unconstitutional.
- The application is not opposed.
- Min of Justice initially files notice of opposition, but changes his mind – expresses support for Mrs G.

The arguments:

- Mrs G's case is as follows:
 - The section creates an arbitrary and irrational distinction at odds with sec 9(1) of the Constitution;
 - Sec 7(3) available to parties who married prior to 1/11/84 and who contracted out of the default of in community of property;
 - Not available to women who married after 1/11/84 and contracted out of the accrual, although they could be under marital power until 1993;
 - If she married four years earlier, she would have fallen under the protection of the section – cannot be justified rationally.

The arguments:

- It is contrary to [section 9\(3\)](#) of the Constitution;
 - The cut-off date has a disproportional impact on women;
 - Women are in a weaker position to escape from toxic relationships;
 - In e.g. labour legislation the state comes to the aid of the weaker party (the employee) in the relationship;
 - Section 7(3)(a) is clear discrimination against women on the basis of gender.

The Minister of Justice's submissions:

- SALRC has already researched the issue.
- Opponents of amendment's important arguments:
 - Does not respect contractual freedom;
 - Parties choose on purpose a marital regime excluding all community of property or accrual;
 - The assistance afforded in sec 7(3)(a) was intended as a temporary measure for parties who did not change their marital regime during the window period.

The Minister of Justice's submissions (2):

- Supporters of amendment's important arguments:
 - Women cannot be allowed to contract their children and themselves into poverty;
 - Women who contract out of community of property seldom make informed decisions about that;
 - A power imbalance exists;
 - Not unknown for the law to intervene where there are power imbalances – labour legislation.

Submissions by the amicus:

- Concerned that court is asked to adjudicate a complex matter without the benefit of comprehensive research;
- Concerned about the following:
 - Longer and more complex litigation in divorce matters;
 - Contractual freedom and *pacta sunt servanda*;
 - No empiric evidence that women are in a weaker bargaining position than men;
 - Potential impact on creditors;
 - Horizontal v vertical impact of Constitution where two private parties enter into a contract;
 - Problems with similar provisions in other jurisdictions.

The judgement:

- The cut-off at 1/11/1984 is neither arbitrary nor irrational.
- However, the inquiry does not stop there:
 - Parties who married out of community of property before 1/11/84 and who did not use the window period, and parties who married after that date and excluded the accrual, in both cases made a conscious decision.
 - Yet, one group does have the protection of sec 7(3)(a) and the other does not.

The judgement (2):

- The unfairness lies therein that in one case the party who contributed to the wealth of the other party enjoys protection, while in the other case not.
- There is no reason to fear that it will become a “free for all.” Two points have to be proved:
 - There is no agreement between the parties about a division of assets;
 - The one party contributed substantially to the other party’s wealth or maintenance, without a quid pro quo, by way of services rendered or expenses saved.

The judgement (3):

- Court orders that sec 7(3)(a) be read without the words “... *entered into before the commencement of the Matrimonial Property Act, 1984, ...*”
- The matter is referred to the Constitutional Court for confirmation.
- The order is not retro-active and therefore does not impact divorces finalised before the date of the order.

What does it mean?

- Conceptually, three groups may be impacted meaningfully by this judgement:
 - Young couples where one of the spouses plan to stay at home for some period of time to raise children.
 - Young couples who have not yet accumulated substantial wealth, but who both have the potential to earn high incomes.
 - Older couples who get married after they have both accumulated substantial wealth.

Section 9(1) of the Constitution, 1996:

Everyone is equal before the law and has the right to equal protection and benefit of the law.

Section 9(3) of the Constitution, 1996:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.



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