

# Forewarned is Forearmed: Impact of Marriage Bill 2022 on Estate Planning

Munirah Osman

Head of School of Law &  
Administration

Regent Business School





# 1. DEVELOPMENT OF THE CONCEPT OF FAMILY LAW

- Family unit is cornerstone of society and critical to estate planning.
- Traditionally family unit based on marriage
- Society places institution of marriage on a central position in law – receives special protection
- Nuclear family – mother, father and biological children – outdated
- Law now recognises different types of families
- Protection granted to nuclear families is now extended to other types of families



## 2. Pre 1994 Legislation

### Colonial Legislation regulating Family Law in SA – based on Canon Law

- Marriage Act 25 of 1961
- Divorce Act 70 of 1979
- Matrimonial Property Act 88 of 1984





### 3. Post 1994 Legislation

- Marriage Act 25 of 1961
- Recognition of Customary Marriages Act 120 of 1998
- Civil Union Act 17 of 2006
- Divorce Act 70 of 1979
- Matrimonial Property Act 88 of 1984
- Common law as developed through Case Law
- Recognition of Muslim Marriages
- Recognition of Hindu Marriages



# Marriage

in community of property

out of community of property

with accrual

without accrual



**Current  
Matrimonial Property  
Regimes**



## Current Application

### Marriage Act 25 of 1961

- If no ANC then default is in COP.

### Recognition of Customary Marriages Act 120 of 1998

- Polygynous customary marriages before this Act – Customary Law applies – s7(1) MPA
- Monogamous customary marriages – in COP unless ANC entered into.
- Polygynous customary marriages after this Act – require consent of court to proceed and need to put up contract with subsequent wife. Out of COP.

### Civil Union Act 17 of 2006

- If no ANC then default is in COP.

### SCA order

- Muslim marriages shall be regarded as out of COP unless there are agreements to the contrary.





## 4. Current Legislative Initiatives

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Marriage Bill 2022

Divorce Amendment Bill

Review of Matrimonial  
Property Law







# Marriage Bill 2022

- History and context
- Purpose
- Proprietary Consequences
- Current debates and views



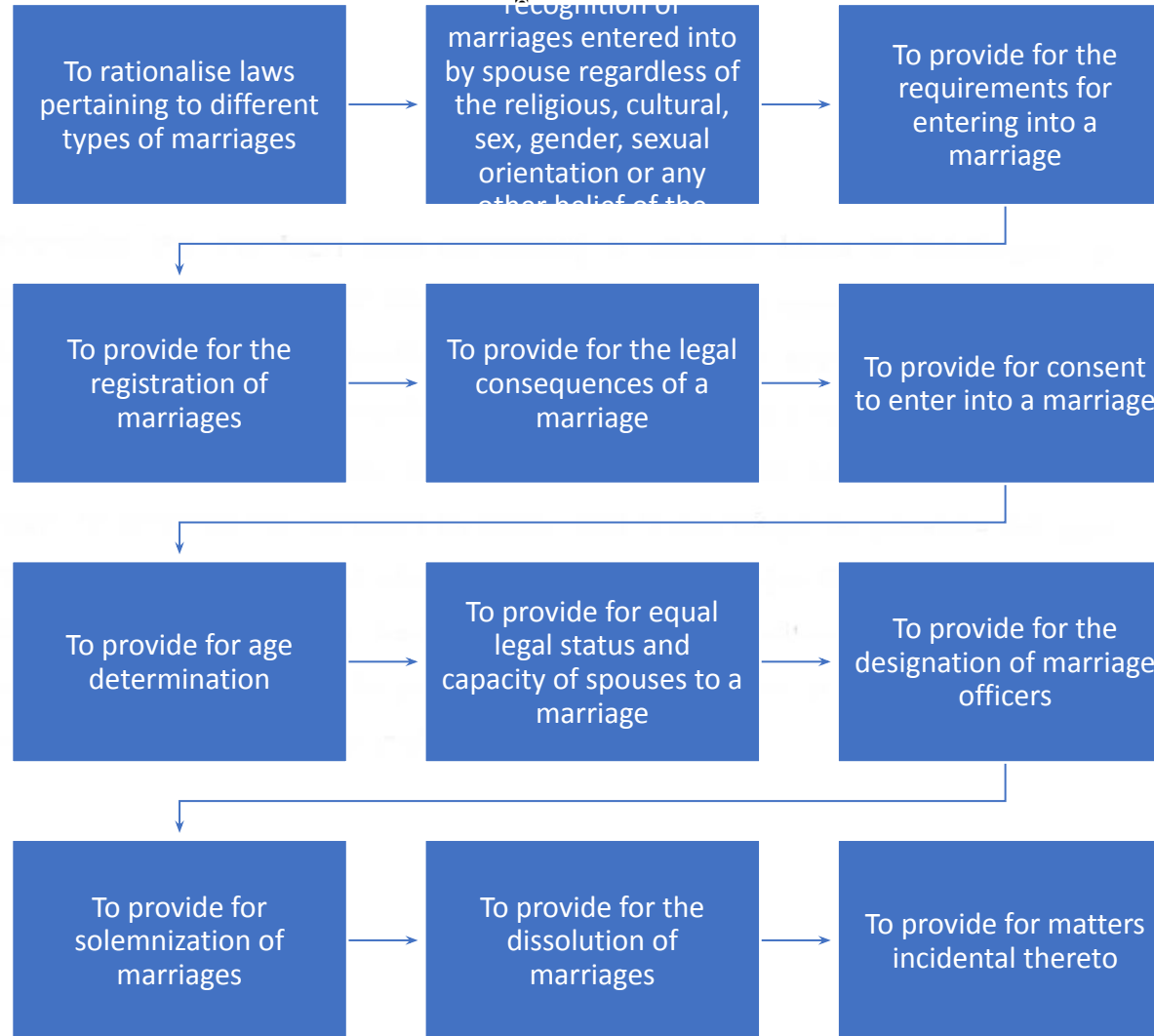


# Marriage Bill 2022: History and Context

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- Post 1994 efforts were made to recognize all types of marriages in SA
- Only 2 laws passed:
  - Recognition of Customary Marriages Act
  - Civil Union Act
- Efforts to recognize Muslim Marriages made much progress culminating in the MMB – Bill was not tabled in Parliament due to Government taking a new stance
- 2013 Minister of home Affairs calls for investigation for possible adoption of a Single Marriage Statute for South Africa
- Why the need for a Single Marriage Statute?
  - Decolonisation
  - Harmonising the variety of marriage systems that exist
  - Complying with the doctrine of Constitutional equality
- 2 options proposed::
  - Protected Relationships Bill
  - Recognition and registration of Marriages and Life Partnerships
- This was then followed by the White paper and Green paper on Marriage in South Africa
- Currently looking at Marriage Bill 2022

# Marriage Bill 2022: Purpose





# Marriage Bill 2022: Proprietary Consequences

Existing monogamous marriages – entered into before this Act will continue to be regulated by the law governing them at the time of the marriage.

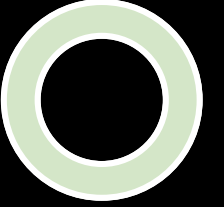
When registering existing marriages the parties have option to change marital regime.

Marriages entered into after the commencement of this Act – select property system before solemnization of marriage.

# Marriage Bill 2022: Current Debates

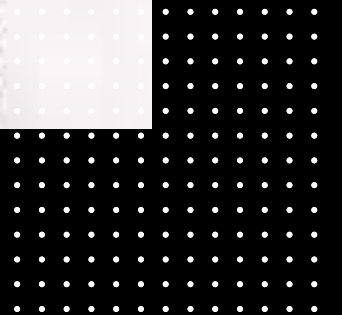
- One-size-fits-all approach not appropriate for SA
- Age determination clash with cultural/religious rules
- Marriage officers and their roles
- Problematic definitions – polygamy/polygyny
- Lacking in clarity – registration of ANCs period
- Penalties and offences





# Divorce Amendment Bill

- Private Members Bill – Introduced by Leader of Al Jamaah Party
- Calling for amendments to existing Divorce Act
- Purpose:
  - To amend the Divorce Act, 1979, so as insert certain definitions;
  - to provide for mechanisms to safeguard the welfare of minor or dependent children born of Muslim marriages;
  - to provide for the redistribution of assets on the dissolution of a Muslim marriage;
  - to provide for the forfeiture of patrimonial benefits of a Muslim marriage; and
  - to provide for matters connected therewith.





# Review of the Matrimonial Property Law

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- Issue paper 41 was published in October 2018
- Discussion paper 160 now published comment
- In light of the significant social change, and to ensure that section 9 of the Constitution is realised in the relationship sphere, this discussion paper makes a variety of proposals. These proposals are made to ensure that legislation around matrimonial property distribution is not discriminatory on the basis of, among others, sex, gender, sexual orientation, race, religion and marital status.

# Summary of Recommendations of Review of Matrimonial Property Law

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- The Commission notes that respondents were particularly concerned about the different treatment of parties in marriages, including life partnerships, the lack of proper financial disclosure rules upon divorce and the need for the state to run campaigns to better educate South African society about substantive equality in the family setting.
  - In general, the ICommission proposes renaming the Matrimonial Property Act to better reflect the intention to regulate the property of all life partnerships, not only those who are married in terms of the Marriage Act, Civil Union Act, and the Recognition of Customary Marriages Act (par 7.9). The Commission sets out some possibilities in this regard such as: the Protected Relationships Act or the Intimate Relationships and the Matrimonial Property Act.
  - There is also a question of whether any, all or some of the suggested amendments should be prospective or retrospective in application. The particular question of prospective/retrospective application is not set out in this summary but is canvassed in the rest of the report.
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You have been  
forewarned!  
Arm yourself –  
understand the  
changes that will  
impact estate  
planning.







Q & A

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