

# Can a matrimonial property system be amended without a court order?

By [Hopewell Sathekge](#)

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It is common practice in South Africa for a couple to first enter a customary marriage without an antenuptial contract, followed by a civil marriage with an antenuptial contract - but does that mean they have effectively altered their matrimonial property system without a court order and taking into account the interests of third parties such as creditors?



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## Freedom of choice

Couples are free to choose which of the matrimonial property systems available under South African law they will apply to their intended marriage before concluding the marriage, not after. Many of the consequences that flow from the chosen system are not easily altered because of their direct influence on the couple's legal relationship with third parties. Any amendment to a couple's chosen matrimonial property system can only be made by application to the High Court.

The matrimonial property system available to any couple in South Africa is marriage either in community of property or out of community of property, the latter with either exclusion or inclusion of the accrual. All marriages in South Africa are in community of property, unless a valid antenuptial contract is executed before the date of marriage. All marriages out of community of property are with the inclusion of the accrual unless a couple expressly excludes the accrual in their antenuptial contract.



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For a couple who elected first to enter a customary marriage, in terms of the Recognition of Customary Marriages Act (120 of 1998), without executing an antenuptial contract, and then later into a civil marriage in terms of the Marriage Act (25 of 1961) and after executing an antenuptial contract, the question is: *what matrimonial property system will govern their*

*marriage?* Should it that their chosen matrimonial property system is out of community of property. Does it mean a couple is able to alter their matrimonial system from in community of property to out of community of property without a court order?

Section 2(2) of the Recognition of Customary Marriages Act provides that customary marriages are for all purposes legally recognised as marriages. In terms of section 7(2) of the Act, customary marriages are in community of property unless it is specifically excluded by spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

## Contracts before or after marriages?

Often a couple will first observe the customs and usages of their culture for the conclusion of a customary marriage and then later enter into a civil marriage in terms of the Marriage Act. They will then execute an antenuptial contract only after the customary marriage, but before the civil marriage. This could be because of a general perception that an antenuptial contract needs to be executed only before the date of the civil marriage but not necessarily before the earlier customary marriage. The legal position is that a customary marriage exists and if no antenuptial contract was entered into before that marriage, it will be in community of property.

What then are the patrimonial consequences when an antenuptial contract is entered into after the date of the customary marriage, but before the civil marriage?



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In terms of section 10(1) of the Recognition of Customary Marriages Act, a man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act.

Section 10(2) of the Recognition of Customary Marriages Act provides that when a civil marriage is concluded, the marriage is in community of property unless an antenuptial contract has been concluded. In a scenario where a customary marriage is entered into and an antenuptial contract is executed after the customary marriage but before the civil marriage, one finds a couple to first have been married in community of property under the Recognition of Customary Marriages Act and then having an antenuptial contract governing their civil marriage in terms of the Marriage Act. It is presumed that the antenuptial contract would then establish a marriage out of community of property, without the couple having made an application to court to change their matrimonial property regime.

## Amending matrimonial property system

In terms of the Matrimonial Property Act (88 of 1984), there are only two ways to amend the matrimonial property system of a married couple.

The first option is under section 20(1) of the Act, in terms of which a court may, on application of a spouse, order the immediate division of the joint estate in equal shares or on such other basis as the court may deem fit. Before granting the order, the court must be satisfied that the interest of the spouse who applied for the order is being seriously prejudiced by the conduct of the other spouse and that third parties will not be prejudiced by the division.

The second option is by way of section 21(1) of the Act, in terms of which a court may, on joint application by a husband and wife, order that their matrimonial property system no longer applies and authorise them to conclude a postnuptial contract to regulate their future matrimonial property system. Before granting the order, the court must be satisfied that there are sound reasons for the proposed change; that sufficient notice of the proposed change has been given to all the creditors of the spouses and that third parties will not be prejudiced by the proposed change.

## **Conversion without a court order?**

Does that then mean a couple who was once married in community of property – in terms of the Recognition of Customary Marriages Act – can change their marriage to be out of community of property in terms of the Marriage Act without a court order?

Considering the two ways available to amend the matrimonial property system of a couple in terms of the Matrimonial Property Act, it may be argued that the amendment should only be allowed by a court once the interests of third parties, such as creditors, are considered.

However, in a conversion from a customary marriage to a civil one, it appears that a couple can amend their matrimonial property system without a court order and with due regard to the interest of third parties, simply because of section 10(2) of the Recognition of Customary Marriages Act. If that is the case, it would be interesting to observe a court adjudicate such a matter.

## **ABOUT THE AUTHOR**

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