

Short notes on:

## **THE IMPORTANCE OF AN ANTENUPTIAL AGREEMENT FOR FOREIGN SPOUSES TO AID IN LEGAL CERTAINTY IN CASE OF DIVORCE**

### ***Introduction***

Antenuptial contracts set what we believe to be the cornerstones of successful unions. This, although seeming fairly negative, includes easing the process of dissolving the marriage, in either death or divorce.

The problem most globe trotters face these days – i.e. when one spouse is living overseas, is that it may become a tedious process to file for divorce. The first step when instituting a divorce action is for the Summons to be served on the other spouse. As already stated, this can prove to be a difficult task when the other spouse is not residing in South Africa.

Our law provides for service of the divorce summons by way of edictal citation, which essentially means a different way of serving the Summons on the spouse overseas. The focus of this article will be to demystify this process.

### ***The process***

An application is brought to Court setting out the particulars of the marriage and the grounds for the divorce. The Judge or Magistrate hearing the application will need to be satisfied that the spouses are legally married and that the application falls within the jurisdiction of the South African Courts. In other words: that either the parties were married in South Africa or one party is permanently residing here.

Permission to initiate divorce proceedings with an edictal citation will be granted only if the party bringing the application (i.e. the applicant) can show that the action has a reasonable chance of

succeeding when the matter finally comes to trial. If the applicant has no other option but an edictal citation, it is of the utmost importance that he or she has legal certainty of the outcome of the process. Spouses who concluded an antenuptial contract before they were married will have more legal certainty than spouses who are married in community of property (without an antenuptial agreement). The antenuptial contract outlines the parties' rights and obligations in the event of a divorce and a Court can easily determine the legal certainty and reasonable chance of a successful outcome of the matter. Whereas spouses married in community of property can argue for years over who gets the yellow couch in the living room and one spouse's claim to it is as good as the other spouse's counterclaim to it.

The process of edictal citation can be shortly summarised as follows: If you have a residential or work address for the overseas spouse in the other country, the Court will grant an order that the Summons be sent to the relevant Sheriff in that country and area the spouse is currently living in for service thereof on him or her. This can be problematic, as not all legal systems have Sheriffs and their way of service also differs from our system. In this instance it would be more appropriate to find a law firm in the specific area to act as an overseas correspondent and handle the service in the proper way.

If you have contact with your spouse via email, a Court can subsequently grant an order that the Summons be sent to the overseas spouse via email with the appropriate read receipts. When he or she replies with a receipt of the Summons it will be served. An even more controversial method used recently, is service via Facebook message. The Summons is sent as an attachment to the overseas spouse on Facebook's messaging service and he or she replies with an acceptance.

Ultimately the Court will need proof that the overseas spouse received the Summons, either by Sheriff's return or acknowledging email or message. Thereafter the divorce can proceed in a South African Court and service of all further pleadings can be done by way of email-, Facebook or whichever method was chosen.

Edictal citation is not an easy means of initiating divorce proceedings and it can become an expensive venture. After the initial service of the Summons, the matter may become opposed and it will be hard to serve each pleading on the overseas spouse.

## **Conclusion**

With the legal certainty an antenuptial agreement provides, it will be easier to finalise the divorce matter by asking for implementation of the terms of the antenuptial contract. So, yet another advantage of executing an antenuptial contract. The overseas spouse cannot oppose the terms of the antenuptial contract and that will shorten the divorce process, reduce disputes and limit the costs. We therefore recommend that spouses engage an expert attorney at SchoemanLaw Inc to obtain the legal certainty and peace of mind an antenuptial contract can provide.

