Short notes on:

CUSTOMARY MARRIAGES AND THE DIVISION OF THE JOINT ESTATE

Introduction

It is a common problem in South Africa, particularly in rural areas, that when spouses to a Customary Marriage institute divorce, the husband indicates an unwillingness to accept division of the matrimonial property. In most cases people separate informally without obtaining a divorce and this leads to them missing out on benefitting from the legal rules regulating the consequences of the dissolution of the Customary Marriage.¹

Overview

According to Section 7(2) of the Recognition of Customary Marriages Act 120 of 1998 (herein after ‘the Act), all Customary Marriages are entered into in community of property and of profit and loss between the spouses, unless the parties have an ante-nuptial contract. If the consequences of the matrimonial property system are not specifically excluded by the spouses, upon the dissolution of the marriage, both spouses are entitled to an equal division of the joint estate.

But first, in order for the law to recognise a marriage as a Customary Marriage, the following requirements have to be met:

- “lobola must be fixed;
- the parties must consent to customary marriage in accordance to customary law;
- parties must be older than 18 years or have parental consent; and
- marriage must be negotiated and entered into or celebrated according to Customary Law.”²

Against this background, it seems that most people are not aware that their Customary Marriages are by default in Community of Property and they are entitled to an equal division of the joint estate. Even though that Customary Marriage has to be registered to serve as proof and in order to reflect the marital status of the couple,³ failure to register the marriage does not mean the marriage is not

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³ Section 4 (2) of the Recognition of Customary Marriages, Act 120 of 1998.
valid.\textsuperscript{4} According to the Act, a Customary marriage may only be dissolved by a Court by a decree of divorce.\textsuperscript{5}

**Conclusion**

This background demonstrates that an informal separation and the wife leaving the matrimonial property does not mean that the family property only belongs to the husband. Spouses are therefore advised not to miss out on benefitting from the legal rules regulating the consequences of the dissolution of the marriage, especially if they have intentions of claiming an even share of the matrimonial property.\textsuperscript{6}

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\textsuperscript{4} Section 4 (9) of the Recognition of Customary Marriages Act. \\
\textsuperscript{5} Section 8 (1) of the Recognition of Customary Marriages Act. \\