



How valid is a marriage contract if not confirmed by court?

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"I have been married to my husband for more than 20 years. We were both in our early twenties when we were married according to customary rites as well as civilly out of community of property. Since then my husband has built up a few successful businesses and a few years ago we created our own post-nuptial agreement to confirm that we see ourselves as married in community of property. Unfortunately, we have fallen on troubled times and wish to get divorced. My husband says we are still married out of community of property as the agreement we signed late is invalid. Is this true?"

To answer your question, it must firstly be confirmed whether a valid marriage exists, and secondly, whether the later concluded marriage contract could validly change your matrimonial property regime.

The legislation that governs the formalities of marriage in South Africa include, the Marriage Act 25 of 1961, which regulates the solemnisation of monogamous, heterosexual civil marriages and the Recognition of Customary Marriages Act 120 of 1998, which recognizes both monogamous and polygamous customary marriages, provided they are concluded according to customs observed among the indigenous people of South Africa as well as other statutory requirements in terms of the Act. Lastly, the Civil Union Act 17 of 2006 regulates the solemnisation of marriages between both opposite and same-sex couples.

In your situation the Marriage Act and the Recognition of Customary Marriages Act is applicable due to the manner in which your marriage was concluded. Provided the necessary statutory and custom requirements for customary marriages was complied with it appears that your marriage was validly concluded.

The question then is whether the contract that you and your husband concluded later between yourselves validly amended the matrimonial property regime that applied to your marriage in a way that would need to be given effect to should you divorce.

Recently, our Constitutional Court, in having to consider whether a post-nuptial marriage contract concluded without the supervision of the court was valid, found that home drafted contracts were not valid and enforceable if not sanctioned by a court order. The Court confirmed that the only way married couples could change their marital regimes were to approach the courts in compliance with Section 21 of the Matrimonial Property Act, and that any contract entered into without the supervision of the court, would not be enforceable.

In your case therefore it does appear that your home contract will not be valid and enforceable to change

your matrimonial property regime. We would recommend however, that should you be considering divorce, you make contact with your attorney to discuss the options available to you.

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