

ACCORDING TO THE LAWS OF WHAT COUNTRY AM I MARRIED?

In the absence of an Antenuptial Agreement, the proprietary consequences of a marriage are determined by the legal system of the country where the husband is domiciled at the time of the marriage.

What does this mean?

It means that the laws of the country that the husband regards as his permanent place of residence /domicile as at the time of the marriage (that is for example, the place he has to return to when his visa expires, or when his diplomatic appointment ends, or the employment contract ends, or the holiday comes to an end etc.) determines what laws apply to the marriage regardless of the nationality of the wife, or the actual location of the marriage.

So:

- if a woman marries a British citizen in South Africa whilst he is out here on a 6 month sabbatical with the intention of both returning to the UK at the end of his sabbatical, the laws of the UK will be applicable to the marriage
- The South African man on a work permit in the UK who marries a British, or Australian, or American girl in the UK will be married according to the laws of South Africa
- The South African couple who meet and marry in Dubai whilst working there, are married according to the Laws of South Africa
- The South African woman who marries her New Zealander husband whilst on holiday in the Seychelles, is married according to the Laws of New Zealand

It does not matter that after the marriage the intentions of where a couple will reside change, the laws applicable to the marriage will always be the laws of the country of the husband's domicile at the time of the marriage.

Straightforward right? But what about same sex unions??

Section 13 of the Civil Union Act that extends the legal rights, privileges, and duties of marriage to same sex couples. Subsection (1) states that "The legal consequences of a marriage contemplated in the Marriage Act apply ...to a civil union" and subsection (2) provides that "...any reference to ... husband, wife or spouse in any other law, including the common law, includes a civil union partner."

So, for purposes of determining the law applicable to a same sex union we also need to look at the domicile of the husband at the time of the marriage... But how can this be done?

This is unfortunately one of the absurdities that results from section 13 of the Civil Union Act where very little attention has been given to the practical issues raised by the extension of the legal consequences of marriage to same-sex civil union partners.

Imagine that a South African woman enters a civil union with a British woman in Italy and they do not conclude an Antenuptial Agreement. What law applies to their marriage? South African Law or the Law of the UK? Common sense dictates that after interviewing the parties a decision based on the doctrine of convenience would have to be reached. Factors such as where and on what basis the couple were living immediately prior to the union, and where they took up residence immediately after the union, would be considered.

Article by Maria Davey