

## PERSONALISED LEGAL ASSISTANCE

Professional legal and property consulting

### **SONNENBERG & ASSOCIATES PROPERTY AND LEGAL ADVICE NEWSLETTER # 8**

#### **1. Legal Quotes**

"If you have ten thousand regulations you destroy all respect for the law." [Winston Churchill]

"Litigation takes the place of sex at middle age." [Gore Vidal, American writer]

"Send lawyers, guns and money, the shit has hit the fan." [Warren Zevon, 'Lawyers, Guns & Money' (song)(1978)]

#### **2. A legal tale**

A new client had just come to see a well known attorney.

"How much do you charge?" said the client.

"I charge R5000 to answer three questions" replied the attorney.

"Isn't that a bit steep?" asked the client.

"Yes, it is" said the attorney, "And what's your third question?"

#### **3. Facts of the day**

An aeroplane's black box is actually orange. The name is a historical hangover from the days before fluorescent paint.

The word "mortgage" is a French legal term meaning "death contract."

#### **4. Inspiring quotes**

"Try not to become a man of success, but a man of value." [Albert Einstein]

"Do not wait for your ship to come in. Swim out to it." [unknown]

"You miss 100% of the shots you don't take." [Wayne Gretzky]

#### **5. South African quote**

"I personally believe that I have a responsibility to teach my children, to sensitize them, to prepare them for life outside our gate. So when they encounter people from different cultures they have that sensitivity, they have that understanding that they're not superior - and they never will be because of the colour of their skin." [Redi Thlabi's comment introducing her #Openline]

#### **6. Common law marriages in South Africa**

The Romans were probably right in saying "***Communio est mater rixarum.***" Loosely translated, this means "**partnership is the mother of all f ... ups.**" One doesn't need to look too hard in today's fickle society where one in every two (or one in every one comma five) marriages are doomed to end in divorce, to give credence to this maxim.

Most couples today live together before they get married. There is a common misconception that if a couple live together for a period of time, a "default marriage" comes into being, which establishes legal rights and duties between them.

**In South African law, this is nonsense; there is no such thing as a common law marriage.** The only way co-habitees can be protected on termination of the relationship, is for the partners to enter into a "**Universal Partnership**" agreement. This agreement may be entered into at any time prior to the dissolution of the partnership.

A Universal Partnership is an agreement between two parties (including gay and lesbian couples) who live together in a permanent relationship without marrying. This agreement can be express (i.e. either orally determined or recorded in a written agreement) or tacit (understood or implied without stating openly), and determines what happens to the assets and property of the partners should they split. The contract, in effect, allows the partners to jointly own all the property acquired during the relationship. The partnership assets include those assets brought into the

partnership, as well as those acquired during the partnership.

A couple whose relationship is governed by a Universal Partnership enjoy the same rights and obligations as a married couple with regards to their present and future assets. Like an antenuptial contract, the agreement is not enforceable vis a vis third parties.

In the absence of proof of a Universal Partnership, a party would have to approach the courts to prove the existence of same (as confirmed in ***Ponelat v Shrepfer 2012 (1) SA 206 (SCA)***):

- a) That each of the partners bring something into the partnership, whether it be money, labour or skill;
- b) That the partnership should be carried on for the joint benefit of the parties;
- c) That the object should be to make a profit;
- d) That the contract should be a legitimate one.

Should there be no recording of a Universal Partnership, the legal consequences are the following:

- a) There would be no exemption in respect of donations tax between the partners;
- b) The surviving partner would not benefit from the exemption from estate duty of bequests to spouses;
- c) There would be no reciprocal obligation of maintenance;
- d) The surviving partner would not be recognised as a beneficiary, should his/her partner die intestate.
- e) In the absence of a will benefitting the surviving partner, he/she would have no right to the property or assets of the deceased partner.

A Universal Partnership terminates on the death of one of the partners, on the insolvency of one of the partners, or by agreement. The partnership assets are divided according to the contract, on dissolution of the partnership.

It is important to note that **partners cannot share in the pension assets of their partner** on dissolution of the relationship as the Pension Fund Act makes reference to a "divorce", thereby excluding co-habitees in a Universal Partnership.

**The Children's Act 38 of 2005 governs the position of children born to partners in a Universal Partnership. The father's obligations in terms of the aforementioned include caring for the children, maintaining contact with the children, acting as guardian and contributing towards the maintenance in respect of the children.**

It is advisable that partners draft wills to ensure that their surviving partner is benefitted as they wish.

As it may be difficult and expensive to prove the existence of a Universal Partnership, I suggest getting an experienced professional to draft the agreement, which amongst other things would clearly set out (in the case of a termination of the relationship/partnership)

- the division of assets,
- the duty of support between the partners, and
- the right to inherit from each other in terms of intestate succession.

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