

I am married in community of property. Do the assets of the surviving spouse also form part of the deceased estate?

Yes.

Where spouses are married in community of property, there is only one joint deceased estate containing all the assets and liabilities of the spouses. Where one of the spouses therefore passes away, all the assets and liabilities will form part of the deceased estate and will have to be dealt with as part of the winding-up of the estate.

In other words, irrespective of whether an asset is in the name of the deceased or the name of the surviving spouse, all the assets must be listed in the liquidation and distribution account. The liquidation and distribution account must be lodged with the Master of the High Court and SARS.

In terms of the marriage in community of property, the surviving spouse is entitled to get back 50% of the deceased estate, in other words, 50% of each asset of the estate. The other 50% will be inherited per the deceased's will, if there is one, or per the Intestate Law of Succession if there is not a will. If the surviving spouse inherits everything from the deceased either in terms of the will or intestate, he or she will get 100% of the assets in the estate, 50% as the surviving spouse of a marriage in community of property and the other 50% as heir.

One of the advantages of a marriage out of community of property is that this consequence is avoided making the winding-up of the estate simpler and cheaper.

Let's take, for example, the case where the deceased's son and not the surviving spouse inherits as sole beneficiary per the deceased's will. In such an event, the surviving spouse would be entitled to 50% of each asset of the joint deceased estate and the son to the other 50% of each asset. In our opinion, if those are the facts, a redistribution agreement between the son and the surviving spouse would, in most cases, be appropriate to consider to avoid joint ownership of assets

as far as possible. In our experience, joint ownership can lead to many headaches.

A major concern of spouses married in community of property is often the availability of funds to the surviving spouse after the death of one of them. This problem can, however, be avoided with proper planning.

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