

6. ADVANTAGES OF BEING MARRIED OUT OF COMMUNITY OF PROPERTY WITH ACCRUAL

A marriage contract will keep all the advantages but avoid all the disadvantages of marriages in community of property. Being married out of community of property recognises the modern perception of marriage as a partnership in all aspects and recognises emotional and physical support as contribution to the marriage in addition to financial ones. This system is based on an equal contribution to the marriage and therefore the parties should share equally the benefits gained during the marriage. The regime is designed to offset the kind of injustices that used occur when women married under an Antenuptial Contract, spent many years running the home and raising children, but got no recognition for her contribution to her estate.

Asset protection is important in that your assets are now protected from the risk of creditors. Because there are two separate estates, specific assets of the spouse can be protected from creditors by being placed in the name of the spouse which is not likely to be declared insolvent.

In this way assets and liabilities are shared in the hearts of the couple, but they are separate in the minds of the outside creditors. Being married out of community of property gives you the freedom and independence to manage your own property, finances, and bank accounts. A further advantage is that there will be no problem with regards to the deceased spouse's estate being wound up and the other spouse having to wait for access to continue to use and maintain the assets. There will be no freezing of the joint estate as effectively there is no joint estate you each retain your own separate estates.

7. WHAT IF WE DON'T SIGN AN ANTENUPTIAL CONTRACT

It is very important to sign the contract before you get married, in front of a notary public. This contract must then be registered at the Deeds Office. Please note that if you need an Antenuptial Contract after you are married, this is going to be a very expensive exercise as you will need to approach the High Court and bring an application for the approval of all your creditors which is an expensive and time consuming exercise.

8. FREQUENTLY ASKED QUESTIONS

- 1. **When must we do it?** An Antenuptial Contract must be signed before you get married since this is such an important step in the marriage process, please get it ticked off your list as soon as possible.
- 2. **What is an Antenuptial Contract?** An Antenuptial Contract is a legally binding contract entered into by the couple before their marriage. It sets out ownership of assets in separate estates and excludes liability for each other debts.
- 3. **How long does it take?** It only takes a few moments for you to meet with your attorney and to get the documents drafted. It shouldn't take more than 60 minutes in consultation with the attorney to draft and sign the necessary documentation.
- 4. **How much does it cost?** An Antenuptial Contract will include a consultation fee, a drafting fee, Deeds Office registration and lodgement fee - R1500.00 plus VAT.
- 5. **Must we sign in person?** It is preferable to sign in person, alternatively you can decide to sign by Power of Attorney.

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THE LEGAL IMPLICATIONS OF SAYING

“I DO”



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THE LEGAL IMPLICATIONS OF SAYING "I DO"

1. WHAT ARE MY OPTIONS?

In South Africa there are three marriage options:

- 1. In community of property;
(what's mine is yours, what's yours is mine);
- 2. Out of community of property with accrual;
(what we collect during the marriage is ours);
- 3. Out of community of property without accrual;
(what's mine is mine and what's yours is yours).

2. IN COMMUNITY OF PROPERTY (IF YOU CHOOSE NOT TO HAVE A MARRIAGE CONTRACT)

In South African Law, a marriage will automatically be in community of property if you do not sign an Antenuptial Contract before the marriage ceremony. This means that from the date of your marriage you will share all your property and all your debts (past, present and future) in one joint estate.

2.1 ADVANTAGES

This system may sound fair, because it is in the spirit of marriage and partnership that everything is shared, and it creates legal and financial equality of both parties.

2.2 DISADVANTAGES

There are serious disadvantages to being married in community of property as you will share each other's assets, but you will also share each other's liabilities. So if either spouse faces financial difficulties, all the combined assets are at risk from your creditors. Because you will also be sharing all the debts of the past, present and future you are also liable for the debts of the other spouse prior to the marriage as well as the debts during the marriage. If one of you goes insolvent the joint estate may be sequestrated

3. TWO TYPES OF ANTENUPTIAL CONTRACTS

There are two types of Antenuptial Contracts. If you are married out of community of property you have to sign an Antenuptial Contract. An Antenuptial Contract must be signed prior to the marriage ceremony for the marriage to be out of community of property.

The two types of marriage contracts are:

1. **Out of community of property with accrual.** This means that there will be equal sharing in what is built up during the marriage.

Who is it for? This type of marriage is perhaps the fairest system, and it is certainly the most popular choice. It is suited to couples who are planning to have children because it recognises non-financial contribution to the marriage, such as looking after the home being the home maker, nurturer and care giver of the children. What we collect during the marriage is ours, and what's mine is mine and what's yours is yours.

2. **Out of community of property without accrual.** In this type of marriage there is no sharing.

Who is for? A non-accrual Antenuptial Contract may be most appropriate where couples have already acquired most of their ultimate wealth. If there is not likely to be substantial gains during the course of the marriage to share, it is particularly suited to these type of couples who do not wish to share in what is made during the marriage if the marriage ends.

4. WHY SIGN AN ANTENUPTIAL CONTRACT?

There is a common misconception that an Antenuptial Contract is a divorce contract! The truth is that an Antenuptial Contract is a marriage contract that will help you to plan your marriage relationship with your spouse in a structured way based on a clear understanding from the start of your marriage. Estate planning plays a very important part of the marriage relationship as well as protecting your assets to protect you as a couple against the outside world.

A reminder that the word "ante" comes from the Latin word meaning "**before**" so this is a **before marriage** contract. Not an "anti" which means **against** marriage contract.

5. HOW DOES THE ACCRUAL WORK

The principle of the accrual system is that what is built up during the marriage is shared the idea is that each party will keep what they had at the start of the marriage and share any gains or losses made during the marriage. The increase in the estate is calculated and an amount is transferred from one spouse to the other so that there is an equal amount of sharing. The commencement values, or specific excluded assets must be declared at the start of the marriage and will not be shared with the other spouse if the marriage ends by death or divorce.

To calculate what has been built up during the marriage, the total net assets at the accrual date are calculated and the net assets from before the marriage that are not shared are deducted. What is left is the accrual or increase which shows what has been built up during the course of the marriage. This increase in the two estates is added up and divided equally between them.

Many couples elect to exclude certain assets for example: property, shares, a business or loan accounts, a trust or a future pension benefit or insurance policies and income. Gifts and inheritances are usually subject to the condition that they will not be shared under the accrual system.

