

ANTENUPTIAL CONTRACTS

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1. INTRODUCTION

Planning for your wedding and marriage is exciting. While much time and focus is directed at planning the wedding itself, it is vital that time and energy also be directed at planning for your marriage and in particular the proprietary consequences of your marriage.

No one goes into a marriage contemplating a divorce but when you consider that the Antenuptial Contract (ANC) governs what will happen to your assets and liabilities on divorce or death and regulates whether creditors have any rights to attach assets belonging to your spouse, it makes sense that proper consideration be given to whether or not an ANC would be appropriate in your circumstances and if so, the particular contents of your ANC. Unfortunately, often people are more drawn into the eyes of their spouse-to-be prior to the marriage than to the importance of considering whether an ANC should be concluded prior to the wedding day.

Concluding an ANC does not indicate a troubled relationship or untrusting spouse. We regularly encounter spouses who are married in community of property and would prefer to be married out of community of property. Either they neglected to consider whether an ANC would be appropriate for their circumstances prior to their marriage, or they were ill-advised on the various options available to them, or they simply ran out of time and funds to conclude an ANC timeously.

The consequences of failing to conclude an ANC prior to your marriage is that your marriage will automatically be one in community of property. If you do conclude an ANC prior to your marriage you will be married out of community of property. The principle of accrual will apply to a marriage out of community of property unless it is specifically excluded in the ANC.

If you determine that concluding an ANC would be the most appropriate alternative for you, the ANC must be concluded prior to your marriage. It is possible to convert a marriage that is in community of property to one that is out of community of property. The process does however involve *inter alia*, an application to court and notice to all of your creditors which is time consuming and costly. There are also no guarantees that the court will grant the order as requested.

A brief discussion of the legal consequences and some advantages and disadvantages of the different marriage systems are set out below. Further guidance should be sought from your attorney.

2. MARRIAGE IN COMMUNITY OF PROPERTY

In a marriage that is 'in community of property', any money or possessions belonging to either of the spouses at the time of the marriage, or acquired by them at any time thereafter, cease to be the private property of the one person and become part of a joint estate in which each of the spouses has an equal, undivided share. The same applies to their debts. On termination of the marriage (whether by divorce or death), the spouses are each entitled to a half-share of the joint estate and they are jointly liable for any liabilities.

A major disadvantage of this marriage system is that, if one spouse becomes insolvent, anything in the joint estate may be attached and sold off to pay creditors. Another disadvantage is that, although both spouses have equal powers with regard to *inter alia* the disposal of assets and management of the joint estate, neither spouse may perform certain acts without the written consent of the other spouse. These acts include *inter alia* purchasing, selling and/or mortgaging immovable property and concluding credit agreements in terms of the National Credit Act.

3. MARRIAGE OUT OF COMMUNITY OF PROPERTY (EXCLUDING ACCRUAL)

A marriage that is “out of community of property” excluding accrual is at the opposite end of the spectrum to a marriage that is in community of property. In the former, there is no sharing of profits and losses and each spouse retains his/her own assets and liabilities whether acquired before or during marriage. Both spouses have full and independent contractual capacity. Upon death or divorce, the spouses keep control over their own assets. The operation of accrual must be specifically excluded in the ANC.

The big advantage of this marriage system is that the spouses have independent contractual capacity and are protected against claims by the other spouse’s creditors. A disadvantage is that there is no sharing of the growth experienced by the spouses in their respective estates during the marriage on death or divorce.

In 1984 Parliament decided this rigid form of separation of estates was often unfair, particularly to a wife who stayed at home to raise a family. The accrual was therefore introduced into our law.

4. MARRIAGE OUT OF COMMUNITY OF PROPERTY WITH ACCRUAL

We find that the accrual system is, perhaps, the fairest marriage system for the majority of couples we assist. The Matrimonial Property Act 88 of 1984 brought with it the “accrual” system which permits a form of sharing, consistent with a primary objective of marriage, but permitting retention of each party’s independence of contract and ability to retain their separate estates. A marriage out of community of property with accrual essentially enables the spouses to share in the growth of their estates at the end of the marriage while protecting them during the marriage from the other spouse’s creditors.

4.1. What does accrual mean?

“Accrual” means increase. The accrual system is a form of sharing, at the end of the marriage, of the assets that are built up during the marriage. The underlying philosophy in respect of the accrual system is that each spouse is entitled to take out the asset value that that spouse brought into the marriage, and then they share what they have built up together.

4.2. Exclusions from the accrual

- (a) Certain assets belonging to either spouse are automatically excluded from the accrual calculations, for example:
 - (i) any damages awarded to either spouse for defamation or for pain and suffering;
 - (ii) any inheritances, legacies or gifts that either spouse has received during the marriage, unless the parties have agreed in their ANC to include these or the donor has stipulated their inclusion;
 - (iii) donations made by one spouse to the other.
- (b) In addition to the exclusions set out in 4.2(a) above, the spouses may also elect to exclude other assets and/or interests from the accrual calculations. These exclusions must be specifically listed in the ANC and require discussion prior to



conclusion of the ANC.

4.3. When is accrual relevant?

Accrual only becomes relevant at the end of the marriage (on death or divorce).

4.4. Calculating the accrual

The accrual is calculated by subtracting the net asset value of spouse's estate at the commencement of marriage (as adjusted for inflation) from the net asset value of that spouse's estate at dissolution of the marriage.

For example, if one spouse ("spouse A") had a net asset value of R10 000.00 at the commencement of the marriage ("commencement value") and a net asset value of R100 000.00 at dissolution of marriage ("dissolution value") then the accrual to that spouse A's estate is R90 000.00. If the other spouse's ("spouse B") commencement value was R20 000.00 and the dissolution value is R200 000.00, it follows that the accrual to that spouse B's estate is R180 000.00.

The net accrual is calculated by subtracting the "smaller" accrual from the "larger" accrual. In the above example: R180 000.00 - R90 000.00 = R90 000.00. In accordance with the Act, spouse A (the spouse with the smaller accrual) acquires a claim against spouse B (the spouse with the larger accrual) for one half of the net accrual, namely R45 000.00.

4.5. Summary of some important features of an accrual marriage

- (a) Each spouse retains his/her own estate. Each party may accumulate assets and incur liabilities without interference from or assistance of the other spouse. The estate of each party is determinable separately.
- (b) An accrual calculation is performed on death or divorce in order for the spouses to share equally in the growth of their estates during the marriage.
- (c) When drafting the ANC, the spouses may decide to exclude certain assets. The effect of excluding an asset will be that it does not feature on the asset statement at commencement or dissolution of the marriage and is completely excluded from the calculation. Assets which are not properly described can cause problems for the executor or the divorce attorney who must decide what to do with it in calculating the net accrual value.
- (d) Parties not wishing to exclude specific assets may exclude a certain sum of money which is the agreed equivalent of assets which they do not wish to share, and which is termed a "commencement value".
- (e) One spouse's property cannot be sold to pay the other's creditors if the other becomes insolvent - in contrast to the case where the parties are married in community of property.

5. CONCLUSION

In order for a marriage to be out of community of property (whether with or without accrual), an ANC must be signed before the marriage is concluded, in the presence of a notary public and two competent witnesses. The notary must then register the ANC in the local registry of deeds within 3 (three) months of the date of signature of the ANC.

It is of utmost importance that parties wishing to conclude an ANC fully understand what it is they are signing. It is for this reason that a standard form contract cannot be used and that the services of a knowledgeable and reputable notary public should be utilised.

For professional but personal advice on, and assistance with, concluding an ANC, please contact Stuart Fourie, Vicky Stott or Eilene Bekker - www.fouriestott.co.za.

