



TRUSTS AND ESTATES ALERT

"I DO" - BUT HOW?

Marital status and the regime your marriage is subject to, is core to the law of succession and holds fundamental implications for your estate.

In this alert, we will discuss the types of marriage regimes a person can choose when getting married. The choice is open to both opposite gender and same sex unions solemnised in terms of either the Marriage Act 1961, the Civil Union Act 2006 and the Customary Marriages Act of 1998.

There are three matrimonial property regimes recognised in South Africa in terms of the common law and The Matrimonial Property Act of 1984.

Marriage in community of property

This is the default regime in our law. It will automatically apply where parties do not conclude an Ante-Nuptial Contract (ANC), irrespective of whether this is the couples' intention or not.

The effect of marriage in community of property is as follows:

- On marriage, a joint estate is formed that consists of each spouse's respective assets and liabilities before marriage.
- All assets are shared equally and the parties are jointly liable for all debts incurred by either party.
- There is no protection in the event of insolvency of one or both parties because all the debts of the marriage are shared equally.
- Both parties' consent is required to buy, sell and encumber certain assets.
- You cannot stand surety for each other should you apply for a mortgage bond or incur a debt or overdraft facility. The assistance of a third party will always be needed in this regard.

- On divorce, in the absence of agreement, the joint estate is divided equally between both parties.
- If the marriage is terminated by death, 50% automatically accrues to the surviving spouse and the testator can only deal with the remaining 50% in terms of the deceased's Will. Where there is no Will, the 50% will devolve in terms of the law of intestate succession.

Marriage out of community of property

The effect of marriage out of community of property is as follows:

- Community of property and community of profit and loss are excluded.
- Each spouse retains control and ownership of his/her own assets without the interference or control of the other spouse. The estate of each spouse consists of all the assets he/she owned prior to marriage and any asset acquired by each spouse after marriage.
- Each spouse is personally liable for his/her own debts and obligations existing before the marriage and arising thereafter.
- On divorce, each party is only entitled to the assets held in their own respective estates and can gain no benefit from the growth of the other parties' estate. Essentially this system works on the principal "what is mine remains mine and what is yours remains yours". There is no grey area.
- On death, each spouse can deal with his or her estate without any restrictions. A portion does not automatically accrue to the surviving spouse.

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- The benefit of this system is that parties are free to deal with their assets as they please. Each party has absolute independence and contractual capacity. They can buy, sell and encumber assets without having to get the other spouses consent. This system also offers greater protection in that in the event of insolvency, creditors will only be able to attach the insolvent spouses' estate.

Where there is a significant difference of earning between the spouses or where the intention is for one party to stay at home and raise children it can present risk to one or more of the parties. This regime is often recommended where couples are marrying for the second time or are marrying later on in their lives having already established themselves financially and possibly having other prior obligations.

Marriage out of community of property with the accrual system

The accrual system was introduced into South African law in 1984 to offer an alternative to what had been perceived as the sometimes unfair consequences on termination of marriages out of community of property, while at the same time addressing the vulnerabilities of an in community of property regime.

The distinction between a marriage subject to the accrual system and a marriage out of community of property becomes apparent on death or divorce. For the duration of the marriage, the parties' estates are governed as if they are married out of community of property.

Community of property and profit and loss are excluded. During the marriage, two separate estates exist and each spouse is free to manage and control his/her estate, including the right to alienate his/her property.

The inclusion of the accrual system provides for 'profit sharing'. Essentially, the spouses' declare a value of their respective estates when entering into the marriage. This value is increased by the average rise in the consumer price index, in order to calculate the present day value of the amount declared in the ANC. This amount can be nil or higher, but cannot be a negative amount.

The right to share in the accrual (profit) of the other spouse's estate only arises on dissolution of the marriage. This right is also not transferable or liable to attachment.

On dissolution of the marriage, the estates values are determined separately, and the estate that shows the greatest growth must pay the other estate half of the net accrual.

There are certain assets that are automatically excluded from the accrual of parties' estates such as:

- Any amount accruing to an estate due to damages other than damages for patrimonial loss.
- An inheritance, legacy or donation that accrues to a spouse during the marriage as well as replacements assets. This provision is also subject to any stipulations by the testator or donor to the contrary.
- Donations between spouses (other than donations *mortis causa*).

Assets can also be expressly excluded from the accrual. By excluding an asset, it will not be taken into consideration when calculating the accrual of each party on death or divorce. The exclusion applies to any asset acquired by virtue of his/her possession or former possession of an excluded asset. For an asset to be excluded, it must be properly described.

Claims in favour or against a deceased spouse's estate may have unintended personal and estate duty consequences, necessitating comprehensive planning and astute drafting.

An ANC must be signed before a marriage is concluded and must be registered with the Registrar of Deeds within three months of it having been concluded. Thereafter, it becomes a public document. As an ANC is a contract, it can be tailored to suit the specific needs and requirements of both parties.

The choice of matrimonial property regime is a personal one that needs to be made taking into consideration each person's family legacy, commercial profile and activity and their respective financial position.

Even though choosing a marital regime happens daily, it is one of the earliest and far reaching estate duty events one undertakes, regrettably often without realising the importance and seeking qualified guidance.

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