



DHOOGELAW

Attorneys • Notaries • Conveyancers

BEFORE YOU SAY “I DO”

In the excitement of planning a future together many couples avoid talking about how their estates would be separated if the marriage were to end. On the surface, marriage might seem to be all about love and companionship but on a deeper level it is also a financial and legal commitment. How you are married can have far-reaching financial consequences so whether you are getting hitched for the first time or remarrying after a divorce or death it is important to understand the options available to you.

Granted, it is not the most thrilling premarital activity but it is smart to sit down with your partner well before the wedding to talk about these issues. The law might not seem important when you first get married, but it will become a huge factor when one spouse dies or if you get divorced. Better to understand how things work than to be unpleasantly surprised later.

In essence, there are two types of matrimonial property regimes in South Africa which are regulated in terms of the Matrimonial Property Act 88 of 1984

- (i) Marriages in community of property
- (ii) Marriages out of community of property

IN COMMUNITY OF PROPERTY

“What’s yours is ours and what’s mine is also ours”

If you **DO NOT** enter into an Antenuptial Contract your marriage will **automatically** be a marriage in community of property.

This is the cheapest and most popular regime as there are no upfront legal costs that need to be incurred - but beware!

In this form of marital property regime the two estates are joined together into ONE ESTATE and the joint estate belongs to both spouses in equal, undivided shares. The estate is only divisible upon termination of the marriage.

All assets **and** liabilities belonging to the individual spouses before the marriage, as well as all assets **and** liabilities accumulated during the marriage form part of the joint estate (subject to a few exceptions). It is important to bear in mind that if your spouse becomes unable to pay his or her debt the joint estate can be declared insolvent.

The bottom line is that you can be held responsible for all debt incurred by your spouse – even debt that was incurred before you were married! If you are the financially stronger spouse going into such a marriage, your financial position could be significantly weakened by being in community of property.

MARRIAGE OUT OF COMMUNITY OF PROPERTY

“What’s mine is mine and what’s yours is yours”

In order to be married OUT of community of property, the couple needs to enter into an Antenuptial Contract (ANC) before getting married.

This means that there is no joining of estates and that each spouse retains absolute control and independence over his/her separate estate and one spouse cannot be held liable for the debts of the other spouse.

The accrual system

In terms of our law if the accrual system is not expressly excluded from your ANC, you will automatically be married out of community of property *with the accrual*.

In simple language accrual means that upon the dissolution of the marriage (either by death or divorce) **the gains made** during the marriage are shared between the spouses. This system aims to ensure that both spouses in a marriage gain a fair share of the estate once the marriage comes to an end.

The actual accrual **is the difference between** the net value at **commencement** of the marriage (properly adjusted to make provision for inflation) and the net value upon dissolution of the marriage.

The spouse whose estate shows no accrual or the smaller accrual **claims against** the spouse whose estate shows the greater increase. That spouse can claim half of the difference between the respective accruals.

Example :

Peter at time of marriage has assets worth R 100 000.00 and no debts. Mary has R 50 000,00 and no debts. Five years later they decide to divorce. At the time of divorce Mary's net estate is R 100 000.00 and Peter's is R 600 000.00. Taking into account the decline in the value of money over the period of their marriage using the Consumer Price Index (say the value of money has fallen by 10% over those five years) the recalculated net commencement value of Peter's estate is now R 100 000,00 x 1.10 = R 110 000,00 and that of Mary's is R 50 000.00 x 1.10 = R 55 000,00.

Calculation of the accrual :

Mary :

- Net value at time of divorce R 100 000.00
- Minus net commencement value R 55 000.00
- Accrual R 45 000.00

Peter

- Net value at time of divorce R 600 000.00
- Minus net commencement value R 110 000.00
- Accrual R 490 000.00

Peter's accrual is higher than that of Mary. As a result Mary will claim half of the difference from Peter's estate.

$R 490\,000.00 - R 45\,000 = R 445\,000$ divide into two = R 222 500.00.

Mary will receive R 222 500.00

EXCLUDED ASSETS

The following assets are not taken into account as part of the estate for the purposes of the accrual at the commencement OR dissolution UNLESS the ANC provides to the contrary:

- Damages received for non-patrimonial loss (ie. personal injury claims where damages are awarded for *inter alia* pain and suffering, emotional shock, disfigurement, loss of amenities of life and shortened life expectancy) ;
- Assets specifically EXCLUDED from accrual in the ANC as well as any other asset/s acquired by virtue of the possession/former possession of the aforementioned asset(s) ;
- Inheritances, legacies and donations received from 3rd parties and any asset/s acquired by virtue of the possession of such inheritance, donation or legacy unless otherwise agreed in the ANC or if the testator/donor stipulates otherwise.

The accrual calculation is always subject to the provisions of the Matrimonial Property Act and the provisions of the ANC and there can never be a negative accrual.

The commencement value must be disclosed in the ANC or in a separate statement as this serves as *prima facie* proof of the net commencement value. If it is not declared it will be deemed to be NIL.

THE ANC

The purpose of an ANC is to arrange the matrimonial property system of the spouses.

The Antenuptial Contract is a contract signed by the couple before a special attorney, called a Notary, **BEFORE** the conclusion of the marriage and the couple must decide if they want the accrual system to apply to their marriage or not.

The contract must then be followed by a marriage to have any force and effect whatsoever.

In other words an ANC only becomes effective after solemnisation of the marriage. Parties are therefore free to amend or cancel the ANC before the conclusion of the marriage.

The ANC must be registered in the Deeds Registry within 3 months after date of the EXECUTION of the contract (not after date of marriage) and if the ANC was executed outside of South Africa, then within 6 months of the date of execution.

Once an ANC has been registered and confirmed by marriage, it cannot be altered without application to the High Court (and then only in exceptional circumstances).

Parties are free to include **any** provisions in the ANC provided the provision is not against reason, nature, morality, public policy nor may it be prohibited by law, not calculated to lead to separation or divorce or to take over the powers of the court and does not conflict with the essential consequences of marriage.

In essence the provisions of an ANC can be infinitely variable as long as they are not against public policy.

CIVIL UNIONS and CUSTOMARY MARRIAGES

The legal consequences contemplated in the Marriage Act and the Matrimonial Property Act apply exactly the same to parties in a **Civil Union**.

Customary Marriages entered into after the commencement of the Recognition of Customary Marriages Act 120 of 1998 (ie. 15th November 2000) are also regulated by the Matrimonial Property Act 88 of 1984 which means that the marriage will be in community of property and profit and loss **unless** the prospective spouses enter into an Antenuptial Contract.

Think carefully about the matrimonial property system that you want to enter into. If you need any further clarity please feel free to contact any one of our team at Dhooge Law to discuss your needs.

With your marital regime discussed and decided upon you'll have peace of mind to focus on the wedding and to enjoy this special time.