

THE ANTENUPTIAL CONTRACT EXPLAINED



There are two types of marriage regimes in South Africa: **IN** community of property and **OUT** of community of property. The marriage out of community of property is furthermore divided into two kinds namely **WITH** the accrual system and **WITHOUT** the accrual system.

IN COMMUNITY OF PROPERTY:

When you get married in community of property, each party's assets and liabilities (also referred to as a party's "estate") is consolidated or massed with the assets and liabilities of the other party, resulting in a joint estate.

The disadvantages of this system are the following:

- 1 Neither party has full contractual capacity. This means that you cannot enter into certain contracts without obtaining the written assistance of your spouse. This affects your situation with financial institutions, the buying and selling of fixed property, loan agreements and the like which can be clumsy and inconvenient.
- 2 If one of the parties becomes insolvent, that party's spouse is automatically also insolvent. This means that the creditors of the original insolvent person are entitled to not only attach the assets of the insolvent person, but the whole of the joint estate is subject to the insolvency.
- 3 If you inherit something or receive a donation, this asset will form part of the joint estate, unless it is specifically excluded from the joint estate by the testator or the donor. This could be unfair to a parent (for example) who intended only to benefit his own child, while legally speaking the inheritance or donation will now automatically be shared 50/50 between the married parties.

OUT OF COMMUNITY OF PROPERTY WITHOUT THE ACCRUAL SYSTEM:

The parties must sign an antenuptial contract before the marriage for this system to be applicable. Both parties will then retain their own estate (in other words, each party keeps his/her own assets and liabilities).

The advantages are as follows:

- 1 Both parties have full contractual capacity. It means that each party can separate from the other sign all contracts and enter into business ventures and the one party is not liable for the debts of the other party.
- 2 If one party becomes insolvent, only his or her estate is sequestrated and can be attached by creditors. The estate of the other party is not automatically attached.
- 3 If either party receives an inheritance or donation, such assets will remain the exclusive property of the person who received it. In other words, it will not form part of the joint estate as in the case of a marriage in community of property. At the dissolution of the marriage, each party retains his or her own estate because there is no joint estate to be divided. It is a case of "your things remain your things and my things remain my things".



THE ANTENUPTIAL CONTRACT EXPLAINED

OUT OF COMMUNITY OF PROPERTY (WITH THE ACCRUAL SYSTEM)

The Accrual System has the effect that, at the dissolution of the marriage, the assets which you have accrued during the marriage, are divided equally between the parties.

In practice, at the dissolution of the marriage (which can only happen through divorce or death) the two estates which the individual spouses built up during the marriage are added together and are then divided equally.

There are two important requirements for this type of marriage, namely that you must specify in the contract whether you own any assets which you wish to exclude from the proposed accrual. Secondly you must specify in the contract your existing assets and the total nett value thereof (assets less liabilities = nett value). At the dissolution of the marriage, this opening balance will be subtracted from the total nett balance which you have built up during the marriage, in order to determine the actual accrual.

EXAMPLE ONE

The husband and wife start their marriage with no assets. Five years later the marriage is dissolved and it appears that the husband has accrued an estate of R100 000 (one hundred thousand rand) while the wife has accrued an estate of R200 000 (two hundred thousand rand). You then add the two amounts together which gives you R300 000 (three hundred thousand rand) and then divide it by 2. The wife will then pay R50 000 to the husband so that both of them end up with R150 000.

EXAMPLE TWO

The husband starts off with assets worth R100 000 (one hundred thousand rand) and the wife starts off with assets worth R200 000 (two hundred thousand rand). At the dissolution of the marriage the husband's assets are worth R200 000 (he has accrued R100 000) and the wife's assets are worth R250 000 (she has accrued R50 000). The difference in accrual is R50 000 and the husband must therefore pay half of the difference (R25 000) to the wife, to the effect that they would each have accrued R75 000 (seventy five thousand rand).

It is also possible for the parties to exclude existing assets from the accrual system. You can specify the assets with their estimated value in the contract. These assets as well as any accumulative value like interest, dividends or any future growth are then excluded from the accrual. This means that the other party will not legally be entitled to the excluded assets and its accumulative value but these assets will remain the sole and exclusive property of the party who excluded the said assets in the contract.