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## **WHEN GETTING MARRIED WHAT TO CONSIDER:**

This article has been compiled to give a better understanding on the concepts such as:

1. Married out of community of property;
2. Married out of community of property with the accrual;
3. Married in community of property;
4. What an ante nuptial contract is;
5. What is meant with the accrual system.

### **FORMALITIES FOR A VALID MARRIAGE**

Preparing to get married under the Marriage Act. If you wish to get married, you must:

1. ensure that you are legally allowed to marry;
2. understand the legal consequences of a marriage, particularly that marriages in South Africa are automatically in community of property, unless a valid ante nuptial contract has been entered into before the marriage; and
3. make sure that your marriage will comply with all the legal requirements for a valid marriage.

### **INTRODUCTION**

In a diverse society like South Africa, relationships between people can take numerous forms. People can enter into civil marriages, same-sex marriages, customary marriages, religious marriages or domestic partnerships (cohabitation/living together). Before entering into the marriage it is very important for couples to understand the legal concepts of marriage as well as the legal consequences of entering into such a marriage. Failing to choose the correct option could have a disastrous effect which could only be rectified by a laborious and time consuming court process.

Article written by:

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Many couples don't fully understand the importance of having full knowledge of which marriage regime it is they desire and what effect it could have should you fail to elect the correct regime before getting married. Should the couple with the be married out of community of property but choose to only take positive steps in this direction after the conclusion of the marriage, they will be deemed married in community of property which as stated above, can only be rectified through lengthy court processes.

### **MARRIED "IN COMMUNITY OF PROPERTY" (this is without an ante nuptial contract)**

Couples concluding a marriage without having an ante nuptial contract registered will face the following consequences:

1. All of the assets and liabilities (debts) of both spouses are combined in a communal pot ('the joint estate') which has the result that the spouses' financial affairs become completely intertwined;
2. Should the husband, or the wife for that matter, deal with their affairs in a reckless manner, the other spouses assets will be subject to the same risk as there is a joint estate and no division seen in the eyes of the law. It extends to debts and expenses as well. If one spouse incurs excessive expenses or debts through gambling, extravagance, ignorance or bad business decisions, the creditors of those debts can claim the amounts due and owing from both the liable spouse as well as the other spouse who might have endured much to obtain all its assets and income.
3. The same is applicable in the sequestration of one of the spouses. The entire joint estate will be subject to the sequestered spouse's creditors;
4. Married in community of property would become extremely unfair in the event of marriages of a short duration. On dissolution of the marriage, the joint estate could be split equally between the spouses – irrespective of the value of the assets each spouse contributed at the start of the marriage. This means that one spouse can lose half of the assets they've accumulated over many years of hard work.

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### MARRIED “OUT OF COMMUNITY OF PROPERTY” (with an ante nuptial contract)

The best way to protect both spouses is by signing an ante nuptial contract (ANC) prior to the marriage. An ANC ensures the assets of each spouse are kept separate. This provides much needed protection to each spouse's assets against the creditors. Adding to this, couples could choose to include '**the accrual system**' as part of their ANC. The accrual system ensures a fair distribution of assets when the marriage ends. This is best illustrated by an example:

1. Peter and Sarah wish to enter into a marriage out of community of property with the inclusion of the accrual system. At the onset of the marriage Peter has assets worth R 100 000.00 and Sarah R 50 000.00;
2. A few years later, Sarah has an accident and gets demoted. Sarah stops working and looks after the family. Peter continues to work, amassing more and more income and assets in his estate;
3. Twenty years later they decide to get divorced. Now, Sarah's assets have grown to only R100,000, but Peter's assets are now worth R 200 000.00;
4. Without the accrual system, Peter and Sarah would simply walk away from the marriage with the assets they have – which would be very unfair to Sarah;
5. With the accrual system, an adjustment takes place to ensure that each spouse shares equally in the assets that have been acquired during the marriage (excluding the assets that each party had before they got married);
6. Sarah's assets grew by R50,000. Peter's grew by R100 000.00. The difference in the growth of their estates is therefore R 50 000.00. In terms of the accrual system, Peter will have to pay R 25 000.00 to Sarah. The accrual system indicates that the spouse whose estate had the least growth during the marriage is entitled to half of the difference between the growths of both of the spouses' estates which comes down to the R 25 000.00. Sarah will therefore be entitled to R 25 000.00 plus the assets she had before the marriage. Peter will have to pay Sarah the amount and retain the difference as well as his assets before marriage.

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Although, the above calculations aren't always easy to understand, the important thing to remember is that the inclusion of the accrual system leads to the fairest possible result. For this reason, almost all couples choose to be married with an ANC that includes the accrual system.

Some of the further benefits of an ANC are the following:

1. Should one of the spouses be sequestrated this will have no impact on the assets and estate of the other spouse;
2. Creditors of one of the spouses can't touch the assets or income of the other spouse. A creditor will only be able to recover amounts owing from the assets or income of the spouse who incurred the debt;
3. The couple can ensure an equitable result in the event that the marriage terminates by including "the accrual system" in their ANC. This ensures that each spouse can share equally in any growth in the other spouse's assets or income which occurs during the marriage";
4. Each spouse can protect the value of any assets accumulated by them prior to the marriage by specifying a "commencement value" in the ANC;
5. The fact that each spouse is regarded as having a separate estate allows for effective tax structuring and the ability to limit financial and business risks.

## REGISTRATION OF THE MARRIAGE

The couple, the two witnesses and the marriage officer must sign the marriage register immediately after the solemnization of the marriage. Then the marriage officer must issue the parties with a handwritten marriage certificate free of charge. The marriage officer must then submit the marriage register to the nearest office of the Department of Home Affairs, where the marriage details will be recorded in the National Population Register. Non-fulfilment of these requirements does not affect the validity of the marriage and registration of the marriage can be affected postnuptially. A duly signed marriage certificate serves as prima facie proof of the existence of the marriage. In the absence of a marriage certificate, the existence of the marriage may still be proved by other evidence.

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