

GUIDE TO MARRIAGE REGIMES

NO ANTENUPTIAL CONTRACT	ANTENUPTIAL CONTRACT	
<p>Joint estate belongs to both spouses in equal undivided shares.</p>	<p>Two separate estates. Each spouse may deal with his/her estate as he/she wishes.</p>	<p>Two separate estates. Each spouse may deal with his/her estate as he/she wishes.</p>
<p>Joint estate assets and contractual liabilities belonged to either spouse at the date of and during the marriage, excluding the following:</p> <p>Property donated bequeathed subject to the condition that it shall be excluded from a community of property marriage;</p> <ul style="list-style-type: none"> Certain life insurance policies; Delictual damages for nonpatrimonial loss; Delictual liabilities. 	<p><u>The accrual system:</u> Automatically applies when not expressly excluded in the antenuptial contract.</p> <p><u>-During the marriage:</u> Position is the same as if married out of community of property.</p> <p><u>-On dissolution</u> (death/divorce): The net increase of each estate are added up and divided equally. The spouse whose estate shows no or a smaller accrual has a concurrent claim against the other for an amount equal to 1/2 of the difference between the accrual of the respective estates.</p>	<p>Only applicable if the accrual system is expressly excluded in the antenuptial contract.</p>
<p>-Husband and wife have equal powers with regard to disposal of assets, contracting of debts and management of the joint estate. Can perform any juristic act with regard to joint estate without consent of the other spouse, except acts set out in Sections 15(2) and 15(3).</p> <p>-Remember that consent must be given separately for each transaction. A spouse can not grant a general power of attorney to the other spouse to consent on his behalf, but must authorise somebody else to consent on his behalf.</p>	<p>Accrual = Difference between the net value at commencement (escalated) and the net value at dissolution of the marriage.</p> <p>-The net value at commencement is declared in the antenuptial contract separate statement. IF NO NET VALUE WAS GIVEN, it shall be deemed to be NIL.</p> <p>ASSETS EXCLUDED:</p> <ul style="list-style-type: none"> Assets excluded in terms of the antenuptial contract; Delictual damages for nonpatrimonial loss; Inheritances, legacies and donations; 	

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<p>-No consent is required for acts performed in ordinary course of business.</p>	<p>Donations between spouses (other than donations mortis causa); Certain life policies.</p>	
<p>MARRIAGE IN COMMUNITY OF PROPERTY, PROFIT AND LOSS</p>	<p>MARRIAGE OUT OF COMMUNITY OF PROPERTY, PROFIT AND LOSS WITH THE ACCRUAL</p>	<p>MARRIAGE OUT OF COMMUNITY OF PROPERTY, PROFIT AND LOSS WITHOUT THE ACCRUAL</p>
<p>ADVANTAGES:</p> <ol style="list-style-type: none"> Spouses have economic equality. Spouses share equally in each other's wealth both existing at date of marriage and acquired thereafter. (This may be inappropriate where there is a vast difference in wealth or expectations (inheritance)). 	<p>ADVANTAGES:</p> <p>It has all the advantages of in community of property but none of the disadvantages of in/out of community of property.</p> <ol style="list-style-type: none"> Protection on insolvency of one of the spouses and against attachment of the assets of one spouse. Fair sharing of profits and losses made during the marriage, without sharing in the estate which existed on the date of marriage. No restrictions in contracting capacity. 	<p>ADVANTAGES:</p> <ol style="list-style-type: none"> Protection on insolvency of one of the spouses and against attachment of assets of one spouse. No restrictions in contracting capacity.
<p>DISADVANTAGES:</p> <ol style="list-style-type: none"> No protection on insolvency. Restrictions in contracting capacity 	<p>DISADVANTAGES:</p> <ol style="list-style-type: none"> Spouses need to keep records of cash flow and more accounting. 	<p>DISADVANTAGES:</p> <ol style="list-style-type: none"> No automatic sharing in each other's wealth. Particularly to the disadvantage of the spouse with lesser earning capacity

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How does it work?

During the subsistence of the marriage the spouses are fully independent and there is a complete separation of property. Only on dissolution of the marriage, the gains made by the parties during the marriage are shared between them. Property acquired by the parties before the marriage is not shared.

According to section 3(2) of the Matrimonial Property Act 88 of 1984, the right of a spouse to share in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment and does not form part of the insolvent estate of a spouse.

What does the expression "accrual" mean in terms of the Act?

The "accrual" of the estate of a spouse is the growth which the estate of such a spouse showed during the subsistence of the marriage, i.e. the difference between the net value of that estate at the commencement of the marriage, properly escalated, and its net value upon dissolution of the marriage.

The value of each spouse's estate at commencement of the marriage must either be disclosed in the antenuptial contract or in a separate statement. If no value is recorded, the net commencement value will be presumed to be nil.

On dissolution of the marriage each spouse's estate will be valued again in order to calculate the growth/accrual of each estate. The commencement values are adjusted to make provision for inflation. In other words, the net values of the respective estates at the commencement of the marriage is calculated with due allowance for any difference which may exist in the value of money at the commencement and dissolution of the marriage. For this purpose the weighted average of the consumer price index as published in the Government Gazette serves as prima facie proof of any change in the value of money.

The commencement value of the respective estates and the proof thereof

The parties can declare their respective net commencement values in the antenuptial contract itself. Alternatively, before the marriage is concluded, or up to six months thereafter, the parties can declare the net values of their respective estates in a separate statement certified by a Notary. The Notary will keep a copy of the statement in his or her protocol for future reference.

An antenuptial contract (or certified copy thereof) or a statement (or certified copy thereof) serves as prima facie proof of the net commencement value of the estate of the parties (spouses) concerned.

Failing which the net commencement value of a spouse's estate is deemed to be nil if the liabilities of that spouse exceed his assets at such commencement or the commencement value was not declared in the antenuptial contract or in a separate statement and the contrary is not proved.

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Keep in mind that because an antenuptial contract is registered at a deeds office it is inevitably a public document. If the parties do not wish that the value of their respective estates be set out in a document to which the public has access to, it will be advisable to rather make use of the statement referred.

Assets excluded in calculation of the accrual

The following assets are however left out of account in calculation of the accrual, in other words it is not taken into account as part of the estate at the commencement or the dissolution of the marriage, unless the antenuptial contract provides to the contrary:

- Damages received for non-patrimonial loss - (section 4(1)(b)(i));
- Assets specifically excluded from the accrual in the antenuptial contract, as well as any other asset which is acquired by virtue of the possession or former possession of the first-mentioned asset - (section 4(1)(b)(ii));
- Inheritances, legacies and donations received from third parties as well as any other asset which is acquired by virtue of the possession or former possession of such inheritance, legacy or donation, except in so far the spouses may agree otherwise in their antenuptial contract or in so far as the testator or donor may stipulate otherwise - (section 5(1)); and
- Donations between the spouses, other than a donation mortis causa (section 5(2)).

The spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate, if he is deceased, has a claim against the spouse whose estate shows the greater increase, for half the difference between the respective accruals.

The claim of a spouse to share in the accrual is a claim sounding in money and it is not a claim to receive a particular asset or assets.

The accrual of the estate of a deceased spouse is determined before effect is given to any testamentary disposition, donation mortis causa or succession out of that estate in terms of the law of intestate succession.

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EXAMPLE:

Facts:

Gareth and Cindy are married out of community of property with inclusion of the accrual system. They did not declare the nett commencement values of their respective estates in the antenuptial contract. Gareth inherited a farm five years after the marriage. Two years later the marriage was dissolved. At that stage Gareth has built up an estate of R1 500 000.00 (which includes the farm which is valued at R1 000 000.00) and Cindy has an estate of R300 000.00.

Consequences:

As the parties have not declared the net values of their respective estates at the commencement of the marriage, the commencement value of each estate is deemed to have been nil.

The accrual of Gareth's estate amounts to R500 000.00, being the difference between the estate's value on dissolution of the marriage and its nil value at its commencement. The value of the farm he inherited is excluded from the value at dissolution, and he is thus left with the figure of R500 000.00.

The accrual of Cindy's estate amounts to R300 000.00, being the difference between the value of her estate on dissolution and its nil value at the commencement of the marriage.

In terms of section 13(1) Cindy will have an accrual claim against Gareth for R 100 000.00, being half of the difference between the accrual of their respective estates. (R500 000.00 minus R300 000.00 = R200 000.00, divided by 2 = R100 000.00).

Inclusion of the accrual system

If the parties enter into an antenuptial contract, the accrual system will automatically apply to their marriage out of community of property, unless it is expressly excluded in the contract. In order to prevent any uncertainty, it is advisable to nevertheless insert a clause in the contract in which it is stated that the marriage is subject to the accrual system.

Exclusion of the accrual system

If the parties do not wish for the marriage to be subject to the accrual system, a clause to this effect must be inserted accordingly.

The parties can include anything in the antenuptial contract as long as it is not *contra bonis mores* or against public policy).

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EXAMPLES OF POSSIBLE MODIFICATIONS:

- The accrual system can be made applicable on condition that the marriage has "lasted" a certain time period or on condition that a child has been born.
- The parties can agree that the accrual system shall not operate on termination of the marriage if either party's estate is insolvent.
- The accrual system can be excluded in whole or in part and may be made applicable to only certain assets or income sources (for example, income earned from employment, services and business conducted). Other assets and income sources will thereby be excluded from the accrual system.
- The contract can also provide that the parties will share in the accrual in a different percentage as the prescribed 50/50.
- Inheritances, legacies and donations from third parties are not taken into account when calculating the accrual of a spouse's estate, unless the parties agree otherwise in the contract.
- The parties can even agree that donations between them as spouses shall be taken into account when calculating the accrual of the estate of the done spouse.
- The parties may insert a clause to the effect that the value of the accrual shall be determined by a referee who has knowledge of the value of the particular kind of asset/s.

IMPORTANT NOTE: It is possible that the parties wish to be married out of community of property only in order to be secured against the claims of each other's creditors, but still wish the de facto effect of the antenuptial contract to be as close as possible to a marriage in community of property.