

TO ANC OR NOT

So you want to get married Congratulations! Marriage is not a word, it's a sentence, and hopefully a long term one.

Now you have popped the question, decided on the honeymoon venue, the flowers and the bridal gear. But what about the matrimonial property system? A lot of ignorance exists amongst prospective husbands and wives about the implications and pro's and cons of a particular property system. Here is a brief outline of the various choices as well as the consequences thereof.

1. MARRIAGE IN COMMUNITY OF PROPERTY:

Each partner in a marriage is an individual who has the right to work and to be economically active. Before marriage, he or she accumulates a separate estate. He or she can make independent choices. When a couple gets married in community of property, the two separate estates are consolidated into one. Although each party can still have a separate estate from sources such as inheritances, and awards for personal damages inflicted, the husband and wife now have one estate. They are liable to the outside world for debts incurred after the commencement of the marriage, and they each have equal power to bind the joint estate (the marital power does not exist any more). There are certain exceptions where the spouse must obtain the permission of the other, such as the purchase and sale of immovable property, or enter into a credit agreement.

If the said consent is not present, the act of the spouse who lacked consent can still be binding towards third parties if the third party did not know that the consent was not present. The spouse who can prove that the estate suffered damages due to such an act has a claim against the other party at the dissolution of the marriage.

The marriage in community of property is the simplest system. However, frequently a partner in the modern marriage engages himself in business activities. A danger is that such a venture can turn sour, and the partner might go insolvent and be sequestered. In such an event, both parties will be sequestered because of the fact that they have one estate. Thus, if the husband gets sequestered, the wife will suffer the same embarrassing fate.

2. MARRIAGE OUT OF COMMUNITY OF PROPERTY

For a marriage to be out of community of property, the prospective husband and wife must conclude an antenuptial contract (ANC) in front of an attorney who is a qualified notary. There are two separate systems for the couple who wants to marry out of community of property.

2.1 Marriage out of community of property *WITHOUT* the accrual system

The marriage out of community of property without the accrual gives recognition to the fact that the spouses each has his/her separate estate, and for purposes of the marriage, there will be no community of property, profit or

loss between the two of them. This means that the one party has no claim against the estate of the other at the dissolution of the marriage through death or divorce. That can be severely detrimental to the spouse that has to raise the children (99% of cases the wife) and has virtually no chance to build up an estate.

The positive side of this system is that each spouse can engage into economic activity separately and does not need the consent of the other party.

2.2 Marriage out of community of property WITH the accrual system

If nothing is said in an ANC with regards the accrual system, it is presumed that the marriage is with the accrual system.

In the accrual system, the marriage is still out of community, profit and loss. However, the element of a marriage in community of property is that a commencement net value of each spouse's estate is calculated as at date of the marriage. The account of the estate of a spouse is the amount by which the net value of his estate at the dissolution of the marriage exceeds the net value of his or her estate at the commencement of the marriage. At the dissolution of the marriage due to death or divorce, the closing net value of each spouse's estate is again calculated. It is then established which spouse's estate showed the largest accrual. The difference between the accrual of the two estates is calculated. In so doing, and because of the fact that inflation has to be accounted for to establish the new value of the commencement value already stated in the ANC as at the dissolution, the CONSUMER PRICE INDEX is used. Eventually the party whose estate shows no or a smaller accrual is entitled to half of the difference of the accrual. The following is an example:

Husband (H) and wife (W) married during 1987. The commencement value of their respective estates are as follows:

H	=	R10 000.00
W	=	R0.00

In 1995 H dies in a car accident. The closing values of their respective estates are as follows:

H	=	R100 000.00
W	=	R 50 000.00

Because of inflation, H's R10 000,00 is worth in 1995 R30 000,00.

The calculation of the accrual is as follows:

H's accrual: R100 000,00 – R30 000,00 = R70 000,00
W's accrual: R50 000,00 – R0,00 = R50 000,00.

The difference between the two accruals is R70 000,00 – R50 000,00 = R20 000,00.

Because H's accrual was the biggest, he will be liable for half the difference namely R10 000,00. Accordingly W will have a claim against H's estate based upon the accrual system for R10 000,00.

As can be seen, the accrual system favours the spouse whose estate shows the least accrual (usually the wife) while still maintaining the benefits of separate estates. The right to accrual cannot be attached at the insolvency of a spouse.

FINAL:

The above does not deal with the property consequences in general at divorce or death. It is only a general discussion of the various property systems available to a spouse at marriage. For detailed advice or more information, contact your attorney.

An ANCE won't ensure that your marriage is a success. Only communication, dedication and hard work will achieve that. A custom-made property system will however provide peace of mind. Once you have decided upon an ANCE, and it has been concluded, file it away in a safe place and forget about it. Then enjoy your marriage long term sentence!

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