THE ANTENUPTIAL CONTRACT EXPLAINED

If you get married in South Africa the provisions of the Matrimonial Property Act No. 88 of 1984 applies. It means that there are two main types of marriages i.e.:

In community of property or alternatively **Out of community of property.**

The marriage out of community of property is divided into two kinds namely **straightforward out of community of property** and **out of community of property with the accrual system.** As a result you have the choice of three types of matrimonial systems.

1. IN COMMUNITY OF PROPERTY:

When you get married in community of property, the estate (in other words the sum total of your assets and liabilities) of each party is consolidated or massed with the estate of the other party, resulting in a **joint estate.** No matter how big or small your estate is both estates are massed in a joint estate in which you share equally. If you get married in community of property you do not need an antenuptial contract as according to South African Law such marriage without an antenuptial contract, is deemed to be **in community of property.** The **disadvantages** of this system are as follows:

1.1 Neither party has full contractual capacity. This means that you cannot enter into certain contracts without obtaining the written assistance of the other spouse. This affects your situation with financial institutions, buying and selling of fixed property, loan agreements etc. It is obviously a clumsy and old fashioned arrangement that is very inconvenient.

1.2 In case of the persons becoming insolvent, the other 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. Obviously this arrangement is detrimental to the estate of the spouse of the insolvent party.

1.3 If you **inherit** something from a third party or receive a **donation** from somebody this asset will form part of the joint estate unless the testator provides specifically in his **Will** that the inheritance will not form part of the joint estate or the donor specifies this fact in the donation agreement. This could be unfair to, for in the parent, who intended only to benefit his own child, while legally speaking the inheritance or donation will now automatically be shared 50/50 between the parties.

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1.4 At the dissolution of the marriage the joint estate is divided equally between the parties. A marriage can only be dissolved by way of divorce or death of one of the parties. The fact that everything will be divided 50/50 at the dissolution of the marriage can be regarded as an advantage to this system, under certain circumstances.

2. MARRIAGE OUT OF COMMUNITY OF PROPERTY (STRAIGHTFORWARD):

The parties must sign an antenuptial contract **before** the marriage to apply this system. Both parties retain their own estate (in other words, each party keeps his own assets and liabilities).
You are married out of community of property and also **out of community of profit and loss.** The **advantages** are as follows:

2.1 Both parties have full contractual capacity. It means that each of you can separately sign all contracts, enter into business ventures and the one party is not liable for any debts of the other party.

2.2 If one party becomes insolvent, only his or her estate is sequestrated and can be attached by creditors. The estate of the other party remains untouchable and cannot be attached.

2.3 If either party receives an inheritance or donation, such assets will remain the exclusive property of the person who had received such inheritance or donation. 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.**

3. OUT OF COMMUNITY OF PROPERTY (WITH THE ACCRUAL SYSTEM)

The principals are exactly the same as explained above in the straightforward marriage out of community of property. The only difference is at the dissolution of the marriage where the assets which you have **accrued during the marriage,** are divided equally between the parties. The same three benefits apply namely, you have full contractual capacity, only the insolvent person's estate can be sequestrated and if you inherit or receive a donation it will remain your exclusive property.

However, at the dissolution of the marriage (which can only happen through divorce or death) the estate which each spouse has built up during the marriage must be added together and will then be divided equally. What it really means is that this system is a **combination** of the above marriage in community of property and the straightforward

marriage out of community of property. During the marriage you enjoy all the benefits of a marriage out of community of property where each party retains his or her own estate but at the dissolution of the marriage, that which you have both **accrued** during the marriage (no matter how much you have built up) is divided equally. There are two **important requirements** for this type of marriage, namely that you must specify in the contract whether you own any existing assets which you wish to **exclude** from the proposed accrual. Secondly you must specify in the contract your existing assets and its **value** that you **start off** with in the marriage. 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 very little or no assets worth nil. Five years later the marriage is dissolved and it appears that the husband has accrued an estate of R 100 000.00 while the wife has accrued an estate of R 20 000.00. You then add the two amounts together which gives you R 120 000.00, this amount will then have to be divided by 2. The husband will get R 60 000.00 and the wife will also get R 60 000.00.

EXAMPLE TWO

The husband starts off with assets worth R 10 000.00 and the wife starts off with assets worth R 5 000.00. At the dissolution of the marriage the husband has accrued R 100 000.00 while the wife has only accrued R 20 000.00. The starting balance of R 10 000.00 will have to be subtracted from the R 100 000.00 of the husband in order to determine the **accrual** which is R 90 000.00 in this case. In the case of the wife the opening balance of R 5 000.00 must be deducted from the total of R 20 000.00, in other words her **accrual** amounts to R 15 000.00. The amount of R 90 000.00 and R 15 000.00 must be added together which will give a grand total of R 105 000.00. The said amount will then have to be divided by 2 with the result that each party will receive R 52 500.00.

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 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.

EXAMPLE THREE

If one of the spouses has a house worth R 100 000.00 and the said property is specified to be excluded from the accrual principal, the other party will never be legally entitled to share in the capital value of R 100 000.00. If the property increased in value and for instance is sold after 5 years for R 150 000.00, the other party will also not be legally entitled to a share of the accrual of R 50 000.00.The party, who so excluded these assets, is entitled to

dispose of these assets freely during his or her lifetime or by way of last Will and Testament when he or she dies.

SUMMARY

It is clear from the above that the marriage **in community of property** is not recommended. You will have to choose between a **straightforward out of community of property** or else **out of community of property with the accrual principal.** The latter system with the accrual principal is the more popular in South Africa, especially among young couples who have not yet built up a substantial estate. It also seems fair that whatever you build up together during your marriage will be shared equally at the end of the marriage no matter whether the marriage is dissolved by divorce or death.

If you choose the marriage out of community of property with the accrual principal, it is important to give me a brief description with the estimated value of the assets that you wish to exclude and also of the assets which you would like to specify as your **starting value.** Keep in mind that it is not necessary to specify any assets to be excluded or to serve as your starting value. Most young couples who do not have substantial assets may choose to exclude nothing and also specify their starting value as nothing. The result is that you throw everything together at the start of the marriage and whatever you build up in future will be divided equally.

I am looking forward to hearing from you!

Yours faithfully,

LOUW LE ROUX INC.