

Congratulations on your decision to formalise your relationship through a marriage or a civil union!

One of the important issues that you need to consider is what the legal consequences of this decision will be. Besides creating certain duties of support, the law also regulates the estates (matrimonial property) of the couple. So before you get married or enter into a civil union you must decide how you are going to structure your estates in law. There is no difference between the property consequences of a marriage and a civil union and for ease of reading ‘marriage’ includes a ‘civil union’.

Many couples find it difficult to negotiate this aspect of their marital plans due to the fact that it requires that you consider the end of the marriage whereas you are rather focused on how you can celebrate its beginning! But the reality is that all marriages end in the legal sense and you have to consider this prior to getting married. It is extremely expensive and time consuming to alter the legal structure of a marriage after the event and therefore it is important to consider all the options seriously.

To help you consider the legal options available the following summary sets out the law in accessible jargon-free language.

There are currently three matrimonial property regimes in South Africa:

1. In Community of Property
2. Out of Community of Property
3. Out of Community of Property with Accrual

### **1. In Community of Property**

All marriages in South Africa are automatically ‘in community of property’. To change this default position, the parties to the marriage must enter into a contract before they get married. Thus, if you don’t draw up a contract before your marriage it will be considered to be one that is ‘in community of property’.

As from the date of the marriage the separate estates of the parties are combined and together regarded as one joint estate. Thus, everything that you own – be it acquired before or after the marriage – belongs to both parties in equal shares.

The advantage of this type of system is that it treats both parties equally and shares everything they own or will own equally between them.

The main disadvantage is that besides sharing everything they own, they also share each other’s losses and debts equally. This could be problematic if you run your own business or may do so one day. Furthermore, neither party may sell or give away anything of value without the written consent of the other.

And lastly, when one party dies the whole estate must be dealt with and this can leave the surviving spouse in a difficult position until matters are finalised.

Because the disadvantages of this system tend to outweigh the advantages, most couples are advised to enter into an antenuptial contract – often referred to as an ‘ANC’, ‘antenup’ or ‘prenup’. To do so you must sign a specially prepared contract before your marriage. There are two different types of ANCs and both need to be specially notarised before you get married.

## **2. Out of Community of Property**

When a couple is married ‘out of community of property’ their estates remain completely separate. They do not share anything - be it assets or debts – acquired before or during the marriage.

The advantage of this type of matrimonial property system is that each party remains completely separate. This type of system may suit parties who both have sizeable estates at the beginning of their marriage and want to keep them separate. Furthermore, the spouses are not liable for each other’s debts and when each spouse enters into a contract the other one is not legally implicated.

However, the disadvantage is that this system doesn’t recognise that marriage is a partnership. It also leads to an unequal distribution of assets. Any non-monetary contributions (such as looking after a home, raising children etc.) are not accounted for.

To overcome these disadvantages, you may want to consider the third option:

## **3. Out of Community of Property with Accrual**

This system combines the advantages of the other two and avoids the disadvantages of both. The estates of the parties remain entirely separate for the duration of the marriage. Each party is free to enter in any transactions and is protected from the other’s debts. However, should the marriage come to an end, then it recognises that marriage is a partnership and everything that was acquired from the date of the marriage is shared equally between the parties. The accrual system recognises emotional and physical support as assets in addition to financial ones.

All inheritances, legacies and donations made to either of you before and during the union are automatically excluded.

How this system works in practice is that at the start of the marriage each party allocates a monetary value to their estate, which is based on the assets already owned. This becomes the commencement value of your separate estates. When calculating this value, you will each need to list your assets and debts (which are subtracted) and note anything of special sentimental or financial value to you. These values do not need to be exact, but must simply be a figure that both parties feel comfortable with.

At the end of the marriage, the joint total financial gain acquired during the marriage, that is, the accrual, is shared between the parties as agreed in your ANC. You can also completely exclude some assets from the calculation of the accrual, should you so wish.

It is possible to exclude certain assets from the operation of the accrual and this can be discussed in more detail during our consultation.

The fee includes a consultation, drafting the ANC as per your instructions, arranging signature as well as attending to the formal registration process at the Deeds Office. Should you have any further questions, please feel free to contact us.