

OUT OF COMMUNITY OF PROPERTY (WITH ACCRUAL)

A marriage subject to the accrual system is also a marriage out of community of property, but subject to the accrual system. The sharing of the "accrual" takes place once the marriage has been dissolved by death or divorce.

The accrual system was created from the idea that on dissolution of the marriage, that both spouses must share in the growth that their estates have made during the marriage.

The accrual system must be **EXPRESSLY EXCLUDED** in the antenuptial contract, if the parties do not want it to apply to the marriage as the accrual system is assumed to apply all marriages out of community of property.

The pros

- The spouse with the small estate will share equally in the accrual.
- Spouses can choose to exclude specific assets from the accrual calculation.
- This system is the most fair and equitable marital system.
- All the other pros applicable to a marriage out of community applies.

The cons

- A spouse may be limited to control their estate if it's likely to prejudice their spouse's right to share in the accrual.
- Accrual calculations can be complex, especially if there are trusts and business involved.

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TYING THE KNOT: MARRIAGE AND ANTENUPTIAL CONTRACTS

WHO WE ARE

MI Attorneys was founded in 2020 with the intention of providing affordable, honest and ethical legal service.

MI Attorneys is a specialist conveyancing, property law and deceased estate administration law firm based in Cape Town.

THE NOTARY PUBLIC

A Notary Public is the terms used for an attorney who has intimate knowledge of a set of legal facts and the processes prescribed therein.

A Notary Public is an attorney who is legally empowered to witness the signing of documents, take statements from the public and certify that the contents of an official document are indeed true and correct.

A Notary specialises in the drafting and legalisation of certain documents such as antenuptial and postnuptial contracts.

WHAT IS CONSIDERED A CIVIL MARRIAGE?

A civil marriage is the most common type of marriage in South Africa. Only heterosexual couples can enter into a civil marriage.

In South Africa, three different civil marriages can be concluded:

- Marriage in community of property
- Marriage out of community of property
- Marriage out of community of property subject to the Accrual system.

IN COMMUNITY OF PROPERTY

The in community of property marriage is the default marital regime in South Africa. When married in community of property, spouses elect to have one estate, and all assets and liabilities are shared equally.

The pros

- The main advantage is that you do not have to pay for the drafting and execution of an antenuptial contract.
- Spouses have one estate and joint owners of everything.
- Marrying a financially stronger spouse means that the financially weaker spouse benefits from one joint estate.
- All assets brought into the marriage or acquired during the marriage will form part of the joint estate.

The cons

- The conduct of a financially irresponsible spouse affects the joint estate. So, if one spouse is placed under debt review or blacklisted, it affects both spouses.
- When one spouse is declared insolvent, both spouses are insolvent.
- Consent or co-signatures are required to give validity to certain acts.
- Spouses have to agree on a financial decision. Failure to agree means that neither spouses can make a decision.
- Inheritance or donation left to an heir or donee who is married in community of property has to be specifically excluded from the community of property estate of the heir or donee.

OUT OF COMMUNITY OF PROPERTY (WITHOUT ACCRUAL)

By marrying out of community of property, spouses choose to keep their estates separate. Whatever assets and liabilities are held by the spouses prior to the marriage, and acquired during the marriage, remain the sole and exclusive property.

In order to be married out of community of property, the execution of an antenuptial in the presence of a NOTARY PUBLIC is required.

It is important to note that an antenuptial **MUST BE SIGNED** before the date of marriage.

The pros

- Each spouse owns and manages their own estate.
- Each spouse is responsible for their debt, and their assets are their sole and exclusive property.
- The consequences associated with financial recklessness by one spouse does not affect the other spouse.
- Spouses have contractual freedom and may enter into any contract.
- If one spouse becomes insolvent, or is sequestrated, the other spouse's assets cannot be attached.

The cons

- Joint financial planning can be difficult.
- The spouse in the financially poorer situation may struggle during and after divorce, especially if the struggling spouse is the home-maker.