

Ante-nuptial contracts: The fine print of love

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The month of February is synonymous with romance and roses as Valentine's Day takes centre stage once again. Celebrations for the day range from handmade cards for mum and dad by the little ones, to magical getaways and marriage proposals. So now that you have the perfect partner, try to plan for an ideal life by choosing the marital regime that suits you as a couple the best. Often, in this heady state of love and romance, couples shy away from discussing how exactly their finances and assets will be managed to their detriment.



Image source: Getty Images

An ante-nuptial contract is a legal document signed prior to entering a marriage and regulates the financial relationship between a couple. The matrimonial property regime in South Africa can be categorized into either: in community of property or out of community of property. Within the latter, there is a further division of being either with accrual or without accrual. But what does this all mean, and which one is right for you?

In community of property

If couples choose to simply register a marriage, without signing any ante-nuptial contract, then their marriage is regarded as being one in community of property. All assets and liabilities which each of the individuals may own or owe, will on the date of dissolution of the marriage, be it death or divorce, be shared equally between the parties, regardless of the nature of the contribution made by each party. If for instance, one of the parties was a home-maker and therefore did not contribute financially, that party would nevertheless on the dissolution of the marriage still be entitled to a share of all assets and be liable for a portion of all debts.

If no ante-nuptial agreement is concluded, marriages are deemed to be in community of property. Couples married in community of property may not transact individually in certain circumstances and will require spousal consent. As a business owner it would make sense for you to not marry in community of property as your business transactions may require spousal consent. The motto for couples married in community of property is: "It's all ours."



Out of community of property

Most couples today opt for being married out of community of property, however it is in this category that we have the option of being married with or without accrual.

Without Accrual

If couples opt to marry without accrual applying to their marriage, it simply means that all their individual assets and liabilities remain separate throughout the marriage. Each person is therefore responsible and liable for their own debts and for accumulating their own asset base. On dissolution of the marriage, neither party has any claim against the other nor is any party liable for a portion of the debt of the other. In other words, "What's yours is yours and what's mine is mine."

With Accrual

Most couples tend to marry out of community of property with accrual. With the accrual system, parties can exclude any assets that they have prior to the marriage if they so wish. In addition, statute specifies that certain assets will be automatically excluded from a marriage subject to accrual, such as inheritances or compensation received for pain and suffering.

The concept of accrual is meant to level the playing fields on the dissolution of the marriage so that if one of the parties was a home-maker, they will have a claim against the other parties' estate, without being liable for the other parties' debts. Simply put, the party that has acquired the most during the marriage must share a portion of the assets with the other party. Only assets acquired during the marriage will form part of the accrual calculation. Neither party should therefore leave the marriage with less than what they entered the marriage with, and anything built up during the marriage must be shared. For couples opting for the accrual system it's a question of "Let's share our assets but not our debts."

Formalities

Once you have decided which marital regime is best suited for you, you will need to execute an ante-nuptial contract in the presence of a notary public and two witnesses. The contract itself is registered at the deeds office and is therefore a public document. The ante-nuptial contract is neither a will, nor a divorce order and is simply meant to regulate the financial arrangement between a couple and provide protection against creditors. Couples are encouraged to prepare a will dealing with their assets and the care of their minor children in addition to having an ante-nuptial contract in place.

So, if you are asked the all-important question this Valentine's Day and agree to tie the knot, make sure your happily ever after is detailed in the fine print.

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