

## 1 MARRYING WITHOUT A CONTRACT - IN COMMUNITY OF PROPERTY (COP)

In South Africa marriages solemnised without an ante nuptial agreement are automatically 'in community of property' (COP). Legally all the assets and liabilities of the husband as well as the wife are shared. Simply put – everything belongs to both in equal shares.

There are advantages and disadvantages for the couple to consider carefully -

**1.1 Advantages** - In the case of death or divorce the estate is divided equally

**1.2 Disadvantages** -

1.2.1 In case of the death of one partner the estate of both - the deceased and surviving partner - will be wound up as it is a joint estate. The result being that the surviving partner will find themselves temporarily in legal limbo.

1.2.2 Should one partner land in financial trouble the creditors will have claim against partners.

1.2.3 Neither husband nor wife have any financial independence – both parties need to give consent to every business transaction. Should the wife need to open an account the husband has to sign the account application, similarly should the husband want to buy a car the wife also has to sign.

## 2 AN ANTE NUPTIAL CONTRACT OR PRENUPTIAL AGREEMENT (ANC)

A couple who marries having drawn up an Ante nuptial Contract or ANC is married out of community of property. Both parties have financial independence and may enter into business transactions without the consent of the other as both are regarded as two separate entities for legal purposes.

Two types of contracts can be considered -

**2.1 Ante nuptial Contract with accrual**

**2.2 Ante nuptial Contract without accrual**

### 2.1 ANC WITH ACCRUAL

Both partner declare the value of their respective assets at the beginning of marriage. After marriage all assets acquired are shared 50/50. Specific assets such as donations, inheritances etc can be specified as excluded from the accrual. Nine out of ten marriages are ANC with accrual – probably a sensible option.

**Advantages** -

2.1.1 Both husband and wife conduct their own independent financial affairs

2.1.2 Both husband and wife share in the assets accumulated during marriage

2.1.3 Should one partner go into debt it cannot be claimed from the estate of the other partner

- 2.1.4 Property individually owned before the marriage, remains in the respective partner's name
- 2.1.5 The 'stay-at-home' partner to care for the family is protected
- 2.1.6 This Contract can be tailored to suit your needs
- 2.1.7 In the unfortunate case of a divorce -
  - a) each partner's current net asset value is calculated by subtracting all liabilities from assets
  - b) any assets made whilst married are shared irrespective of who acquired them

## **2.2 ANC WITHOUT ACCRUAL**

Both husband and wife have separate estates – their assets are not shared. Assets acquired before or during the marriage remain separate assets throughout the course of the marriage.

### **Advantages -**

- 2.2.1 Both partners are legally obliged to support each other financially should one partner be unable to support himself or herself
- 2.2.2 Should one partner go insolvent creditors may not lay hands on the assets of the other which could be the case where the house may be involved.

**Disadvantages -** The 'stay-at-home' partner is not entitled to the assets accumulated by the other partner in the case of death or divorce. Each partner is entitled only to the assets accrued in their own name.

### **Final Notes:**

We advise you to carefully consider the above information as there are positive benefits to be considered.

The marriage contract isn't only about divorce as many couples may think – it is important to be considered - should one partner engage in a business deal or partnership a few years down the line or in case of overspending (debt) on the part of one partner, this could result in financial ruin for the whole family should a home be at stake.

Should you opt for an Ante nuptial Contract you have to make an appointment with an attorney before your date of marriage. Your attorney will register your contract at the Deeds Office and give you a letter which we will attach to your documents when submitting to Home Affairs.