



NR NAGEL

ATTORNEY | CONVEYANCER | NOTARY

ALL YOU NEED IS LOVE AND A GOOD ANTENUPTIAL CONTRACT

An Antenuptial Contract is an agreement entered into between two parties prior to their marriage and is often referred to as a “prenuptial”.

Somehow many people see the Antenuptial Contract as a mere formality, something that needs to be signed prior to the wedding day, without realizing the consequences of such an important legal instrument.

No one enters into a marriage contemplating a divorce, but when you consider that the Antenuptial Contract governs what will happen to your assets and liabilities upon divorce or death, it makes a lot of sense that considerable thought should be given to concluding a Antenuptial Contract and that its contents should be fully understood by all parties concerned.

Herewith a brief discussion on the different marital regimes and the influence of an Antenuptial Contract thereon:

MARRIAGE IN COMMUNITY OF PROPERTY

If the couple do not sign a Antenuptial Contract before their marriage, then they will be married in community of property by default in terms of the South African Matrimonial Law. While a marriage in community of property is the least expensive and most popular matrimonial regime, it is deeply flawed.

Being married in community of property basically means that all the assets and debts from before the marriage are shared in a joint estate between both spouses. Any assets, debts and liabilities acquired by either spouse after their marriage will then also be added to this joint estate.

When couples are married in community of property, their separate estates are combined, and each spouse has the right to dispose of the assets as they wish. They are also equal managers of the joint estate. On dissolution of the marriage, the parties are each entitled to a half-share of the joint estate and they are jointly liable for any liabilities. A major disadvantage is that if one partner becomes insolvent, the other is protected only if he or she owns property that does not form part of the joint estate. Everything in the joint estate will be attached and sold off to pay any creditors.

MARRIAGE OUT OF COMMUNITY OF PROPERTY

If the couple enters into an Antenuptial Contract, with the exclusion of the Accrual system before their marriage each spouse retains his or her own assets and liabilities whether acquired before or during the marriage. There is no sharing of profits and losses and both spouses have full and independent contractual capacity. On dissolution of the marriage by either death or divorce, each spouse retains control over their own assets.

This clearly gives parties absolute independence of contractual capacity and protects the estates of each party against claims by the other party's creditors. There is no provision for any sharing whatsoever. A party who contributed to the other party's estate whether in cash or otherwise would have a heavy onus to prove that he/she was entitled to anything from that party's estate on dissolution of the marriage.

Where one party stays at home to raise children and does not contribute financially towards the marriage and the other party works and accumulates assets, the former may find himself/herself with nothing and no claim to the assets of the latter.

MARRIAGE OUT OF COMMUNITY OF PROPERTY WITH THE APPLICATION OF THE ACCRUAL SYSTEM

In most cases the accrual system is, perhaps, the fairest marriage system for the majority of couples. A marriage out of community of property with it the "accrual" system permits a form of sharing, consistent with the primary objective of marriage, but permitting retention of each party's independence of contractual capacity and the ability to retain their own unique separate estates.

"Accrual" means increase. The accrual system is a form of sharing of the assets that are built up during the marriage. The underlying philosophy in respect of the accrual system is that each party is entitled to take out the asset value that he or she brought into the marriage, and then they share what they have built up together. One spouse's property cannot be sold to pay the other's creditors if the other becomes insolvent – in contrast to the case where the parties are married in community of property.

It is of utmost importance that a party wishing to enter into an Antenuptial Contract must fully understand what it is they are signing. It is for this reason that a standard form contract cannot be used and that consultations cannot be held over the phone or by means of email, in order to draft a fully comprehensive antenuptial contract.

The important features of an accrual marriage are in essence the following:

- 1** Each party retains his or her own estate. Each party may accumulate assets and incur liabilities without the interference from or assistance of the other spouse.
- 2** The monetary value of the smaller estate is subtracted from the monetary value of the larger estate, the difference is split, and the party having the larger estate pays half of the difference between the two estates to the party with the smaller estate.
- 3** At dissolution of the marriage, the estate of each party is calculated by listing all assets and all liabilities, subtracting liabilities from assets and arriving at a net asset value.

In practical terms this amounts to a similar division to a marriage in community of property. However, there are certain crucial factors of an accrual marriage which add complexity and much more freedom of choice.

When drafting an Antenuptial Contract, the parties can each decide to exclude certain assets. The effect of excluding an asset will be that it does not feature on the asset statement at dissolution of the marriage and is completely excluded from the calculation. Assets which are not properly described can cause huge problems when the executor of the estate or the divorce attorney tries to decide what to do with it in calculating the net accrual value.

To exclude either a specific asset, or a commencement value, or both (which must be separate and not derived from the same asset), can effectively ensure that couples share only what they choose to share and keep separate any item or items, or values, which they do not believe is fair to share (for example something acquired before the relationship commenced).

Parties not wishing to exclude specific assets may exclude a certain sum of money which is the agreed equivalent of assets which they do not wish to share, and which is termed a "commencement value".

EXCLUDED FROM THE ACCRUAL

Certain property belonging to either the husband or the wife may not be taken into account when the accruals are calculated:

- 1** Any damages awarded to either spouse for defamation or for pain and suffering;
- 2** Any inheritances, legacies or gifts that either spouse has received during the marriage, unless the parties have agreed in their antenuptial contract to include these or the donor has stipulated their inclusion;
- 3** A donation made by one spouse to the other. This is not taken into account as part of either the giver's or the receiver's estate, with the result that the giver cannot recover part of what he or she gave and the receiver need not return any of it.

CALCULATING THE ACCRUAL

The accrual is calculated by subtracting the net asset value of his/her estate at the commencement of marriage from the net asset value of his/her estate at dissolution of the marriage.

EXAMPLE:

If spouse C had a net asset value of R10 000.00 at the commencement of the marriage (his/her "initial value") and a net asset value of R100 000.00 at dissolution of marriage (his/her "end value") then the accrual to his/her estate is R90 000.00. If the initial value of the other spouse B was R20 000.00 and his/her end value R200 000.00, it follows that the accrual to his/her estate is R180 000.00.

Net accrual is calculated by subtracting the "smaller" accrual from the "larger" accrual. In the above example: R180 000.00 – R90 000.00 = R90 000.00. In accordance with the Act, C (the spouse with the smaller accrual) acquires a claim against B (the spouse with the larger accrual) for one half of the net accrual, namely R45 000.00.

If you do intend to get married, it is well worth your while to consult a reputable attorney, to discuss your particular requirements and ensure that you fully understand the application of the accrual system to your particular situation.



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HOW TO CONCLUDE AN ANTENUPTIAL CONTRACT

A consultation can be arranged with NR Nagel Attorneys prior to the solemnization of the marriage.

Once your instructions to the content of the Antenuptial Contract were given, we will draft the Antenuptial contract and arrange for you and your spouse to attend to the signature thereof before the date of your marriage. The original Antenuptial Contract will be attested by a Notary Public and lodged at the Deeds Registry to be registered. The Antenuptial Contract must be registered at the Deeds Registry within 3 months of the date of the marriage.

CONTACT YOUR PARTNER DEDICATED TO EXCELLENCE

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