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# Antenuptial contracts

## What is an antenuptial contract?

An antenuptial (prenuptial, prenup, marriage contract) contract is a written agreement (contract) between two people who are about to get married, setting out: the terms of possession of assets, treatment of future earnings, control of the property of each party, and the potential division of estates if the marriage is later dissolved or when one of the parties passes away.

## Why consider the registration of an antenuptial contract

When two persons that are about to be married enter into an antenuptial contract their marriage will be out of community of property. The most common consequences of a marriage out of community of property are as follows:

- The parties will not be held liable for the debts of a spouse that such spouse may have incurred prior to the marriage;
- The parties will not be held liable for the debts of a spouse that such spouse may incur during the marriage;
- Assets may be protected, particularly if one of the spouses has a business in his or her own name. The parties may decide to register assets such as their residential property in the name of only one spouse, being the spouse with the lowest risk profile. The assets of each spouse will also be safe in the event that the other spouse is sequestered;
- One or both spouses may have assets prior to the marriage that they want to exclude from the joint estate;
- Spouses may enter into commercial transactions without the consent of their spouse;
- Each spouse retains control over his or her assets, builds his or her own estate and is responsible for his or her own debts.

## Some additional facts to consider:

- ½ Of all south-african marriages ends in divorce in the first few years of marriage.
- A contested divorce can cost anything from R15 000 - R500 000 and may take years to complete;
- The risks of sequestration, liquidation, execution sales, debt, business failure, fraud and theft are a reality of doing business in South Africa;
- 100% Of us will eventually die. If married in community of property the whole of the estate (both parties estate) is frozen. Finalisation of a deceased estate is a lengthy affair.

## Common misconceptions about antenuptial contracts

"Antenuptial contracts are only for the rich"

"We can always do it later"

"Antenuptial agreements are unfair"

"Antenuptial agreements are unromantic"

"If we divorce i am sure it will be amicable"

"We do not own much"

"Our parents didn't do it"

"Antenuptial agreements are too personal"

"We will never divorce"

## You have 3 marital property regime choices:

1. Marriage in community of property (no contract)
2. Marriage out of community of property without the accrual system
3. Marriage out of community of property with the accrual system (most popular)

## 1. Marriage in community of property. (marrying without an antenuptial contract)

The parties do not enter into a antenuptial contract before their marriage. Everything which is mine is yours, and everything which is yours is mine. This may sound lovely and in line with the spirit in which you enter marriage, but take a step back and look at the risks and implications of this choice in a modern world.

### 1.1 Benefit of a marriage in community of property: on death or divorce, the estate is divided equally.

### 1.2 Risks and disadvantages to marriage in community of property

- if one of the spouses fall into debt, creditors have a claim over the assets in the joint estate – that's the assets of both spouses.
- if one spouse has his/her own business and becomes insolvent, the communal home and all assets, in both the names of the spouses, becomes attachable by creditors
- there is no financial or even contractual independence as certain transactions, such the sale of shares, need the consent of both parties
- if one partner should die, the estate of both the deceased and surviving partner will be wound up because it is a joint estate – not great for the surviving spouse who will find themselves in legal limbo, possibly without access to funds in addition to the trauma of losing a loved one.



## 2. Marriage out of community of property with the accrual system excluded

The parties enter into an antenuptial contract and exclude the accrual system. Assets acquired before or during the marriage remain separate throughout the course of the marriage. Assets are not shared and each partner has a separate estate. In short: what's yours stays yours and what's mine stays mine.

### 2.1 Advantages of a marriage out of community of property with the accrual excluded

- If one of the parties becomes insolvent, creditors may not attach the assets of the other
- Both parties are still legally obliged to offer financial support to one another, should one of them be unable to support himself/herself.
- Full contractual freedom.
- In second marriages, marriages where the parties already have children and where both parties have already amassed a sizeable estate or in so called marriages of convenience it simplifies matters drastically.

### 2.2 Disadvantages of a marriage out of community of property with the accrual system excluded

In the case of death or divorce, each spouse is only entitled to those assets accrued in their own name. Should one spouse choose to stay at home to raise the children, that spouse would not be entitled to the assets accumulated by the other spouse.

## 3. Marriage out of community of property with the accrual system

The parties enter into an antenuptial contract and include the accrual system. Each partner states the value of their respective assets (net asset value) at the beginning of marriage. Thereafter any assets accumulated are shared 50/50. One can state that specific assets be excluded from the accrual system, such a property or shares etc.

### 3.1 Advantages of marriage out of community of property with application of the accrual system

- Both parties share in the wealth accumulated during marriage.
- If any party owned property before the marriage, it remains the property of the person who owned it.
- Each party has complete financial and contractual freedom.
- If one party incurs debt or liability, it cannot be claimed from the estate of the other party.
- In the case of divorce, any assets accumulated during the marriage are shared – it doesn't matter who acquired them. Each partner's current net asset value is calculated by subtracting all liabilities of that partner from his or her assets. The accrual is then shared equally.
- The antenuptial contract can be tailored to suit your needs.
- It protects the partner who remains at home to care for the family.
- In many ways the safest and fairest marriage regime.



### 3.2 What is the accrual system and how is it calculated

The 'accrual' is the extent to which the respective spouses have become richer by the end of the marriage, in other words, the amount by which the spouses' joint wealth has increased over the period of the marriage. The spouse with the smaller accrual has a claim against the one with the greater accrual for half of the difference between the two amounts.

### 3.3 Assets automatically excluded from accrual calculation

Various assets are excluded from the determination of the accrual of a spouse's estate, they are:

- Any amount which accrued to the estate by way of damages other than damages for patrimonial loss;
- Any asset which has been expressly excluded from the accrual system in terms of the antenuptial contract of the spouses as well as any other asset which a spouse has acquired by virtue of his or her possession or former possession of such asset;
- An inheritance, a legacy or a donation which accrues to a spouse during the subsistence of his or her marriage as well as any other asset which he or she acquired by virtue of his or her possession or former possession of such inheritance, legacy or donation, except insofar as the spouses may agree otherwise in their antenuptial contract or insofar as the testator/testatrix or donor may stipulate otherwise;
- Donations between spouses other than a donation mortis causa (after death).

### What other legal issues should be addressed or considered before getting married?

- The drafting of a final will and testament.
- Estate planning.
- Consider the registration of a family trust – [www.aucamp.co.za](http://www.aucamp.co.za)

### Registration costs

We register antenuptial contracts for an all-inclusive fee of **R2 035.00**.

Information sheet for the registration of an antenuptial contract  
Please complete and email to [info@aucamp.co.za](mailto:info@aucamp.co.za)

With accrual YES / NO (delete whichever is not applicable)	
<b>SPOUSE 1</b>	
Full names:	
Surname:	
ID number:	
Marriage status:	Unmarried
Residential address:	
City:	
Postal address:	
E-mail:	
Tel (home)	
Tel (mobile)	
Tel (work)	
Fax:	
Marriage date	
Nett commencement value	
Assets excluded from accrual	
<b>SPOUSE 2</b>	
Full names:	
Surname:	
ID number:	
Marriage status:	Unmarried
Residential address:	
City:	
Postal address:	
E-mail:	
Tel (home)	
Tel (mobile)	
Tel (work)	
Fax:	
Nett commencement value	
Assets excluded from accrual	
Any other relevant information:	
Questions?	