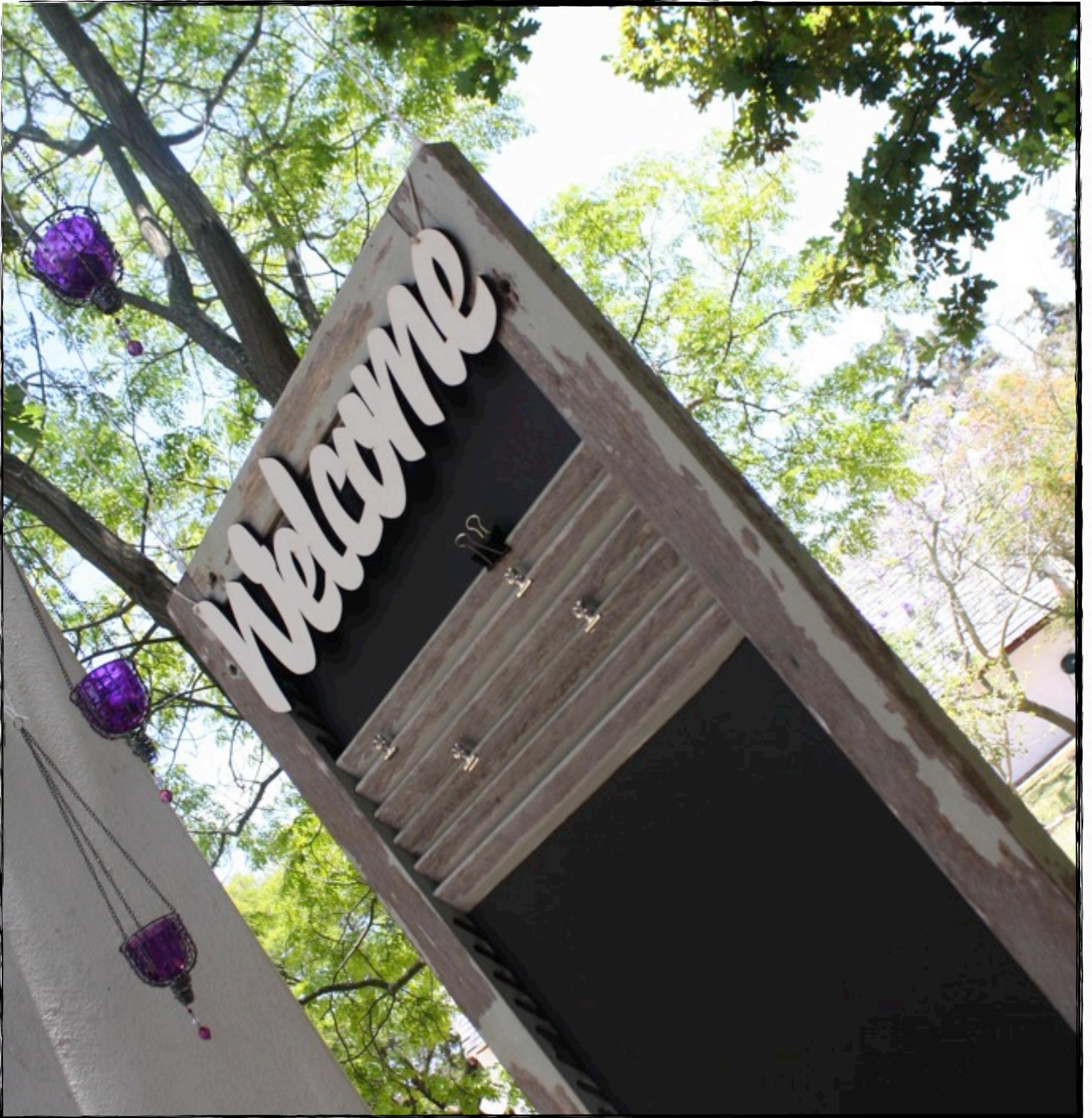


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Matrimonial Property & Antenuptial Contracts.

In terms of South African Law, people can either marry in community of property or out of community of property. Your choice will determine your proprietary rights during your marriage, as well as when it is dissolved - either by death or divorce. It is essential that you elect your matrimonial regime prior to the marriage; as to try to change it thereafter is an expensive and time-consuming process. You and your spouse will have to make a joint application to the High Court for authority to change your matrimonial property system. There are a lot of formalities involved including placing an advertisement in the newspaper to notify creditors.

You are automatically married in community of property in terms of South African Law if you did not sign an Antenuptial Contract prior to your marriage. The Antenuptial Contract also had to be attested before an attorney who is a Notary prior to the marriage, as only a Notary can execute an Antenuptial Contract. The contract will then be lodged in the Deeds Registries Office for registration.

'In community of property' means that everything each individual spouse owned and each of their individual debts from before their marriage are put together in a joint estate. From this point onwards everything they earn or buy after their marriage will also form part of this joint estate, including any debt and liabilities incurred by either one of them.

Should one spouse be reckless with his financial affairs, it will adversely affect the other spouse, as they will be liable for each other's debts. The spouses will however also be joint owners of all property in the estate. Both spouses therefore have equal rights of ownership and administration over all the assets.

There are various transactions that require the consent of both spouses. The most prejudicial consequence of marrying in community of property, is that assets in the joint estate are vulnerable to the claims of creditors of both spouses and very little can be done to protect against this vulnerability. This marital regime is not recommended for spouses running independent businesses.

Our Insolvency Division often has to deal with clients who were married without having had the benefit of professional advice regarding the registration of an Antenuptial Contract. This may lead to premarital or post-marital liabilities that become communal and thereby endangering the good standing of not just one, but both partners.

The only real advantage of being married in community of property is that it is based on the fact that marriage is a partnership and as such it can be conducive to a harmonious marriage relationship as it promotes both legal and economic equality of the spouses.

What is an Antenuptial Contract (Prenuptial Contract)?

An Antenuptial Contract, also known as a Prenuptial Contract or Prenup, is a contract entered into by two people prior to their marriage, to stipulate the terms and conditions for the exclusion of community of property between them. The terms and conditions may not be illegal, immoral or contrary to public policy.

Each spouse usually retains his or her separate property and have complete freedom to deal with that property as he or she chooses. If one spouse was declared insolvent, the other's property is protected from the insolvent spouse's creditors, subject to Section 21 of the Insolvency Act.

Why should I consider registering an Antenuptial Contract?

There are various reasons why some people prefer to enter into an Antenuptial Contract in order to be married out of community of property. The most common reasons are that:

- They do not want to be held liable for any debts that the other spouse may have incurred prior to the marriage;
- They do not want to be held liable for any debts that the other spouse may incur during the marriage;
- They want to protect assets such as a house from creditors, particularly if one of the spouses has a business of his or her own, and they would therefore want to be able to register the house in the name of the other spouse;

- One or both spouses have assets at the time of the marriage that they don't want to become part of a joint estate;
- They want to be able to enter into transactions without having to obtain the consent of the other spouse;
- During the marriage each spouse retains control of his or her own property, builds up his or her own estate and each is responsible for his or her own debts.

The two options regarding an Antenuptial Contract

An Antenuptial Contract excludes community of property. This can only be achieved by entering into an Antenuptial Contract before you get married. There are two options:

- marriage out of community of property with application of the accrual system
- marriage out of community of property without application of the accrual system

If you conclude an Antenuptial Contract prior to your marriage, the accrual system will automatically apply under the Matrimonial Property Act of 1984, unless it is expressly excluded in the contract.

'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.

Under both options (with or without the accrual system), 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.

Marriage out of community of property WITHOUT application of the accrual system

If you do not want the accrual system to apply, it must specifically be excluded in the Antenuptial Contract.

This achieves a complete separation of assets of spouses - not only those brought into the marriage but also those acquired during the marriage. Each spouse will retain ownership of completely separate estates.

There is no sharing and on dissolution of the marriage, neither spouse has any claim against the assets of the other. Similarly, neither spouse is liable for the debts of the other. In other words, there is no sharing of profit or loss and the Court has no discretion whatsoever to adjust the division on the basis of equity or fairness.

Marriage out of community of property WITH application of the accrual system

In most cases the accrual system is, perhaps, the fairest marriage system for the majority of couples. Before the introduction of the accrual system in 1984, if prospective spouses chose to be married out of community of property there was no form of sharing between them of what was built up during the marriage. The accrual system was introduced to remedy this. It is applicable to all marriages out of community of property, unless the prospective spouses specifically exclude the accrual system in their contract.

In terms of this regime, both spouses have separate estates during the subsistence of the marriage and do not share each other's profits or losses during the marriage. This system has all the advantages of the protection afforded to marriages concluded out of community of property i.e. that assets of one spouse are secure from the creditors of the other spouse, but it incorporates the ethic of sharing, which is the basis of an in community of property marriage. In other words, while neither spouse will be liable for the other spouse's debts, the parties will, however, share what they have acquired during the subsistence of the marriage. This sharing only occurs upon dissolution of the marriage. This regime of marriage allows for very imaginative and flexible estate planning.

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.

An example of how accrual is calculated

The starting point is that the parties are married out of community of property, so the assets are not jointly owned nor are the debts joint debts. Each party still has a separate estate.

On dissolution of the marriage, either by death or divorce, the accrual or growth to each party's estate is worked out. This is done by calculating the net value at dissolution less the net value at commencement of the marriage, as declared in the Antenuptial Contract. If one of the estates has grown more than the other during the marriage, the party with the smaller growth has a claim against the party with the greater growth, for half the difference.

The parties may, in their Antenuptial Contract, declare the net value of their possessions at the beginning of the marriage. Alternatively, a marriage partner may, before the marriage or within six months of it, declare his or her net worth in a written statement, signed by the other partner and attested by a notary (who will usually be the one attending to their Antenuptial Contract). The notary files the statement with the copy of the Antenuptial Contract in the official record, known as the protocol.

If either partner's debts at the time of the marriage exceed the value of his or her property, the net value of his or her estate at the start of the marriage is regarded as nil. Also, if either partner fails to state the value of his or her property in the Antenuptial Contract or in a separate statement, his or her estate at the time of the marriage will be valued at nil, unless there is other proof of its value.

If a partner's estate on marriage is regarded as nil, everything he or she owns at the end of the marriage will be treated as having accrued during the marriage, unless it can be proved that the property belonged to him or her before the marriage took place.

Certain property belonging to either spouse may not be taken into account when the accruals are worked out:

- Any damages awarded to either spouse for defamation or for pain and suffering;
- 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;
- 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.

- Compensation for injury received during the marriage.

When calculating the values of the dissolution of the marriage, allowance is made for any difference in the value of money at the commencement and the dissolution of the marriage, usually with reference to the consumer price index (i.e. the inflation rate).

The total asset value of the husband's estate at dissolution of the marriage	R350,000
LESS his total liabilities/debt at dissolution of the marriage	-R200,000
The current value of the husband's estate	R150,000
LESS the commencement value of his estate, stated in the Antenuptial Contract	-R20,000
Subtotal	R130,000
LESS adjustment for inflation on commencement value	-R10,000
Husband's accrual or growth	R120,000

The total asset value of the wife's estate at dissolution of the marriage	R125,000
LESS her total liabilities/debt at dissolution of the marriage	-R35,000
The current value of the wife's estate	R90,000
LESS the commencement value of her estate, stated in the Antenuptial Contract	-R10,000

Subtotal	R80,000
LESS adjustment for inflation on commencement value	-R5,000
Wife's accrual or growth	R75,000

Wife's accrual or growth	R75,000
Husband's accrual or growth	R120,000
Wife's accrual or growth	R75,000
Amount with which the husband's accrual exceeded the wife's accrual	R45,000

The wife will therefore be entitled to 50% of R45,000 which will amount to a claim of R22,500 against the husband's estate. This amount of R22,500 added to the wife's accrual will result in a total growth of R97,500, exactly the same amount as the husband's growth will be after deduction of the wife's claim. Both their estates would therefore have increased by the same value since the marriage.

An accrual claim can only be made on dissolution of the marriage, not during the marriage. If the marriage is dissolved by death, a claim in terms of the accrual system must be paid before the will or intestate succession is given effect to.

If the estate of the first dying spouse has a greater accrual, the surviving spouse would have a claim against the deceased estate. If the estate of the surviving spouse has a greater accrual, the estate of the deceased spouse would have a claim against the surviving spouse. If the surviving spouse is the sole heir/heirress by virtue of the will or of intestate succession (ie how an estate devolves when a person dies without leaving a will) then it is academic. It

is not necessary to work out the accruals as the surviving spouse receives everything anyway.

How to register an Antenuptial Contract

Please take note that the Antenuptial Contract will have to conform to certain standards and prescriptions in order for the Registrar of Deeds to accept and register it. Although anyone with enough knowledge could probably draft an Antenuptial Contract, only an attorney who is a Notary may tend to the registration thereof. The Antenuptial Contract must be signed in his presence by you and your spouse to be or by someone you both have given Power of Attorney to sign it on your behalf.

Note:

1. The above article supplied to you with acknowledgment to Dionne Lamprecht.
2. I suggest that you phone various attorneys and obtain a quote re their fees for their services in this regard. Should you reside in the Cape Peninsula you might also try Harry de Villiers in Durbanville at 021-9190336, or harry@htdevilliersatt.co.za His fee of R1000,00+VAT is very reasonable and competitive. - Johan Botha.