A summary of the South African Marital Regimes

Renette Hendriks, Director and Legal Advisor, summarises the different options one has when deciding on one’s marriage contract.

Having briefly touched on this subject in a previous edition of Personal Opinions, we have been asked by quite a few of our clients to advise on the advantages and disadvantages of the different marital regimes.

Choosing a marital regime is just as important as choosing a suitable partner. Not only does it have an impact on the manner in which your assets will be divided upon death or divorce, but it may also impact on the day-to-day management of your affairs.

Two main marital property regimes are recognised under South African Law, namely the marriage in community of property and the marriage out of community of property, profit and loss. When it comes to a marriage out of community of property, one also has the option to include the accrual system. It is important to note that if one fails to register a valid antenuptial agreement, this may also impact on the day-to-day management of your affairs.

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A marriage in community of property has the following legal consequences:

- All property, whether acquired before or after the date of marriage, including gifts, donations, inheritances and remuneration forms part of the joint estate. It is thus important to explicitly exclude this in your Will should you leave assets to beneficiaries who are married in community of property, as per the provisions included in all Personal Trust Wills.
- Each spouse owns an undivided one-half share in the joint estate which means that both spouses must consent (in writing) to transactions involving the:
  - disposal of assets
  - contracting of debts by the communal joint estate
  - performance of juristic acts.
- Should the communal joint estate be liquidated, both spouses will be declared insolvent.
- Upon the death of the first-dying spouse, the assets of, or share of the surviving spouse in the communal joint estate is dealt with and reflected in the deceased’s Estate. The surviving spouse will thus acquire one-half share of the communal estate by virtue of being married in community of property, and the other half will devolve in terms of the provisions contained in the Will of the deceased spouse.
- Upon divorce the communal estate is split between the spouses in equal shares, including all profits and losses.

A marriage out of community of property and of profit and loss has the following legal consequences:

Without the application of the accrual system:

- All assets and liabilities of the spouses are kept separate from one another.
- Spouses do not require each other’s consent when entering into certain transactions, as is the case in a marriage in community of property.
- The estate of the other spouse is protected from insolvency.
- Upon the death of either spouse, the deceased spouse’s estate is administered without affecting the surviving spouse’s estate.
- Upon divorce, each spouse retains his/her assets and liabilities are kept separate. It is important to note that this marital regime does not do away with possible maintenance claims that may arise between spouses.

This system is ideally suited to couples who want to keep their Estates and the future growth separate and where risks pertaining to business interests or ventures are involved.

With the application of the accrual system:

- All assets and liabilities of the spouses are kept separate from one another and only the accrual is shared.
- Spouses do not require each other’s consent when entering into certain transactions, as is the case in a marriage in community of property.
- The estate of the other spouse is protected from insolvency.
- Upon the death of either spouse, the deceased spouse’s estate is administered without affecting the surviving spouse’s estate.
- Upon death or divorce the accrual will be calculated using a basic formula to determine how much the party whose estate accrued the most during the marriage will have to pay to the party whose estate showed a smaller accrual/growth.

This system is ideally suited to situations where one of the spouses is dependent on the income of the other (either periodically or permanently) and where financial equality between spouses is to be maintained, as many of the contributions to a marriage are immeasurable in monetary terms.