AVOID LOOSE ENDS WHEN TYING THE KNOT

Marriages only come to an end for one of two reasons: death or divorce. Since the former is inevitable and the latter quite common, it is wise to investigate and plan the legal intricacies carefully before walking down the aisle.

ANTE-Nuptial Contracts

When contemplating marriage in South Africa, one has to bear the following factors in mind:

1) If the parties are domiciled in South Africa, then the proprietary consequences of the marriage (what happens to your assets) will be governed by South African Law. (Domicile = the country you intend to live in after the wedding and regard as your permanent home, and is not necessarily the country the wedding ceremony takes place in).

2) South African Law presents the marriage partners (whether same sex or opposite sex) with three general options:
   a) Marriage IN COMMUNITY OF PROPERTY;
   b) Marriage OUT OF COMMUNITY OF PROPERTY WITHOUT THE ACCRUAL SYSTEM; or
   c) Marriage OUT OF COMMUNITY OF PROPERTY WITH THE ACCRUAL SYSTEM.

One has to be aware that, once married, to change a marital regime can prove extremely difficult and costly. Also bear in mind that an ante-nuptial contract is NOT an estate planning tool and should not be considered as such under any circumstances. It is a choice as to how you want your property and finances to be arranged between yourself and your spouse during the marriage, and how you want your estate to be dealt with, BEFORE YOUR WILL COMES INTO EFFECT, after your death or at the end of the marriage.

As a broad guideline, the following thoughts may be helpful:

MARRIAGE IN COMMUNITY OF PROPERTY

Marriage in community of property is the system which will apply by default, if you do not enter into an ante-nuptial contract with your partner. It is a PARTNERSHIP between equal partners. You have joint and equal say over your assets, and all your property (movable and immovable, including your bank accounts, and everything that you may have brought into the marriage or acquired during the marriage, with the exception of certain
inheritances which may be specifically excluded).

Think of a marriage in community of property as a pool: everything goes into the pool. If you own two chairs before the marriage, and your intended spouse owns two chairs, then, once married, you will each own four half chairs (not two chairs each!). In many of your dealings, you will need the signature of your spouse (e.g. when you sell property, pass a bond over property, withdraw money from your spouse's account or buy goods on a credit sale).

This is a good system for younger people who start out both working for employers and earning salaries or who expect to do so for the rest of their working lives. It requires them to work together on decision-making within the marriage, and leaves them with the expectation that they will benefit equally from the fruits of the marriage, and share, and are responsible for a joint fate both during and after the marriage.

This system also gives security to a partner who may expect to stop working at some stage – for example, to have children – but who needs to know that they will be supported and will benefit from wealth coming into the marriage over the years.

Older people who are thinking of marriage, second-time-rounders and people who already have children from previous partners, should rather consider one of the options below.

**MARRIAGE OUT OF COMMUNITY OF PROPERTY WITHOUT AN ACCRUAL SYSTEM**

Prior to 1984, this was the only kind of ante-nuptial contract available in South Africa.

Often, when you ask people what this contract constitutes, the typical answer is, “What’s his is his, and what’s mine is mine”. That’s about 75% correct. You keep what you brought into the marriage and you keep what you earn during the marriage.

More importantly however, is that the marriage partners have contractual independence, i.e. they don’t need each other’s signatures on contracts, they can own property and deal with it independently without consulting or co-operating with the other spouse. They can also independently dispose of their property – sell, donate or will it away – without referring to the other party.

The system is most useful where one partner has a high-risk, high-income lifestyle: the assets of the other partner are protected from negative consequences of that lifestyle and indeed, the partners may decide that certain assets should be protected from risk by being put into the name of the other partner. The “other” partner can then serve as a “lifeboat” for any commercial misfortunes of the high-income partner.

The danger with this system is that it does not automatically assure a financially weaker
partner of any share in the proprietary benefits of the marriage, and this would be more serious the longer the marriage exists.

Normally, partners to this sort of marriage would take care of these issues by way of their wills, which would be regularly updated, and by way of other agreements between them regarding the share and control of assets in the marriage – for example, they may decide that notwithstanding the marriage out of community of property, they will own certain assets (like the matrimonial home) jointly. The important thing here is not to allow the financial and other material aspects of your marriage to run “on autopilot” indefinitely: it requires management and consistent attention.

This system is more suitable, as mentioned above, in cases where partners need greater independence, or come into the marriage already having children, or are older and may have plans to bequeath parts of their estates to other people on their deaths.

**MARRIAGE WITH THE ACCRUAL SYSTEM**

This is a modern option, only having come into existence in South Africa in 1984. The prospective partners have to sign an ante-nuptial contract just as above, save that the contract provides that when the marriage comes to an end, a calculation will be done which has the effect of equalising the value of the separate estates of the partners.

Effectively, half the difference in value between their separate estates accrues to the smaller estate when the marriage ends.

Please note that the contract does not operate any differently from the older-style ante-nuptial contract described under the previous heading, during the existence of the marriage. The difference is only in what happens when the marriage ends.

In order to use this option, each of the prospective partners has to take an inventory of their estate as at the date of entering into the marriage. The value of this inventory is called your commencement value.

At the end of the marriage, each partner (or the partner’s executor) takes an inventory and values that inventory again. This is called the final value. The commencement value is then adjusted to allow for inflation according to the consumer price index, and the adjusted commencement value is deducted from the final value. The result (which is hopefully a positive figure) is then compared with the result of the same calculation in the other partner’s estate.

The lesser result is then subtracted from the greater result, the difference is divided by half, and that half is then transferred (“paid”) from the greater estate to the lesser estate. That figure is, in fact, the accrual.
These are the basic principles, although it can, at times, be more complicated:

- Parties can, for example, exclude certain assets from the accrual by naming them specifically when they sign the contract. These assets may be things which they own at that stage, or which they expect to acquire afterwards. Remember that if you exclude too much, you may as well not have a contract with an accrual system, and should rather go for the older type of ante-nuptial contract.

- In addition, there are certain classes of assets which the law excludes automatically from the accrual calculation: namely, inheritances and money awarded as personal injury damages. The first class (inheritances) speaks for itself. As for the second class – think of it like this: it’s your pain, so it’s your money!

This type of ante-nuptial contract was created to rectify some of the injustices of the old-style contract: it takes care of the fact that the partners may start out in life fairly equal in wealth, but at some stage one of them stops working (say, to have children), while the other keeps growing his or her estate by earning an income. When that type of marriage (a very common example) comes to an end, one partner is much richer than the other, and the poorer partner is pretty much at the mercy of the richer partner.

**GENERAL**

Ante-nuptial contracts have a long history in our law, but many of the circumstances they were intended to deal with no longer exist. They were intended to protect the daughters of wealthy families from exploitation by their spouses because of laws relating to marriages in community of property (which also no longer exist). In the past they generally implied something about the social status of the parties: they give the partners independence, and have therefore traditionally had some kind of snob appeal – but in the post-World War 2 world, more often than not, they simply guaranteed the poverty of a non-income-earning spouse.

The traditional ante-nuptial contract is losing its appeal and one who is thinking of such a contract should first seek independent legal advice. In fact, it is becoming increasingly common internationally for each partner to get independent legal advice from his or her own lawyer. In the United Kingdom, the United States and Canada, that is now taken for granted. In the “old days”, a young couple would breeze into their lawyer’s office, hand in hand, sign a contract without much discussion and really just as a common middle-class formality, and go off (still hand in hand) to get married.

Today, although they still walk into the lawyer’s office that way, they frequently leave with more on their minds, and they may even want a second or even a third consultation before they sign. It is much more of a businesslike transaction, and perhaps that’s a good
thing – better to think about the consequences before getting married, than to end up at the doors of the divorce court, or at the graveside of your partner, wondering what’s going to become of you.

**FORMALITIES**

**Marriage in community of Property**
- You don’t need to do anything other than see a marriage officer in order to get married in community of property. You will have to book an appointment for this purpose and he or she will simply take you through the formalities of the marriage ceremony and issue you with a marriage certificate.

**Marriage Out of Community of Property**
- The ante-nuptial contract has to be prepared by and signed before a specially qualified person designated as a notary public. It must then be registered at a South African Deeds Registry whereupon the notary will furnish you with confirmation of registration and, in due course, furnish you with the original registered contract. This is absolutely crucial because the contract is a “public document”, and any member of the public can go and view a copy of your contract at the Deeds Registry – and that is what proves that you have the right to conduct your financial affairs independently.

- It is important to note that the contract must be signed prior to getting married and must be registered in the Deeds Office within 3 months of it having been signed. If this is not done, an order from a High Court Judge will need to be obtained to allow you to remedy this (an extremely expensive and time consuming process).

**WILLS**

It is essential that the intended spouses should give attention to the subject of their wills. Unlike the ante-nuptial contract, a will is an essential estate planning tool. It has all the flexibility which the ante-nuptial contract does not have, and it complements the ante-nuptial contract in the legal preparations for the marriage. People often discuss the will at the same time as the ante-nuptial contract and sign their ante-nuptial contract and their will in a single sitting. This is highly recommended as part of a “good management” policy for a marriage.

For assistance contact our specialist Harry Friedland on harryf@stbb.co.za.