MATRIMONIAL PROPERTY SYSTEMS
IN SOUTH AFRICA

There are currently only three recognised Matrimonial Property Regimes in South Africa, namely In Community of Property, Out of Community of Property without Accrual and Out of Community of Property with Accrual. Customary marriages in terms of Indigenous Law, common law marriages and marriages according to Muslim/Islamic or Hindu Rites are not legally recognised in terms of South African marriage laws and persons married in terms thereof are accordingly regarded as being unmarried.

**IN COMMUNITY OF PROPERTY**

Marriage in community of property is the default matrimonial property system and will apply in every marriage where the parties enter into the marriage without executing or registering an Antenuptial Contract beforehand.

With this system, all the assets and liabilities which the parties had prior to the marriage or acquired during the marriage will fall into the joint or communal estate of the two spouses, who will own all property and other assets in equal, undivided shares and will likewise be jointly and equally liable for all debts and other liabilities. Certain types of assets are however excluded from the joint estate.

This system is very equitable and based on the theory that each spouse, whether working or taking care of the children and household, contribute equally to the marriage and are accordingly entitled to share equally in the joint estate.

The largest disadvantage of this system is however that, should one spouse have large debts and become insolvent, the assets of both spouses will, except in exceptional circumstances, form part of the joint insolvent estate and be subject to distribution amongst the creditors.

**OUT OF COMMUNITY OF PROPERTY**

In order to be married Out of Community of Property, one must execute an Antenuptial Contract in front of a Notary prior to the marriage, which Antenuptial Contract must be registered in the Deeds Office within three months of date of execution.

One can be married out of community of property either with or without the inclusion of the Accrual system. Unless the accrual system is specifically excluded in the Antenuptial Contract, the accrual system will apply automatically to all marriages out of community of property.

**OUT OF COMMUNITY OF PROPERTY WITHOUT ACCRUAL**

In terms of this system, each party retains his or her own assets and liabilities and cannot be held liable for the debts of his or her spouse. Accordingly, one spouse is protected from insolvency should the other spouse end up in financial difficulty.

This system can however be inequitable in circumstances where only one spouse works, as the non-working spouse (eg. a stay-at-home mother/father) contributes to the success of the working spouse by; for example, looking after the children and household, cooking food and otherwise supporting the working spouse, but is left with no assets of his or her own should the parties divorce.

This system is normally suitable for second or further marriages or where each spouse has already amassed a substantial estate of his or her own and the respective spouses are not financially dependant upon each other for maintenance should the marriage be dissolved by death or divorce.

**OUT OF COMMUNITY OF PROPERTY WITH ACCRUAL**

This matrimonial property systems is a blend of the positive aspects of the above two system, cutting out most of the disadvantages.

In essence and for the duration of the marriage, it is basically the same as marriage out of community of property without accrual. The difference comes in when the marriage is dissolved, either by death or divorce.

In the Antenuptial Contract which is signed prior to the marriage, the parties must elect an initial value of their respective estates as at the commencement of the marriage, which is recorded in the Antenuptial Contract. This value can be the
actual, calculated value of the estate or an estimate. Spouses can also have the value of their estate at the commencement date deemed to be R0.00 (NIL RAND).

When the marriage is dissolved, a new calculation of the actual value of each estate is made. The initial value, as recorded in the Antenuptial Contract, is then subtracted from this value to give the amount of accrual in each estate (the amount with which the value of each estate has increased during the existence of the marriage).

The estate with the higher accrual must then pay over half the difference of the net accrual of each estate to the estate with the lesser accrual, unless otherwise provided in the Antenuptial Contract.

Example: A's estate has an initial value of R100 000 and B’s estate has an initial value of R200 000. At the dissolution of the marriage, A’s estate is valued at R400 000 and B’s estate at R 300 000. This means that A’s estate has accrued by R300 000 (400 000 less 100 000) and B’s estate by R100 000 (300 000 less 200 000). The difference between the two accruals is R200 000 (300 000 less 100 000). The estate with the higher accrual, A, must then pay half the difference, R100 000 (200 000/2), to the estate with the lesser accrual, B. The net effect will then be that both A and B’s estates will have increased by R200 000.

It is possible to have certain assets excluded in the Antenuptial Contract for purposes of calculating the Accrual both at the commencement and dissolution of the marriage. Inheritances are also normally excluded.

One disadvantage of this matrimonial property system is that the estate with the higher accrual may have a cash flow problem when it comes to paying over half the difference in accrual to the other estate and this may necessitate the registration of a mortgage bond or the selling of assets in order to finance same.

**FOREIGN MARRIAGES**

In order to determine whether a person is married according to the laws of South Africa or whether the laws of another country applies, one must find out where the husband was domiciled (i.e. resident with the intention of staying there permanently or indefinitely) at the date of marriage.

Example: If a South African woman gets married in Mauritius to a man domiciled in England, they will be married according to the laws of England.