

**MARRIAGE:**

**AVOID LOOSE**

**ENDS WHEN TYING**

**THE KNOT**

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Firm

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# THE FIRM

Established in 1900, STBB is a dynamic law firm of more than 100 business-minded attorneys practising from various offices across South Africa.

By understanding our clients' needs and objectives, we strive to deliver cost-effective legal solutions for all business and personal matters. We are committed to developing close working relationships with our clients, enabling us to succeed consistently on their behalf.



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A marriage is a unique parcel made up of considerations and undertakings private and intimate to two persons and, on the other hand, certain legislative consequences that automatically apply to the persons' patrimonial relationship.

Married persons are often, at least initially, unaware of the effect of these somewhat contradictory elements that exist within their marriage relationship. But as time passes and spouses become involved in businesses, investments, and other opportunities, the legal side of the relationship plays a very significant role – and particularly if the spouses divorce.


## **MARITAL REGIMES**

Under South African law, couples intending to conclude a marriage under the Marriage Act 25 of 1961 or the Civil Union Act 17 of 2006, have three primary options:

- Marriage in community of property;
- Marriage out of community of property without the accrual system; or
- Marriage out of the community of property with the accrual system.

## **MARRIAGES IN COMMUNITY OF PROPERTY**

In a marriage of community of property, the spouses' assets, including movable and immovable property as well as their bank accounts, and liabilities are pooled under a joint estate, which belong to the spouses in equal and undivided shares. In other words, everything each party brought into the marriage or acquired during the marriage automatically falls under the joint estate. There are, however, certain exceptions, such as inheritances, which may be specifically excluded.



The legal effect of this marital regime is that each spouse requires the written consent of the other to perform certain juristic acts, such as alienating or burdening immovable property which forms part of the joint estate, or receiving credit under a credit agreement.


A marriage in community of property applies to all civil marriages by default, i.e. a civil marriage is automatically a marriage in community of property if the parties do not enter into an antenuptial contract before their marriage.

### **MARRIAGES OUT OF COMMUNITY OF PROPERTY**

Unlike a marriage in community of property, a marriage out of community of property enables spouses to keep their estates – consisting of both assets and liabilities – separate. While getting married is an exciting event for any couple, a lasting marriage is not certain. Divorce is emotionally draining and stressful, and financial situations change.

For these and other reasons, spouses-to-be are advised to invest in a custom-made antenuptial contract to avoid future uncertainty or conflict.

An antenuptial contract is a document that gives spouses contractual and financial independence by reflecting how they want to arrange their assets and finances during the existence of their marriage. It also constitutes a notification to third parties as to the spouses' marital regime so that third parties can adapt any dealings with them accordingly.



To that end, an antenuptial contract provides parties with the opportunity to (among other things):

- Protect and secure their individual assets (including those intended for heirs) from the other spouse's creditors;
- Protect them from becoming jointly liable for each other's debts;
- Ensure that any inheritance received by them during the marriage will remain in their individual estates; and
- Outline their rights and obligations in the event of divorce or death.

Many couples are uncomfortable contemplating the possibility that their intended marriage may be subject to financial strain or come to an end. It is, however, in the best interests of both parties to do so.

There are two variations of marriages out of community of property, namely a marriage out of community of property with accrual, and one without accrual.

### **MARRIAGES OUT OF COMMUNITY OF PROPERTY WITHOUT THE ACCRUAL SYSTEM**

A marriage which is out of community of property and excludes the accrual system is referred to as a total separation of property. In practice, each spouse retains the estate they had at the date of the marriage as well as everything they acquired during the course of the marriage. This system is most useful where the parties' financial positions differ markedly, or where one party has a high-risk lifestyle and the other spouse wants to insulate themselves from the negative consequences of that lifestyle.

The concern with this system is that it does not automatically assure a financially weaker spouse of any share in the proprietary benefits of the



marriage. Generally, spouses may resolve this by concluding separate agreements or by making provision for the sharing and control of their assets in their wills. For example, they may decide to own certain assets (like the matrimonial home) jointly.

This system is thus most suitable in cases where the spouses need greater independence, are older and enter into the marriage already having had children, or where they may have plans to bequeath parts of their estates to other people on their deaths.


It is also worth noting that it is now possible for spouses to claim for a redistribution of assets in certain circumstances during divorce proceedings.



## **MARRIAGES OUT OF COMMUNITY OF PROPERTY WITH THE ACCRUAL SYSTEM**

The complete separation of property may prove financially prejudicial to the spouse who is not the primary breadwinner, earns little income, and or has no major assets. While spouses may start out in life fairly equal in wealth, at some stage, one of them may stop working (say, to raise children), while the other continues to grow their estate by earning an income.





One spouse may thus be left financially dependent on the other, and vulnerable in the event of divorce.

For this reason, the Matrimonial Property Act 88 of 1984 provides that all marriages out of community of property entered into after 1984 are automatically subject to the accrual system, unless expressly excluded by the antenuptial contract. The accrual system requires that, upon the dissolution of a marriage out of community of property, both spouses must share equally in the growth of their respective estates.

In practice, this requires each of the prospective spouses to take an inventory of their estates as at the date of entering into the marriage. The value of this inventory is called the 'commencement value'. At the end of the marriage, each spouse (or their executor) conducts 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 is then compared with the result of the same calculation of the other spouse's estate. The lesser result is subtracted from the greater result, the difference is divided by half, and that half is then transferred from the greater estate to the lesser estate. That figure is, in fact, the accrual.

The parties may, however, elect to specifically exclude certain assets from the accrual when they sign the contract. These assets include movable and immovable property which they owned prior to entering into the marriage, or which they expect to acquire in future.

In addition, there are certain classes of assets which, by law, are automatically excluded from the accrual calculation, namely inheritances and money awarded as general damages arising from an accident or injury.

## **FORMALITIES REQUIRED TO CONCLUDE AN ANTENUPTIAL CONTRACT**

Spouses-to-be are required to comply with certain formalities when concluding an antenuptial contract:

- The antenuptial contract must be prepared by a specially qualified person designated as a notary public before the date of marriage. It must be signed in the presence of the notary public and two competent witnesses, who must also sign it.
- The notary public must affix their seal of office or embossing seal on the last page of the antenuptial contract, and the inner pages must be initialed by all parties.
- The antenuptial contract must then be registered at a South African Deeds Office within three months of the solemnisation of the marriage. This is crucial as the antenuptial contract is a public document which proves that the parties may conduct their affairs independently. Any member of the public may request and view a copy of it at the relevant Deeds Office.

## **CIVIL UNIONS**

Enacted in 2006, the Civil Union Act is a groundbreaking piece of legislation. It grants same-sex married couples the same rights, protection, and legal status as those enjoyed by heterosexual couples in civil marriages.

Civil unions are modelled parallel to other civil marriages and the legal consequences flowing from these unions are equivalent to those of heterosexual marriages. Just as heterosexual couples may elect to be married either in community of property or out of community of property (with or without accrual), the same options are available to same-sex spouses who enter into a civil union under the Civil Union Act.

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## **IS THERE SUCH A THING AS A COMMON LAW MARRIAGE?**


South African law does not recognise the concept of a 'common law marriage'. This means that no amount of time spent living with another person will convert that cohabitation relationship into a marriage. Many people are nonetheless under the mistaken belief that such 'common law marriages' are legally recognised and that legal rights and duties automatically flow from the cohabitation relationship.

Although our courts have, in specific instances, recognised that certain reciprocal duties flow from such relationships, it is not a given. Partners in such relationships are thus urged to conclude a domestic partnership agreement (as explained below), to safeguard their investment in the relationship.

## **DOMESTIC PARTNERSHIP AGREEMENTS**

Nowadays, it is common to enter into a permanent relationship with another person with the intention of living together as married persons, without ever getting married. Currently, limited legal protection is afforded to partners in such relationships. As such, if the relationship were to break down or end as a result of death, one party may face dire consequences where there was no prior agreement regarding the division of assets, or maintenance.

The only way to ensure that both parties are protected if the relationship breaks down, is for them to enter into a domestic partnership agreement. This agreement records the expectations that each partner may have with regard to their financial contribution to the joint household and assets acquired individually or jointly. Importantly, it provides life partners with the opportunity to properly iron out any concerns that may arise in the future.



This agreement is only enforceable between the parties thereto and is not binding on third parties, as in the case of civil marriages.

## **WILLS**

While on the subject of marriage, it is essential that spouses-to-be give proper attention to the subject of their wills. Unlike the antenuptial contract, a will is an important estate planning tool. It is a flexible instrument that complements the antenuptial contract in the legal preparations for the marriage.

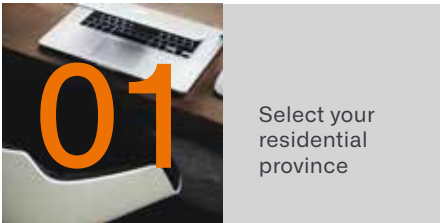
Often, prospective spouses discuss their wills at the same time as negotiating their antenuptial contract, and sign both documents in a single sitting. This is recommended as part of a good management policy for the marriage.

## **CONCLUSION**

Planning a wedding is a thrilling period for couples in love. Alongside essentials like the venue, dress, caterers, and rings, it's crucial to add another essential to your checklist: consulting with an attorney. This enables you to make one of the most significant decisions of your life accurately and confidently.

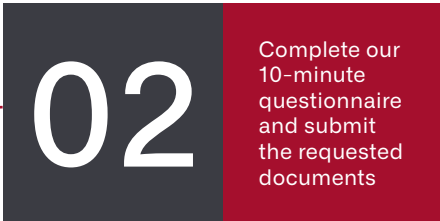
What you need to know about  
**ONLINE DIVORCE**

**4-STEP PROCESS**



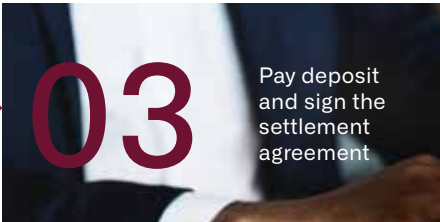
**01** Select your residential province

This block features a background image of a laptop on a desk. The number '01' is overlaid in large orange font. To the right, a grey box contains the text 'Select your residential province'. A red dashed arrow on the right side points downwards to the next step.



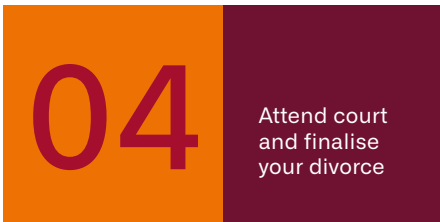
**02** Complete our 10-minute questionnaire and submit the requested documents

This block has a dark grey background on the left with the number '02' in white. The right side has a red background with white text: 'Complete our 10-minute questionnaire and submit the requested documents'. Red dashed arrows on both sides point downwards to the next step.



**03** Pay deposit and sign the settlement agreement

This block features a background image of a person's hands signing a document. The number '03' is overlaid in large dark red font. To the right, a white box contains the text 'Pay deposit and sign the settlement agreement'. Red dashed arrows on both sides point downwards to the next step.



**04** Attend court and finalise your divorce

This block has an orange background on the left with the number '04' in dark red. The right side has a dark red background with white text: 'Attend court and finalise your divorce'. A red dashed arrow on the right side points downwards.



The purpose of our innovative online divorce service is to create a convenient platform enabling you to finalise your divorce electronically, as far as possible, at a fixed and all-inclusive cost, but with the benefit of professional oversight.

The service is only available where the parties have already agreed on the terms of their divorce agreement.

Note: The STBB online divorce process and costs are subject to terms and conditions.



Scan the QR code to learn more about our online divorce platform

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