

# What should be considered when choosing a marital regime in a marriage contract?

The basic choice is between a marriage in community of property and a marriage out of community of property, whilst the latter can be with or without the accrual system.

You do not need a marriage contract for a marriage in community of property. With a marriage in community of property one joint estate is formed on the date of the marriage with both spouses' assets and liabilities falling into the joint estate, irrespective of whether they originated before the marriage or thereafter.

When the marriage in community is dissolved through death or divorce the joint estate will be divided amongst the spouses in equal shares. With a marriage out of community of property

- a. Each spouse has his or her own estate with assets and liabilities;
- b. When the marriage out of community of property without the accrual system is dissolved through death or divorce each spouse will retain his or her own estate with the basic rule being that neither estate has a claim against the other for redistribution of assets (an exception to the basic rule for example is a claim in terms of section 7 of the Divorce Act);
- c. With the marriage out of community of property with the accrual system each spouse has his or her own estate with assets and liabilities;
- d. When the marriage out of community of property with the accrual system is dissolved through death or divorce a redistribution of assets will be done according to the prescribed formula;
- e. The formula stipulates that the spouse whose accrual during the marriage was smaller is entitled to half of the difference of the accruals between the two estates;
- f. The accrual is calculated by deducting the beginning value of the estates from

the end value of the estates, for example:

	Beginning value	End value	Accrual
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Husband	R 100 000.00	R1 100 000.00	R1 000 000.00
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Wife	R 50 000.00	R550 000.00	R500 000.00
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Wife's claim in terms of accrual system = 50% (R1 000 000.00 - R500 000.00)=  
R250 000.00

g. Where a marriage is dissolved as a result of death, a claim in terms of the accrual system will first be considered before the remainder of the deceased spouse's estate will be transferred to the heirs according to the provisions of the deceased's will.

The most important "advantage" of a marriage in community of property is that all profits and losses as well as assets and liabilities are shared by the spouses.

The most important advantage of a marriage out of community of property (with or without the accrual system) is that creditors can in principle not attach the assets of one spouse for the liabilities of the other spouse and furthermore that the insolvency of one spouse does not in principle affect the estate of the other spouse.

The most important "advantage" of the accrual system is that all assets built up together by the spouses during the marriage will be shared.

Ask your lawyer to revise your will together with the drafting of the marriage contract. The most important difference between a will and a marriage contract is that the former can at any time be changed by any of the spouse by having a new will drafted and signed, whilst the latter can only be changed with the consent of both spouses and through a Court application.