Marital property regimes in terms of South African law

Introduction:

In South Africa, two main marital property regimes exist, namely:

1. The marriage in community of property and of profit and loss and,
2. The marriage out of community of property, where two options exist, namely:

   2.1 out of community of property with the application of the accrual system and,
   2.2 out of community of property without the application of the accrual system.

In South Africa the automatic matrimonial property regime is the marriage in community of property and of profit and loss, unless such is excluded by means of entering into an antenuptial contract, prior to the marriage being solemnised.

The various matrimonial property regimes:

1. A marriage in community of property and of profit and loss has the following legal consequences:

   1. all property at date of marriage as well as all property acquired after date of marriage (including gifts, donations, inheritances and remuneration) fall into a communal joint estate,
   2. each spouse owns a fifty percent undivided share in the communal joint estate,
   3. both spouses must consent (in writing) to transactions involving the:

      ● disposal of assets of the communal joint estate,
● contracting of debts by the communal joint estate,
● performance of juristic acts,
● litigation against a third party.

4. liquidation of the communal joint estate effectively means that both spouses are declared insolvent,
5. upon death of either spouse the communal joint estate is administered leaving the other spouse unable to access the funds held in the communal joint estate. The administration process can take anything between 12 and 36 months to complete.

2. **A marriage out of community of property:**

All marriages out of community of property automatically include the application of the accrual system, unless expressly excluded in an antenuptial contract.

2.1. A marriage out of community of property **without** the application of the accrual system has the following legal consequences:

1. all assets and liabilities of the spouses are generally kept separate from one another (“what is mine is mine and what is yours is yours”),
2. spouses do not require each other’s consent when entering into certain transactions, as is the case in the marriage in community of property and of profit and loss,
3. the estate of the other spouse is protected from insolvency,
4. upon death of either spouse the deceased spouse’s estate is administered, without affecting the surviving spouse’s estate.

**Therefore this system is ideally suited to:**

1. couples who have built up substantial estates in their own right (or own their own businesses) and,
2. cases where either of the spouses do not contribute to the future growth of the other spouse’s income.
2.2 A marriage out of community of property with the application of the accrual system:

The marriage out of community of property with the application of the accrual system is the sweet union of the advantages of the marriage in community of property and out of community of property but, without the disadvantages thereof.

This regime basically operates as follows:

when the marriage dissolves (death or divorce), the spouse’s estate which shows no growth or lesser growth acquires a claim against the other spouse for half of the difference between what has accrued to the two estates.

A marriage out of community of property with the application of the accrual system has the following legal consequences:

1. all assets and liabilities of the spouses are generally kept separate from one another and only the accrual is shared,
2. spouses do not require each other’s consent when entering into certain transactions, as is the case in the marriage in community of property and of profit and loss,
3. the estate of the other spouse is protected from insolvency,
4. upon death of either spouse the deceased spouse’s estate is administered, without affecting the surviving spouse’s estate.

Therefore this system is ideally suited to:

1. couples who intend to have children,
2. situations where one of the spouses are be dependant on the income of the other (either periodically or permanently),
3. maintaining financial equality between spouses, as many of the contributions to a marriage are immeasurable in monetary terms.