



**Limiting the effect  
of a marital regime  
– the law of  
intended or  
unintended  
consequences**



# Matrimonial property regimes

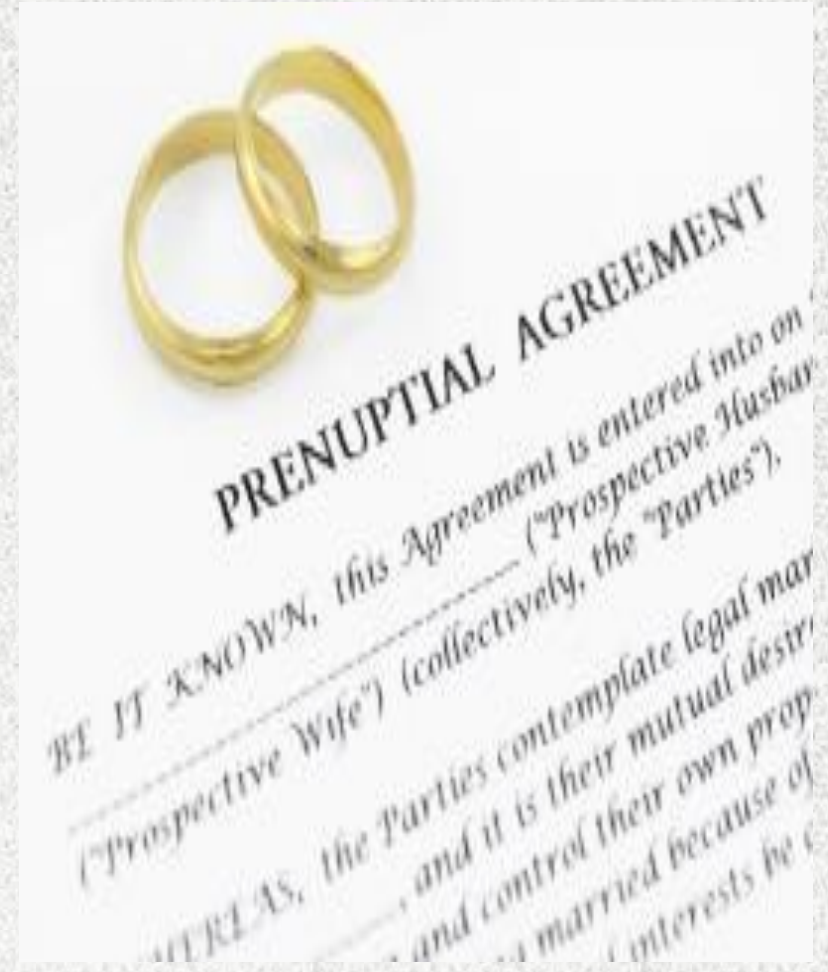
- In community of property
- Out of community of property (with accrual) – the default
  - every marriage out of community of property entered into after the commencement of the MPA is subject to the accrual unless expressly excluded
- Out of community of property excluding accrual
- Out of community of property without accrual – pre-1984
- Foreign marriages – the Pandora's Box





# The purpose of a pre-nuptial contract

- Invariable consequences of a marriage
  - Maintenance
  - ST v CT 2018
- Variable consequences of a marriage
  - the proprietary consequences of the marriage
  - determined by a set of rules governing the regime





# Are Post-nuptial agreements possible – the principle of immutability



- The rule: the matrimonial property system is immutable during the marriage
- Founded in the common law
  - Honey v Honey 1992 (3) SA 609 W
- The exceptions:
  - The 1988 window
  - S8(1) MPA
  - Rectification
  - S21(1) MPA
- Regulates only variable consequences of a marriage
- Private international law – lex domicilii



# The accrual system

- The essence: at the dissolution of a marriage the spouse whose estate shows no accrual or a smaller accrual acquires a claim against the other spouse for an amount equal to half the difference between the accrual of the respective estates of the spouses
- A claim to the accrual arises at dissolution of the marriage and is not transferable or liable to attachment
- The claim to the accrual is a contingent right, not a vested right – *Reeder v Softline*





# Section 4 of the MPA - variations



- The accrual is the amount by which the net value of a spouse's estate at dissolution exceeds the value at commencement of the marriage
- Less:
  - Non-patrimonial damages
  - **Excluded assets and their fruits**
  - The change in value of money
- Accrual precedes testamentary dispositions
- He who alleges the exclusion must prove it - ST v CT 2018 (citing AM v JM with approval)

# Section 5 of the MPA- more exclusions

- Inheritances, legacies and donations and their fruits
- Inter spousal donations not taken into account for either the donor or donee





# The rationale for the accrual system

- **South African Law Reform Commission request for comments on Issue Paper 34 on Project 100E – the Review of Aspects of the Matrimonial Property Act**
- **accrual means that parties to a marriage share equally in the growth shown by both estates between the date of the marriage and its termination**
- **Should exclusion of accrual be allowed/**
- **New definition of “property”: trust assets?**





# The trends in the Law Reports

- JA v DA 2014 – deliberate disposition
- BF v RF 2019 – accrual is accrual
- ST v CT 2018 – sui generis contracts and relationships
- LM v CM 2020
  - marriage is a collaboration
  - Accrual is accrual
  - Trusts are not always trusts





# In conclusion

- Accrual has a premise and a purpose worthy of protection;
- The relationship between spouses is collaborative and peculiar;
- Accrual really means accrual;
- Beware the intended or unintended consequences of undermining the accrual

