



Strategic Homeowner's Briefing: Navigating the New Landscape of South African Matrimonial Property Law

Deconstructing the "Unjust & Inequitable" Clause: The End of Contractual Certainty

A foundational shift is underway in South African matrimonial property law, moving the system from one of contractual certainty to one of judicial discretion. This change, driven by a landmark Constitutional Court judgment, fundamentally alters the risk profile of marriage for asset-owning individuals, particularly homeowners. The era where an Antenuptial Contract (ANC) excluding the accrual system provided an unassailable shield for separate estates has ended.

The Constitutional Mandate: Analysis of *EB v ER* and *KG v Minister of Home Affairs*

In October 2023, the Constitutional Court delivered a judgment in the consolidated cases of *EB v ER and Others* and *KG v Minister of Home Affairs and Others* that declared key aspects of Section 7(3) of the Divorce Act 70 of 1979 to be unconstitutional. The Court's reasoning was anchored in two principal findings.

First, it found that the provision allowing for asset redistribution only in marriages out of community of property without accrual entered into before 1 November 1984 constituted unfair discrimination. The court noted that this cut-off date indirectly discriminated on the basis of gender, as it disproportionately prejudiced women, who, for societal and historical reasons, were more likely to be homemakers or non-earning spouses without the means to accumulate their own estates. This differentiation was deemed irrational and a violation of the right to equality enshrined in Section 9 of the Constitution.

Second, the Court found the exclusion of marriages dissolved by death from this redistribution remedy to be equally unconstitutional. It reasoned that this exclusion served no legitimate government purpose and unfairly prejudiced surviving spouses who had contributed to the growth of the deceased's estate but were left with no claim.

The practical effect of this ruling is profound: the judiciary's discretionary power to redistribute assets is now extended to *all* marriages out of community of property without accrual, irrespective of when the marriage was concluded or whether it is terminated by divorce or death. The core argument for maintaining the old system—that spouses married after 1984 had the

choice to include the accrual system and willingly contracted out of it—was explicitly considered and rejected by the Court. The judgment stated that valuing spousal choice could

not, on its own, render gender-based discrimination fair. This signals a monumental shift in legal philosophy. The constitutional imperative for a just and equitable outcome now supersedes the principle of freedom of contract in this matrimonial context. An ANC without accrual is no longer a sacrosanct agreement but a preference that can be judicially overridden to achieve fairness.

The Legislative Response: The General Laws (Family Matters) Amendment Bill, 2025

In response to the Court's directive, the government is set to table the General Laws (Family Matters) Amendment Bill, which will codify the judgment into statute. This Bill will amend three pivotal pieces of legislation: the Divorce Act of 1979, the Matrimonial Property Act of 1984, and the Mediation in Certain Divorce Matters Act of 1987. The central reform is the explicit empowerment of courts to order a transfer of assets from one spouse to another in marriages out of community of property without accrual, if such a transfer is deemed "just and equitable". This power will apply universally, overriding the strict separation of estates that was once the hallmark of this marital regime.

Defining "Contribution": The Judicial Calculus for Redistribution

The determination of a "just and equitable" redistribution hinges on a claimant spouse demonstrating that they contributed, either directly or indirectly, to the maintenance or increase of the other spouse's estate. The law now explicitly recognizes and values non-financial contributions, which was a key driver of the court's decision. These indirect contributions include:

- Managing the household and performing homemaking duties.
- Raising children, often at the expense of one's own career advancement.
- Saving the household expenses that would otherwise have been incurred, thereby freeing up the other spouse's capital for investment and growth.
- Providing informal support, advice, or services to a spouse's business or career.

When considering a redistribution order, the court will weigh several factors, including the duration of the marriage, the explicit and implicit arrangements between the couple, and the tangible extent of the applicant's contribution. It is critical to note that this is not a default 50/50 split. The award is entirely discretionary and could, for example, result in a transfer of 30% of an estate, 50% of specific assets, or another quantum the court deems fair under the circumstances.

The Practical Impact on Homeowners and the New Litigation Landscape

For homeowners and individuals with significant assets, the primary consequence of this legal evolution is the injection of profound uncertainty into what was previously the most certain and predictable marital regime. An ANC without accrual can no longer be relied upon for absolute protection of assets like a primary residence, investment properties, or business interests.

This change has created a potent new cause of action in divorce proceedings. Anticipating the enactment of the Bill, legal practitioners are already including claims for redistribution in divorce summonses, acting on the strength and immediacy of the Constitutional Court's ruling. The shift from a clear, contractual rule to a subjective "just and equitable" standard fundamentally alters divorce litigation strategy. It incentivizes the financially weaker spouse to litigate, as a potential claim now exists where there was none before. This, in turn, forces the financially stronger spouse into a defensive posture, requiring them to justify the fairness of an agreement they both signed, possibly decades earlier. The uncertainty and potential cost of a court battle create significant leverage for the claimant spouse, likely leading to higher settlement offers to avoid litigation.

Furthermore, because the claim now survives death, it creates a direct conflict with the principle of freedom of testation. A will leaving an entire estate to children or other heirs could be challenged by a surviving spouse. This forces a paradigm shift in estate planning, which must now include a "matrimonial claim risk assessment." An estate planner can no longer simply execute the testator's wishes; they must analyze the deceased's marital history to anticipate and potentially mitigate a post-mortem claim for redistribution against the estate.

Regime	Default Asset Treatment	Impact of New Judicial Discretion	Key Risk/Benefit
In Community of Property	Joint Estate (50/50 split of assets and liabilities).	N/A (already a fully shared regime).	Risk: Joint liability for spouse's debt. Benefit: Simplicity, automatic fairness.
Out of Community of Property (With Accrual)	Separate estates, but growth during the marriage is shared based on a contractual formula.	Minimal. The accrual formula provides a contractual baseline for fairness, reducing the scope for judicial intervention.	Risk: Can involve complex calculations at dissolution. Benefit: Protects initial assets, provides predictable sharing of growth.
Out of Community of Property (Without Accrual)	Completely separate estates; no sharing of assets or growth upon dissolution.	High. The entire regime is now subject to a judicial override based on a subjective "just and equitable" assessment of contributions.	Risk: High legal uncertainty, potential for costly litigation, court can override the contract. Benefit: (Diminished) Protects initial assets only if no redistribution is awarded.

The Proactive Solution: The Modernized Antenuptial Contract (ANC)

In this new legal environment, proactive and strategic planning through a modernized Antenuptial Contract is paramount. The traditional, boilerplate ANC is no longer sufficient. A new approach to drafting is required to mitigate risk and establish the clear, fair intentions of the parties from the outset.

The ANC Post-2023: Assessing the Diminished Protection of the "Without Accrual" Regime

The standard ANC that merely excludes community of property, profit and loss, and the accrual system no longer provides a reliable shield against claims. The court's newfound discretionary power means that even with such a contract in place, a redistribution of assets can be ordered if deemed just. Consequently, the ANC should now be viewed not as an unbreakable contract, but as a foundational document that establishes the parties' intentions. Its defensibility will depend heavily on whether the conduct of the spouses throughout the marriage aligns with the fairness and principles outlined in the contract.

Drafting a Resilient ANC: Essential Clauses for the New Legal Era

To build a more robust and defensible ANC, several modern clauses should be incorporated. While no clause can completely prevent a court from exercising its discretion, these provisions can provide powerful evidence of the parties' informed consent and the inherent fairness of their agreement.

- **Detailed Commencement Value Declaration:** While standard for accrual contracts, it is now critical for all ANCs to include a meticulously detailed and valued schedule of each spouse's assets and liabilities at the start of the marriage. This creates an unambiguous financial baseline against which any future growth and contributions can be measured.
- **Express Exclusion of Specific Assets:** Rather than a blanket exclusion, the ANC should itemize specific assets to be excluded from any potential future claim. This should include, for example, shares in a family business, inherited properties, or specific investment portfolios. Providing a rationale for their exclusion (e.g., "assets acquired through inheritance from the party's family") strengthens the clause.
- **Waiver of Maintenance Clause:** A clause where both parties explicitly waive the right to claim spousal maintenance from each other upon divorce can establish a clear initial intent regarding post-marital financial independence. An example clause reads: *"Neither party is under obligation to maintain, support or to make any form of financial provision to or for the benefit of the other party at anytime of separation or divorce. This does not include maintenance payments for any children that will be decided by the court"*.
- **Pension Interest Waiver:** Pension and retirement funds are often a person's most significant assets and must be addressed directly. An example clause is: *"Each party*

agrees that an individual pension will not be split at the time of divorce or any time in the future and agree to waive any right a party may have over the other's pension".

- **"Fairness" Acknowledgment Clause:** This is a novel but crucial addition. In this clause, both parties formally acknowledge that they have received separate and independent legal advice, that they fully understand the consequences of the agreement, and that they consider its terms to be fair and equitable at the time of signing. It should also state that they understand how the agreement might impact the recognition of future non-financial contributions. This clause directly preempts a future argument based on ignorance, coercion, or inherent unfairness.

A Strategic Re-evaluation of the Accrual System

Given the new uncertainty surrounding the "without accrual" regime, the accrual system now emerges as a more predictable and strategically sound alternative. This system protects each spouse's pre-marital assets (their "commencement value") while contractually providing for the sharing of wealth generated during the marriage. By operating on a clear, pre-agreed mathematical formula—typically a claim for half the difference between the respective accruals—it minimizes the scope for subjective judicial intervention. A court is far less likely to find an agreement that already provides for a fair sharing of marital growth to be "unjust and inequitable" than one that provides for zero sharing. This transforms the accrual system from simply the "sharing option" into the "predictability and certainty option," making it a more attractive safe harbour for strategic financial and legal planning.

The High Bar for Post-Marital Amendments

The difficulty, expense, and uncertainty of amending an ANC after marriage underscore the critical importance of meticulous initial drafting. An ANC cannot be changed by a simple subsequent agreement between the spouses. 1 Any modification requires a joint application to the High Court, a process that is both costly and time-consuming. 2 The applicants must provide "sound reasons" for the change, give sufficient notice to all creditors, and satisfy the court that no third party will be prejudiced by the amendment. 3 While minor factual errors, such as an incorrect ID number or property description, can be rectified through a simpler application to the Registrar of Deeds, the fundamental terms and principles of the contract cannot be altered in this way. 1 This legal inflexibility makes the initial consultation and drafting phase absolutely critical.

Clause Category	Action Item	Strategic Purpose
Commencement Values	Have you accurately valued and listed all assets and liabilities at the start?	Creates an unambiguous financial baseline to measure growth and contributions.
Asset Exclusions	Have you specifically listed assets (e.g., business shares, inheritance) to be excluded from any future claim?	Reduces ambiguity and strengthens the argument against their inclusion in a redistribution claim.

Maintenance	Have you included a clear waiver for spousal maintenance?	Establishes clear intent regarding post-divorce financial independence.
Pension Interests	Have you explicitly waived rights to each other's pension/retirement funds?	Protects critical retirement savings from division.
Estate Rights	Have you included a waiver of rights to claim against each other's deceased estates (subject to the will)?	Aligns the ANC with estate planning intentions and mitigates post-mortem claims.
"Fairness" Acknowledgment	Have both parties signed an acknowledgment of independent legal advice and the perceived fairness of the contract at inception?	Preemptively counters future claims of ignorance, coercion, or unfairness.

Export to Sheets

The Asset Protection Deep Dive: Trusts & Companies

Beyond the ANC, high-net-worth individuals often turn to legal structures like trusts and companies for enhanced asset protection. However, in the new legal environment, the resilience of these structures depends entirely on their proper establishment and, more importantly, their immaculate administration.

Trusts as a Primary Shield: Legal Framework and Strategic Rationale

An *inter vivos* (living) trust is a legal arrangement where a founder transfers ownership of assets to trustees, who administer them for the benefit of named beneficiaries. The foundational principle for asset protection is that property held in trust is legally separate and does not form part of a trustee's personal estate. This separation is intended to shield the assets from the personal creditors of the trustees and, in the context of a divorce, from matrimonial property claims. The use of trusts to house assets accumulated during a marriage, thereby reducing the apparent growth of a personal estate and defeating a potential accrual claim, is a well-known strategy that courts now scrutinize with increasing rigour.

The Doctrine of "Piercing the Veil": The "Alter Ego" and "Sham" Trust Doctrines

Despite the principle of legal separation, courts are empowered to "pierce the trust veil" and disregard the structure if it is proven to be a "sham" or the "alter ego" of a spouse.

- A **"sham" trust** is one where there was no genuine intention to create a trust from the outset. The founder and trustees merely go through the motions, intending to create a façade to deceive third parties.
- An **"alter ego" trust** is a more common vulnerability. Here, a trust may have been validly established, but it is subsequently administered in a way that demonstrates it is merely an extension of the founder. The key legal test is *de facto control*. The court will investigate whether the trustee-spouse controlled the trust assets as if they were their own, making unilateral decisions and disregarding the terms of the trust deed and the interests of the beneficiaries. The landmark case of
- *Badenhorst v Badenhorst* confirmed that if a trust is found to be an alter ego, its assets can be included in that spouse's estate for the purposes of a redistribution order.

Architecting a "Divorce-Resistant" Trust: Key Structural and Administrative Imperatives

Structuring and managing a trust to withstand judicial scrutiny requires an unwavering commitment to legal formalities and genuine separation. The following imperatives are non-negotiable:

- **Genuinely Relinquish Control:** The founder must cede true control of the assets to the trustees. If the founder continues to deal with the assets as their own—for example, by living in a trust-owned property without paying rent or using trust funds for personal expenses—the trust's integrity is compromised.
- **Appoint an Independent Trustee:** This is the single most critical element in demonstrating a trust's legitimacy. An independent professional, such as an attorney or accountant, who actively participates in all trust decisions provides powerful evidence that the trust is not a mere puppet of the founder. The absence of an independent voice allows a court to infer that the other trustees are simply following the founder's instructions.
- **Meticulous Administration:** The trust must be administered with scrupulous adherence to its deed and the law. This includes holding regular trustee meetings, keeping detailed minutes of all discussions and decisions, passing formal resolutions for every transaction, maintaining a separate bank account for the trust, and ensuring all actions demonstrably benefit the beneficiaries.
- **Clarify Beneficiary Status:** The legal standing of the non-founder spouse is a key factor. If that spouse is not a named beneficiary of the trust, their legal right to demand information or challenge the trust's administration is significantly weaker, as established in the Supreme Court of Appeal case of *WT and Others v KT*.

A fundamental conflict exists for many who establish trusts: the desire to protect assets is often coupled with a desire to retain influence over them. However, the legal tests for a robust, "divorce-resistant" trust demand the founder to *genuinely relinquish control* and submit to the independent discretion of the trustees. The more control the founder attempts to retain, the weaker the trust becomes as an asset protection vehicle. Therefore, the only

truly effective strategy is to accept this loss of control, appoint a genuinely independent professional trustee, and rely on a well-drafted trust deed to ensure the founder's long-term intentions are met.

Tax and Cost Implications of Asset Transfers

Transferring a property into a trust is a formal disposal with significant financial consequences that must be carefully weighed against the potential asset protection benefits.

- **Transfer Duty:** This is payable to the South African Revenue Service (SARS) based on the property's market value at the time of transfer.
- **Donations Tax:** If the property is donated to the trust or sold for less than its market value, Donations Tax is levied at 20% on the value exceeding the R100,000 annual exemption (rising to 25% for donations over R30 million).
- **Capital Gains Tax (CGT):** The transfer is a CGT event for the individual transferring the asset. Critically, the long-term tax implications are severe. The effective CGT rate for trusts upon the future sale of the property is 36%, double the maximum effective rate of 18% for an individual. This is a significant financial trade-off for the protection offered.
- **Administrative Costs:** Trusts involve initial setup costs and require ongoing professional fees for administration, accounting, and tax compliance.

Factor	Low Risk (High Integrity)	High Risk (Vulnerable to "Alter Ego" Claim)
Trustee Composition	At least one fully independent professional trustee is appointed and actively involved in all decisions.	All trustees are family members, close associates, or the founder themselves.
Decision Making	All decisions are made in formal, minuted meetings with joint resolutions passed by all trustees.	The founder makes unilateral decisions and simply instructs other trustees to sign documents.
Financial Separation	The trust has its own bank account, and no personal expenses of the founder are paid from it. All transactions are at arm's length.	Personal and trust funds are co-mingled. The trust is used as a personal bank account for the founder.
Adherence to Deed	Trustees act strictly within the powers and limitations defined in the trust deed.	The terms of the trust deed are ignored or loosely followed to suit the founder's immediate needs.
Beneficiary Benefit	All transactions, investments, and distributions demonstrably benefit the named beneficiaries as per the trust's objectives.	Transactions primarily benefit the founder, who is often not a beneficiary, to the detriment of the actual beneficiaries.

The Financial Planning Perspective

The new legal landscape demands that matrimonial property arrangements be viewed not as isolated legal documents, but as a core component of a holistic, lifelong financial plan. This requires integrated thinking, transparent communication, and collaborative professional advice.

Integrated Marital Financial Strategy: Aligning Legal Structures with Financial Goals

The choice of a marital regime and the use of asset protection structures like trusts must be made in the context of a couple's shared financial goals. This necessitates open and honest conversations before marriage about individual financial histories, attitudes towards money, and long-term objectives for wealth creation, property ownership, and retirement. A practical approach often involves a hybrid banking system: a joint account for shared household expenses, funded proportionally to income, and separate individual accounts to maintain financial autonomy and freedom.

Actionable Strategies for the Financially Vulnerable Spouse

While the new law provides a legal remedy at dissolution, the primary goal for any spouse, particularly one who anticipates making non-financial contributions, should be to build financial independence during the marriage. Proactive strategies include:

- **Building a Personal Estate:** Even if not earning a formal salary, a spouse should actively build assets in their own name. This can be achieved by systematically investing a portion of a household allowance into personal savings vehicles like a tax-free savings account (TFSA) or unit trusts.
- **Documenting Contributions:** It is essential to keep a detailed, contemporaneous record of non-financial contributions. This can be a journal or log detailing career opportunities foregone, specific support provided to the spouse's business (e.g., administrative work, networking), or the management of significant household projects like a major renovation. This documentation, which may seem unnecessary in a healthy marriage, can become invaluable evidence in a future redistribution claim.
- **Ensuring Personal Coverage:** A spouse must ensure they are a named beneficiary on all relevant life and disability insurance policies and have independent, adequate medical aid coverage to protect against unforeseen events.

Estate Planning in the New Paradigm: Aligning Wills, ANCs, and Trust Deeds

The extension of redistribution claims to dissolution by death introduces a significant new complication for estate planning. A will can no longer be drafted in a vacuum. It must now anticipate a potential Section 7(3) claim against the deceased estate by the surviving spouse. A will that leaves the bulk of an estate to children, effectively disinheriting a spouse

who made substantial non-financial contributions over a long marriage, is now highly vulnerable to a legal challenge.

This new reality forces what can be termed a "post-mortem matrimonial audit." Upon the death of a spouse, if the surviving spouse launches a claim against the estate, the executor may be forced into a defensive legal position. This could require a forensic reconstruction of the entire marriage, attempting to quantify the financial and non-financial contributions of both parties over decades to either defend the will's provisions or negotiate a settlement. This fundamentally alters the executor's role and makes estate planning for couples married without accrual infinitely more complex. It necessitates a holistic review to ensure the ANC, will, and any trust deeds are aligned and do not create contradictions that could fuel litigation against the estate.

The Non-Negotiable Role of Collaborative Professional Advice

The complexity of navigating these interconnected legal and financial issues makes it imperative for couples, especially those with significant assets, to seek integrated advice from both a specialist family law attorney and a Certified Financial Planner (CFP®). The attorney is responsible for structuring the legal agreements—the ANC, trust deed, and will—to accurately reflect the couple's intentions and mitigate legal risk. The CFP® is responsible for modeling the long-term financial implications of these legal structures, ensuring they align with the couple's goals for wealth creation, retirement planning, and tax efficiency. These roles are distinct but complementary. Proceeding with only one stream of professional advice creates a critical gap, leaving the couple exposed to either legal risks or suboptimal financial outcomes.

Reasoning Log

1. The analysis was initiated by identifying the core legal shift from contractual certainty to judicial discretion, as mandated by the Constitutional Court.
2. This foundational change was then used as the lens through which all proactive and defensive strategies were evaluated, ensuring a coherent analytical framework.
3. The report systematically deconstructs the problem (the new law), presents a contractual solution (the modernized ANC), explores an advanced structural solution (the robust trust), and integrates these into a holistic financial planning strategy.
4. Actionable tools—the comparative table, clause checklist, and trust scorecard—were developed to translate complex legal principles into practical guidance for the homeowner.
5. The final analysis connects the legal changes to their second- and third-order consequences, particularly in the realm of litigation strategy and the unprecedented challenges now facing estate planning.

Important: This resource is for information only and does not replace professional legal advice. Always consult a qualified attorney for your personal circumstances.