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GUIDE TO

DIVORCE

IN SOUTH AFRICA

This guide explains in simple terms the process of divorce in South Africa and the provisions that must be made for any children of the marriage.



Attorneys • Notaries • Conveyancers

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Introduction

Simon Dippenaar & Associates is a general practice of attorneys offering a one-stop, comprehensive range of key, up-to-date legal services. We have particular expertise in family law and divorce. With our reputation for high EQ, win-win solutions, you can be assured of expert, highly personalised attention, discretion and total commitment.

Founder Simon Dippenaar has a BBusSc LLB degree and Professional Diploma in Legal Practice from the University of Cape Town, and is an admitted attorney of the High Court of South Africa, with offices in Cape Town, Johannesburg and Durban, representing South African and international clients.

Simon's dedication, diplomacy and compassionate approach make him the attorney of choice for many clients facing the trauma of divorce.

This guide explains in simple terms the process of divorce in South Africa and the provisions that must be made for any children of the marriage.

Types of divorce and associated timelines

There are three types of divorce in South Africa: contested, uncontested and mediated.

Uncontested divorce

This is the quickest and least expensive option and minimises emotional stress to family members. In an uncontested divorce the spouses work together to agree divorce terms. This includes maintenance, division of assets, child care and contact, and other important decisions.

An impartial attorney can be consulted and appointed by both spouses to take care of their interests and draft the official settlement agreement, which is signed by both spouses and then made an order of the court. Uncontested divorce proceedings may be finalised in a matter of weeks.

Mediated divorce

Mediated divorces cost more and take longer. In this type of divorce couples who are unable to agree a divorce settlement employ the services of an attorney and /or professional mediator to help them negotiate and reach agreement.

Mediators are impartial trained professionals skilled in helping couples set aside their short-term differences and focus on reaching a reasonable settlement that will allow them to move on and build a new future. In most cases mediators are appointed by the attorney who provides legal advice during mediation.

Once the mediator helps the spouses reach agreement, their attorney or attorneys can draft the official settlement agreement, which is signed by both spouses and then made an order of the court. Mediation can dramatically reduce the cost of contested divorce proceedings and mediated divorces are often finalised in three months.

Contested divorce

Contested divorces occur when spouses cannot agree the terms and conditions of their divorce. The most common disagreements relate to maintenance, division of assets and child care. In some cases one or both spouses refuse to settle for emotional reasons.

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In a contested divorce both spouses appear in court repeatedly, and the court decides the terms of the divorce. This can result in very high legal costs and emotional distress, and can drag on for three years (or even longer) before resolution. Contested divorces can cause great emotional and financial harm to all family members and are to be avoided if at all possible.

Grounds for divorce

In South Africa there are only three grounds for divorce, two of which are very rare.

Irretrievable breakdown of the marriage

This is where the relationship has deteriorated to the point where it cannot be restored. The Divorce Act 70 of 1979 cites certain circumstances that can be classed as causing irreversible damage to a marriage:

- Separation for a continued period of at least one year
- Adultery, where the “wronged” spouse believes there is no likelihood of reconciliation (note that adultery in itself is not grounds for a divorce but is a symptom of irretrievable breakdown)
- The defendant has committed multiple crimes and/or is serving time in jail

Mental illness

The court must hear evidence that the defendant has been admitted to and is being detained in an institution or is being held as a convicted mentally ill prisoner in a correctional services facility.

Two psychiatrists (one appointed by the court) must give evidence of the mental capacity of the defendant and any prospects for recovery.

Continuous unconsciousness

If one spouse is a state of continuous unconsciousness, a court will consider granting a divorce if the unconsciousness has lasted for an uninterrupted period of least six months and evidence is presented by two medical practitioners, one of whom is a neurologist or neurosurgeon appointed by the court.

The role of the marital regime in divorce proceedings

By the time a couple is considering divorce, the marital regime is already in place. It can't be changed at this stage, but it's worth reviewing the main marital property regimes and their role in the divorce process. There are two main marital regimes, and two options for one of them, resulting in three effective property regimes. They are:

- Marriage In Community of Property
- Marriage Out of Community of Property:
 - Marriage Out of Community of Property Without Accrual
 - Marriage Out of Community of Property With Accrual

The default option: in community of property

If there is no antenuptial contract (“prenup”) the marriage is automatically in community of property. Historically this was the most common type of marriage. All assets of both parties are joined into what is called a “common estate”, which is owned equally by both spouses. Everything earned, bought, inherited or acquired in any way during the marriage becomes part of the common or joint estate. Money in either spouse's bank account, even if it is not a joint account, legally belongs to the joint estate. If one party enters the marriage with significantly more assets than the other, they immediately forfeit ownership of half of everything to the other.

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Furthermore, any debts incurred by either party bind the joint estate. This can be a serious problem in the case of insolvency because no assets are protected and both parties will be deemed insolvent.

When the marriage ends, whether by death or divorce, the entire estate, including debt, is equally divided.

Out of community of property without accrual

In-community-of-property marriages were the norm in the days when few women worked outside the home. The regime was a way of protecting women from financial ruin in the event of the marriage ending. As modern couples enter marriage with independent resources and mutual earning capacities, they are increasingly likely to draw up an antenuptial contract prior to the wedding, to protect their individual assets. Marriage in community of property *without accrual* is like getting married but staying single as far as finances are concerned. Each partner's estate remains exclusively theirs before, during and after the marriage.

Everything earned, bought, inherited or acquired in any way by either spouse during the marriage remains exclusively theirs and does not affect the spouse. Money in either spouse's bank account belongs exclusively to them.

Debts incurred by either party are exclusively theirs. Insolvency of one partner does not affect the assets or legal status of the other.

If one party enters the marriage with significantly more assets than the other, those assets remain theirs during and after the marriage. Any significant increases in wealth or debt by one party during the marriage are not shared by the other party in case of death or divorce.

The end of a marriage under this regime is financially much faster and simpler than under the other regimes.

Marriage out of community of property with accrual

Marriage out of community of property *with accrual* is similar to one without accrual, but any increases or decreases in each partner's estate are shared.

In this marital regime, each partner's estate is valued at the time of marriage, and again when the marriage ends. This can be complicated and cause delays, but is often chosen as the fairest solution by partners who have assets before getting married they want to protect, but want to share any value added during the marriage.

Pension interest and the clean break principle

It's also worth mentioning pension interest at this point, as pensions often cause the most friction and delay in the divorce process. "Pension interest" refers to the pension fund benefit at time of divorce and the entitlement of the non-member to a portion of that fund, in situations where one spouse is a member of an occupational or personal pension scheme and the other is not, or where both spouses are members of their own schemes but there is a significant discrepancy in value. The court granting the divorce decree can order that "any part of the pension interest of that member which...is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member."

This means the award to the non-member spouse of any part of the member spouse's "interest" is calculated as at the date of the divorce, but is paid in the future when the pension benefit accrues to the member spouse. In this way the fund continues to grow for the benefit of both parties on retirement.

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However, the non-member spouse has the right to take the pension interest allocation as a lump sum in cash or reinvested into another retirement fund at the date of divorce.

The clean-break principle, which was introduced to occupational schemes in 2007 and extended to private sector retirement funds in 2008, describes the right or entitlement of the non-member spouse who is married in community of property to receive immediate payment or transfer of the portion of the other spouse's pension interest allocated to them upon divorce. Certain public pension funds are not regulated by the PFA and the clean-break principle does not automatically apply.

You are advised to discuss your pension arrangements and entitlements with your divorce attorney as each circumstance is different.

Spousal maintenance

In South African law, no maintenance will be awarded to an individual who has the ability to support themselves. In certain circumstances a court may order rehabilitative maintenance, taking into consideration the divorcing couple's current and potential future financial means, earning capacities, financial needs and obligations, the length of the marriage, and other factors. Rehabilitative maintenance is usually awarded if the court feels that the marriage has had a negative effect on the ability of one person to support themselves, usually the wife, if she has stayed at home to look after children. In this situation, the court will evaluate the length of time it will take for the relevant spouse to gain the skills to re-enter the job market.

Children

In a marriage parents share custody. When they divorce, custody (now called "care") is normally granted to a single parent, with reasonable access (now called "contact") awarded to the other parent. They may agree instead on joint (shared) custody.

Types of custody

Custody can be a minefield, and is a common source of delay and discord in negotiating the divorce agreement. The days of custody automatically being granted to the mother, with visitation rights to the father, are gone, as society has modernised and fathers are more involved in their children's upbringing. Parents must work out a settlement that suits all parties, most importantly the child or children. The Children's Act is very clear that the interests of the child must be the overarching consideration in any care and contact arrangement.

- **Legal custody** is the right to make decisions about your child's upbringing, for example, their schooling, religious practices and health concerns. Generally both parents have legal custody, unless there is a reason not to grant this (history of physical abuse or substance abuse, etc.)
- **Physical custody** refers to the child's living arrangements:
 - In **sole custody** they live with one parent most of the time while the other parent has contact rights.
 - **Joint custody** means that the child's residential time is divided equally between both parents. An example arrangement would be 2-3-2, i.e. two days in one home, three in the other, then two in the first location. This can work; the children are equally at home in each residence. But it generally only works if the parents live close to each other and the children's school. The time division can also be one week in each home, but a week is a long time to go without seeing a parent (or one's child). In

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practice it is usually much more manageable to have a primary residence and regular contact with the non-custodial parent.

Guardianship

Custody is not the same as guardianship. South African courts normally grant guardianship to both parents as part of the divorce settlement. Guardianship is an adult's right and responsibility to:

- Manage a child's interests
- Manage any assets or financial aspects of the child's life
- Assist the child in legal or contractual situations
- Give consent to the child's medical treatment, marriage or adoption
- Give consent for the child to travel out of South Africa

In certain very specific circumstances, the court may grant sole guardianship to one parent or to someone who is not the biological parent.

Parenting plan

In a contested divorce or where parents cannot agree on the care arrangements for children, the court may require a parenting plan. But it's a good idea even when the divorce is amicable. The parenting plan defines the roles and powers of each parent. These may be equal (co- or shared parenting) or one parent may have a greater share of the care responsibility. In an emergency, it's important that the parent on the scene be able to act swiftly and decisively in the best interests of the child. A parenting plan spells out these powers.

A parenting time schedule is the basis for the plan. Other important details include a specific holiday schedule with dates and times. The plan needs to indicate the circumstances when the Christmas plan (for example) can be altered, and when it can't be. Parenting plans are designed to be reviewed and revised. It's a good idea to incorporate a review date or interval in the parenting plan itself.

Family Advocate

The Family Advocate is a state official who assists divorcing parties to reach an agreement on disputed issues, namely custody, access and guardianship. If they are unable to reach an agreement, the Family Advocate reviews the circumstances in terms of the best interests of the child and makes a recommendation to the court with regard to custody, access or guardianship.

Maintenance

Under South African law, children have the right to receive financial maintenance. Both parents, whether married or not, are required to provide financial support for a child. Maintenance amounts must be negotiated and finalised according to the Maintenance Act 99 of 1998 and the Children's Act 38 of 2005. Parents are obliged to pay for their children's upbringing. Their respective payments depend on how much each earns. The amount paid to the primary caregiver is based on the monthly earnings of each parent and the cost of the child's education, care and upbringing. Maintenance orders are orders of the court. Failure to meet their obligations is a criminal offence.

Rule 43 maintenance

Where a divorce is contested and is taking a long time to conclude, one or other spouse may apply to the court for a Rule 43 interim maintenance order. Rule 43 maintenance is designed to ensure interim arrangements for a number of issues, not only financial. It can provide:

- Interim maintenance for the minor children and in some cases one of the spouses (e.g. if one is financially dependent on the other) until the divorce is finalised
- A contribution towards legal costs

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- Interim care and contact with the child/children
- Interim custody of the child/children

A Rule 43 order cannot be appealed because it is an interim measure, and can only be altered if a substantial change in financial circumstances can be demonstrated. Its purpose is to provide an immediate, interim facility to prevent potential financial hardship or to ensure custodial arrangements are suitable and children are not placed at risk, while waiting for a divorce to be finalised. The appeal process could leave a family in a vulnerable situation for a lengthy period of time, while the appeal is resolved, hence it is prohibited.

Suspected abuse

If you suspect abuse or otherwise believe that your ex-spouse cannot provide a suitable home environment for your child, perhaps due to mental health issues or substance abuse, there are steps you can take to protect your child and yourself, ranging from protection orders to supervised contact visits. Speak to your family lawyer about your situation.

Divorce process

In South African law, divorce means the legal termination of a marriage by means other than death of a spouse. South African courts encourage parties to reach settlements before the divorce reaches court, especially in cases of couples with minor children. (See types of divorce, above.)

The divorce procedure in South Africa comprises the following steps:

- Arrange a consultation with your divorce attorney. We will ask you questions about your life, to assess if the divorce will be opposed or unopposed by your future ex-spouse.
- Draft a divorce summons – this is best done by specialist divorce attorneys to avoid issues later.
- The summons is issued by the court on behalf of the person launching the divorce action (called the Plaintiff).
- It includes details of both parties, where and when they were married, and what the plaintiff wants the divorce order to determine. This may include details of distribution of wealth and debt, maintenance payments, and issues of child care and contact. If this is not done correctly and does not contain the information as required, this can be costly in time and money.
- The summons is delivered by the Sheriff to the other spouse (called the Defendant).
- The defendant responds to the contents of the divorce summons. This is called a plea.
- Together with the plea, the defendant delivers a counterclaim document, which sets out what the defendant wants the divorce order to determine. (If the defendant does not deliver a plea and counterclaim then the court may, after a set period of time, issue the order of divorce according to the conditions requested in the summons. This is known as an uncontested divorce in South Africa.)
- The plaintiff may now, within a set period of time, deliver to the court a document responding to the defendant's plea.
- This is called the plaintiff's plea to defendant's counterclaim and sets out their response to the defendant's plea.
- In most cases this is the end of the plea part of the divorce process. These documents are together referred to as the pleadings.
- The plaintiff now applies to the court for a trial date.

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- This date varies according to the type and location of the court chosen. If the divorce is filed in the High Court, the court date may be a year or more in the future. Divorce proceedings filed in a Magistrate's Court receive earlier court dates depending on how busy the court is.
- Under South African law, all documents to be used by either party in a trial must be revealed to the other party before the court date. This is called a discovery process.
- After the pleadings close each party's divorce lawyer will request the other party to disclose and provide copies of all documents they intend to use to support their arguments in court. These include a variety of financial documents such as bank and credit card statements, share certificates, documents proving ownership of assets or debt and more.
- In some cases, the divorce attorney may have to issue summons to companies or institutions to deliver required documents.
- In some divorces, one party may attempt to hide assets from the court, or even remove documents proving asset ownership from the spouse's access.
- In cases where the parties have not managed to reach a divorce settlement agreement the divorce will go to trial and the court will decide who gets what.

Pitfalls of DIY divorce

There are many websites offering online or DIY divorce. This is misleading, as divorce cannot be granted online. All divorces in South Africa are granted either in the High Court or the Divorce Court, as a division of the Magistrate's Court. Only a judge can grant a divorce order. An online divorce attorney simply charges to provide the relevant documentation. They do not appear in court for either plaintiff or defendant.

Advice and guidance is fundamental

Online or DIY divorce is only suitable for couples who have discussed and agreed the terms of the divorce. However, there are many factors the divorcing couple might not have considered. Certain issues, undisclosed or unresolved at time of divorce, can come back to haunt the couple later in life.

Assets

If the divorcing couple rents their home, has no children, and has no other property in common, a DIY divorce might be appropriate. But if there is a shared marital home, with a bond, there are complex issues such as the transfer of property to manage. There are many financial implications of divorce when assets are involved, and only a legal adviser can make sure all elements of the marital estate are accounted for.

Maintenance and pensions

Only a lawyer understands all the legal entitlements. You may be able to claim maintenance from your spouse, even if they are unemployed, because maintenance can kick in once they secure employment. If you are married in community of property, you can claim 50% of your spouse's pension – even before they reach pensionable age. If you handle your divorce yourself you may miss out on financial compensation to which you are entitled, or your spouse may make a claim later that catches you unawares.

Children

If there are children, there is a procedure that must be followed, however the divorce is enacted. Even if parents draw up a post-divorce parenting plan, a court must be involved when it comes to care and contact. The parents may approach the Family Advocate for help with the parenting plan, but the Family Advocate does not issue a judgement or an order.

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Some other considerations

In this guide we have tried to outline the standard procedures for the most common situations. In certain circumstances slightly different rules and customs might apply, for example, traditional or Islamic marriage, or where one spouse resides in a different country (international divorce). We will advise you according to your specific requirements.

Same-sex marriage

In the eyes of the law, it is irrelevant whether a marriage is heterosexual or same-sex. If a married couple wishes to divorce, the considerations and process outlined in this guide apply, regardless of sex/gender.

Surviving emotionally

Our role as specialist divorce attorneys is to guide you through the legal process. However, we understand that divorce is emotionally turbulent and can be traumatic. Divorcing with dignity may seem impossible but it can pave the way for future wellbeing, for you, your ex-spouse, and your children. Divorce with dignity does not mean caving in on matters that are important to you; rather it means calmly asserting your position on the issues, being prepared to listen to the other, and reaching a mutually acceptable solution as adults.

Don't underestimate the impact of divorce on your emotional state. Many recently divorced people experience sadness and depression both during and after the divorce proceedings, a natural response to a distressing experience. If you are feeling overwhelmed by the feelings associated with your divorce, seek out a professional counsellor, psychologist or therapist to help you come to terms with the grief and anger you are experiencing. Divorce is a form of loss, and grief is a normal reaction to loss.

Some resources that might help include:

- [Families South Africa \(Western Cape\)](#)
- [South African Divorce Support Association \(SADSA\)](#)
- [Hope House Counselling Centre](#)

If you have suffered abuse, either physical or emotional, that has led to filing for divorce, you may find the following support helpful:

- [Reeva Steenkamp Foundation](#)
- [Rape Crisis Cape Town Trust](#)
- [Lifeline](#)
- [South African Depression and Anxiety Group \(SADAG\)](#)

Contact us

For more information on any of the issues described in this guide, or to discuss your personal situation in complete confidence, contact Simon on **086 099 5146** or email sdippenaar@sdlaw.co.za.

Join 100s of satisfied clients in choosing the divorce lawyer with unparalleled sensitivity and EQ.