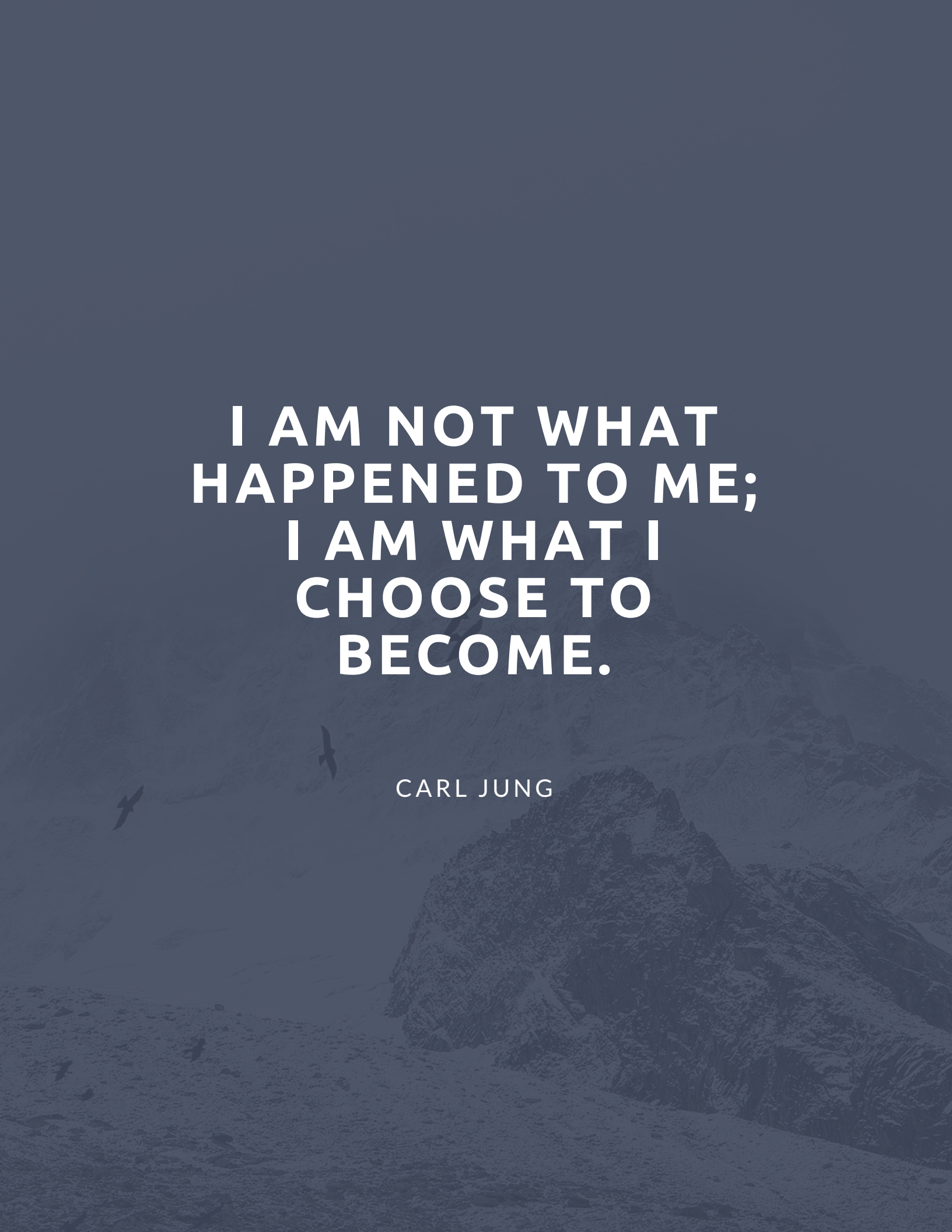


DIVORCE

UNDERSTANDING THE PROCESS IS THE KEY TO SURVIVING IT



The background is a dark, monochromatic image of a rugged mountain landscape. In the foreground, a steep, rocky slope rises from the bottom left. In the mid-ground, a large, craggy mountain peak dominates the right side. The sky is filled with the silhouettes of several birds in flight, scattered across the upper and middle portions of the frame. The overall mood is somber and majestic.

**I AM NOT WHAT
HAPPENED TO ME;
I AM WHAT I
CHOOSE TO
BECOME.**

CARL JUNG

WHY THIS BOOKLET?

During my years of practice as a divorce lawyer I have realized that, for most people, divorce is a once in a lifetime occurrence which is often characterized by uncertainty and discomfort.

From the outset, my firm acknowledges that every divorce is different and requires personal attention. The purpose of this booklet is not to detract from this fact in any way. That being said, however, I have identified some issues which frequently arise, which I would like to deal with.

In this booklet I will try to elucidate on these issues, as far as is possible, in order to provide a measure of certainty to my clients and the clients of my firm during their divorce process. I sincerely hope that this booklet will prove to be a valuable resource for this purpose.

Please remember that the principles elucidated upon in this booklet are merely to assist you in understanding the process a bit better, and are not formal legal advice. We can only give advice when we have discussed all the facts with you. When in doubt, please feel free to contact a representative from my offices for assistance.

I wish you all the best during this difficult time and hope that this booklet will answer some of the questions you may have.

Mervyn Vermeulen



WHAT IS DIVORCE?

Divorce refers to the process whereby a marriage relationship is dissolved and brought to an end. Divorce is, in South Africa, fully regulated by the Divorce Act, 1979.

UNDER WHAT CIRCUMSTANCES MAY A DIVORCE BE GRANTED?

For a Decree of Divorce to be granted, the following needs to be proven:

1. The irretrievable breakdown of the marriage; or
2. The mental illness or the continuous unconsciousness of a party to the marriage

DIVORCE BASED ON IRRETRIEVABLE BREAKDOWN OF THE MARRIAGE

WHAT NEEDS TO BE PROVEN:

That the marriage has disintegrated to such an extent that there is no reasonable prospect for the marriage relationship be restored to a normal state.

DIVORCE BASED ON MENTAL ILLNESS OR CONTINUED UNCONSCIOUSNESS

WHAT NEEDS TO BE PROVEN:

That the one party to the marriage is mentally ill or in a state of continual unconsciousness

WHICH COURTS ARE EMPOWERED TO DEAL
WITH A DIVORCE MATTER

In divorce matters you may proceed in either the:

High Court OR Regional Court

having jurisdiction over either or both of the parties
(ie. the Court within the region where either or both the
parties reside)



ISSUES DEALT WITH IN A DIVORCE MATTER

Issues to be dealt with in divorce are numerous and varied. The below, however, are the issues most frequently encountered



Assets & Liabilities

Dependent on the matrimonial property regime of the parties, most marriages have some form of division of the assets and the debt flowing from the marriage.

Some of the assets which may be dealt with in divorce are as follows:

- Immovable property (houses, farms, vacant stands, offices et cetera)
 - Vehicles
 - Household Contents
- Pension Interest such as pension funds, preservation funds or retirement annuities
 - Shares and Share Options
 - Art and Artefacts

Some of the debts which may be dealt with in divorce are as follows:

- Personal loans & Credit cards
 - Home loans
- Revolving credit facilities
 - Overdrafts



Maintenance for the Parties

In some instances, the Court, when granting a decree of divorce, may make an order that one spouse be responsible for the maintenance of the other spouse financially.

Legislation makes provision for various factors to be considered when making an order for spousal maintenance, but the Court has a fairly wide discretion in this regard and each and every matter must be considered on its own merits.

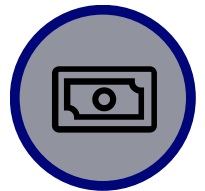


Parental Responsibilities & Rights

In most cases, children under 18 are considered minor children and it is unlikely that the Court will deal with the divorce matter if parental responsibilities and rights in respect of the children have not been set out fully.

Without delving too much into the technicalities of parental responsibilities and rights, it must be stated that, in terms of the Children's Act of 2005, parental responsibilities and rights include the following:

- Care
- Contact
- Guardianship
- Maintenance



Costs

It is an unfortunate reality that any action dealt with in the Courts has an implication in respect of costs. The Court has a discretion to order one party to pay the costs of the other party under certain circumstances. The issue of costs may be agreed on, alternatively the Court will make an order which it considers to be fair under the circumstances.

DIFFERENCES BETWEEN A CONTESTED AND UNCONTESTED DIVORCE

Uncontested Divorce



Agreement between the parties

Parties sign a Settlement Agreement

Order will accord with that which has been agreed to by the parties

6-8 weeks

Co-operative

AGREEMENT



FIRST STEP



COURT ORDER GRANTED



TIME-FRAME



APPROACH



Contested Divorce



No agreement between the parties

Summons is issued and served

The Court will grant the Order it considers to be just and equitable

1 - 4 years

Adversarial

BENEFITS OF PROCEEDING WITH AN UNCONTESTED DIVORCE

1

AVOID LEGAL COSTS

Uncontested divorces are much more cost-effective than contested divorces. This makes it much easier to budget for an uncontested divorce

2

SAVE TIME

Uncontested divorces are usually finalised within a couple of weeks, whereas contested divorces may span over many months, or even years!

3

GET RID OF UNCERTAINTY

In an uncontested divorce, both parties have agreed to the terms of the divorce, therefore both parties know exactly what to expect.

4

AVERT CONFLICT

The best way to avoid conflict with your spouse during a divorce is to seek to reach agreement from day one.

5

MINIMISE TRAUMA

Divorce is difficult, but the added stress of high conflict divorce may be curtailed by proceeding with an uncontested divorce.

6

CONSIDER THE CHILDREN

Children are usually the ones who suffer the most during a divorce. This suffering may easily be alleviated if the parties reach agreement and avert high conflict situations

PROCESS INVOLVED IN UNCONTESTED DIVORCE

STEP 1 - THE SETTLEMENT AGREEMENT

In an uncontested divorce, the parties will first seek to reach agreement on all the issues which may be relevant to their divorce.

Once an agreement has been reached, such agreement must be reduced to writing in the form of a Settlement Agreement. This settlement agreement must then be signed by both parties in front of two witnesses.

STEP 2 - PREPARATION OF DIVORCE SUMMONS

Since an uncontested divorce must still be approved by the Court, a summons must be issued and served. The proper preparation of this summons is therefore a critical step in the uncontested divorce process.

The summons will set out all the information which the Court will need to take into account when considering the divorce. Among other things it will set out the names of the parties, the reasons why the marriage has broken down, whether there are any minor children involved, and other technical issues such as the jurisdiction of the Court.

Your attorney will require some information from you such as the reasons for the breakdown of the marriage. You will also be required to complete a statistics form which is provided to Statistics SA for them to compile the divorce statistics which are published from time to time. If there are minor children involved, there is a form to be completed which will be provided to the Office of the Family Advocate together with the summons.

It is important to provide your attorney with your original marriage certificate and a copy of your antenuptial contract if you are married out of community of property.

PROCESS INVOLVED IN UNCONTESTED DIVORCE

STEP 3 - SERVICE OF THE SUMMONS

The summons will be issued at Court and a case number will be allocated to your case. Once this has been done, the summons is given to the sheriff of the Court for service on the spouse who will not be attending Court (the defendant).

Once the summons has been served on the defendant, two weeks need to pass in terms of the Court rules to give the defendant an opportunity to defend the divorce should they wish to do so. This is generally highly unlikely since the parties have come to an agreement pertaining to the terms of the divorce.

STEP 4 - PREPARATION FOR COURT

In this stage of the uncontested divorce process, your attorney will get the matter ready for hearing at Court. This will entail the following:

- Getting an endorsement from the Office of the Family Advocate if there are minor children involved;
- Indexing and paginating the bundle of documents to be submitted to Court;
- Applying for a Court date;
- Having the matter placed on the roll for hearing once a Court date has been allocated

Your attorney should inform you of the Court date once it has been allocated.

PROCESS INVOLVED IN UNCONTESTED DIVORCE

STEP 5 - HEARING AT COURT

The final step in the divorce process is the hearing at Court. The party who instituted the action (plaintiff) has to attend Court with the attorney representing them, where they will testify regarding the divorce matter.

This may be somewhat daunting. Fortunately, the questions asked in open Court are fairly simple and self-explanatory.

QUESTIONS YOU WILL BE ASKED IN COURT

Your name and your spouse's name

Your residential address

Whether you confirm that you are married to your spouse, and whether you confirm your matrimonial property regime

If you are married out of community of property, you will be asked to identify your antenuptial contract and confirm that it is your antenuptial contract

You will be asked to identify your marriage certificate and confirm that it is indeed your marriage certificate

You will be asked whether you have any children, and how old your children are

You will be asked to briefly set out the reasons why your marriage relationship has broken down and why you believe that the marriage cannot be saved

You will be asked to identify the settlement agreement which you and your spouse signed

If the Court is satisfied, a decree of divorce will be granted and the settlement agreement which you signed will be made an order of Court which means that it is fully binding on you and your ex-spouse.

Although some Courts provide you with a copy of your divorce decree immediately, this is rare. In most cases the decree of divorce will first be typed out by a Court typist and will be ready for collection within a couple of weeks.



PROCESS INVOLVED IN CONTESTED DIVORCE

CONTESTED DIVORCE

Contested divorces usually ensue where the parties are unable to reach an agreement regarding the terms of their divorce. In such cases it is left up to the Court to hear both parties' cases and contentions and thereafter make an order which it considers to be fair.

THE PROCESS

Since a contested divorce is often quite unpredictable, it is very difficult to definitively set out the exact sequence of events that will take place in the divorce. There are, however, a few steps which will invariably take place in a divorce which I would like to set out briefly:

THE SUMMONS AND PARTICULARS OF CLAIM

The divorce starts with a summons being served on the defendant by the sheriff of the Court. This summons would have been prepared by the attorneys acting on behalf of the plaintiff (i.e. the person instituting the divorce).

Attached to the summons is a document known as the Particulars of Claim which will set out the case which the plaintiff intends to prove at trial, as well as full details of the order which the plaintiff will be seeking. All allegations made in the particulars of claim are numbered sequentially in order for the defendant to easily and concisely answer to these allegations in his or her plea.

PROCESS INVOLVED IN CONTESTED DIVORCE

THE NOTICE OF INTENTION TO DEFEND

Once the summons has been served, the defendant has 10 Court days (i.e. working days) to file a notice of intention to defend if they dispute the claim instituted by the plaintiff.

If the defendant fails to file a notice of intention to defend, the matter may be immediately set down for hearing and a divorce granted by the Court.

THE PLEA AND COUNTERCLAIM

After the defendant has entered his or her intention to defend he or she must answer to the allegations made in the particulars of claim by admitting or denying these allegations. If an allegation is denied, it is up to the plaintiff to prove the truthfulness of such an allegation at trial.

In divorce matters, the plea is usually accompanied by a counterclaim. The counterclaim is much like the particulars of claim in that it sets out the case which the defendant intends to prove at trial, as well as full details of the order which the defendant will ask the Court to grant. Much like the particulars of claim, the allegations contained in the counterclaim will be numbered sequentially in order for the plaintiff to answer to these allegations easily and concisely.

THE PLEA TO THE COUNTERCLAIM

In this document, the plaintiff will have an opportunity to answer to the allegations made by the defendant in their counterclaim. The plaintiff must then also admit or deny these allegations. If an allegation is denied, it is up to the defendant to prove the truthfulness of this allegation at trial.



PROCESS INVOLVED IN CONTESTED DIVORCE

DISCOVERY AND EXCHANGE OF DOCUMENTS

The discovery process was designed to ensure that neither party may ambush the other party with documents at trial. In order to use a document at trial, the party wishing to rely on such document must, by means of the discovery process, advise the other party that they intend to use the relevant document.

The discovery process, therefore deals with the parties making available to one another the necessary documents which they want to use at trial. This is a very useful process to gain insight into the case which your opponent intends to prove at trial.

PRE-TRIAL CONFERENCE

Before the trial can proceed, your attorney will be required to attend what is known as a pre-trial conference with the attorney acting for your spouse. In this meeting the parties will work through a meeting agenda which is prescribed by the rules of Court to try to see whether the issues to be determined at trial can be limited to save time in Court.

During the pre-trial, the parties will also have the opportunity to pose questions to one another in writing, and to seek admissions in respect of issues which may be in dispute on the particulars of claim, plea, counterclaim, and plea to counterclaim.

TRIAL

The final leg of the contested divorce is the hearing of the matter at trial. At this stage, both parties will be entitled to call witnesses and to produce documents to Court to prove their case. Once the Court has heard and seen all the evidence, the Court will prepare a judgement.



RULE 43 APPLICATIONS

It is fairly common knowledge that contested divorces can take a long time to finalise. Some divorces can even stretch over a couple of years. In many cases parties need urgent relief from the Court regarding certain aspects of the divorce, which cannot wait for the significant amount of time it takes to get to trial. Rule 43 Applications were specifically designed with this in mind.

WHAT IS A RULE 43 APPLICATION

Rule 43 is a process by which a party to divorce proceedings may approach the Court on a fairly urgent basis to get interim relief pending the finalisation of the divorce proceedings. There are specific things which a Rule 43 application may deal with, which are as follows:

- Maintenance for children or one of the parties pending finalisation of the divorce;
- A contribution towards the legal costs of one of the parties to the divorce;
- Interim custody of children;
- Interim contact and access rights in respect of children

RULE 43 PROCESS

In Rule 43 applications the person applying for the order in terms of Rule 43 completes an affidavit which is submitted to Court. The other party to the Rule 43 has an opportunity to file one affidavit in response to the allegations made in the Applicant's affidavit. The matter is then immediately set down for hearing and the Court will make a judgement which stands until the divorce matter has been finalised.

DOMESTIC VIOLENCE

Unfortunately, many divorces have an element of domestic violence. The Domestic Violence Court was specifically brought into being by the Domestic Violence Act to give protection to persons who are the victims of domestic violence.

GROUNDS FOR A DOMESTIC VIOLENCE INTERDICT

It is a common misconception that the Court can only help when there is an element of physical abuse. This is not the case. There are various factors which the Court may consider when granting an order in terms of the Domestic Violence Act, and the specific examples of domestic violence set out in the Domestic Violence Act are as follows:

- physical abuse
- sexual abuse
- emotional, verbal and psychological abuse
- economic abuse
- intimidation
- harassment
- stalking
- damage to property
- entry into a person's residence without consent (only in cases where the parties do not share the same residence)
- any other controlling or abusive behaviour



SPOUSAL MAINTENANCE

Spousal maintenance was introduced into our Law by means of the Divorce Act, 1979.

In terms of the Divorce Act, a Court may order that one spouse pay maintenance to the other spouse after their divorce.

WHAT FACTORS ARE CONSIDERED

When deciding whether or not to award spousal maintenance, the Court considers the following factors:

- the existing or prospective means of each of the parties,
- the parties' respective earning capacities,
- the financial needs and obligations of the parties,
- the age of each of the parties,
- the duration of the marriage,
- the standard of living of the parties prior to the divorce,
- the parties' conduct in so far as it may be relevant to the break-down of the marriage,
- an order in terms of subsection 7(3) of the Divorce Act, and
- any other factor which in the opinion of the court should be taken into account,

GENERAL PRINCIPLES

The overriding factor when it comes to spousal maintenance is whether the spouse claiming such maintenance has a true need for it. If the spouse claiming spousal maintenance fails to prove that they have a bona fide need for maintenance, they will fail with their claim.

Spousal maintenance may be granted for life, or for a specified period to be determined by the court.

FORFEITURE OF PATRIMONIAL BENEFITS

WHAT IS A FORFEITURE ORDER?

A forfeiture order is an order which the court may make simultaneously with the grant of a decree of divorce. In terms of such an order one spouse may forfeit the patrimonial benefits of the marriage. In other words a spouse may be ordered not to share in the assets in a joint estate, or even not to claim against the accrual of the other spouse.

“

When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

”

THE LEGAL PRINCIPLES

The court has a discretion to grant a forfeiture order if it is satisfied that one party will be unduly benefitted in relation to the other if such an order is not made.

In deciding whether or not one party will be unduly benefited in relation to the other, the Court will consider the following factors:

- The duration of the marriage;
- The circumstances which gave rise to the breakdown of the marriage; and
- Material misconduct on the part of either of the parties.

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