



DIVORCE

A BASIC GUIDE



**I AM NOT WHAT
HAPPENED TO
ME;**

**I AM WHAT I
CHOOSE TO
BECOME.**

CARL JUNG

INTRODUCTION

Whichever way you look at it, divorce is an experience filled with uncertainty and discomfort.

From the outset, Vermeulen Attorneys 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.

Please remember that the principles set out in this booklet are shared 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 our offices for assistance.

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

Mervyn Vermeulen

MEET OUR FAMILY LAW TEAM



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WHAT IS DIVORCE?

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

UNDER WHAT CIRCUMSTANCES CAN 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 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.



Scan this QR with your phone to see our Law In Three Minutes or Less Video on Basic Concepts in Divorce

In divorce matters you may proceed in 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, or where either of the parties are domiciled)



FREQUENTLY ENCOUNTERED ISSUES

PROPRIETARY INTERESTS

Dependent on the matrimonial property regime of the parties, most marriages have some form of division of the assets and liabilities and/or accrual sharing.

Such claims may include:

Division of Joint Estates

Accrual Claims

Division of Jointly Owned Property



PARENTAL RESPONSIBILITIES AND RIGHTS

Children under 18 are usually considered minors. Courts do not entertain divorce matters if parental responsibilities and rights have not been adequately resolved.

Parental Responsibilities and Rights include:



Care
Contact
Guardianship
Maintenance

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 every matter must be considered on its own merits.



MAINTENANCE FOR MAJOR DEPENDENT CHILDREN

Parents' responsibility to maintain their children does not come to an end when their child turns 18. The Court has the power to make orders regarding maintenance for major dependent children in divorce matters.



Scan this QR with your phone to
learn more about the Issues
Frequently Encountered in Divorce

UNCONTESTED DIVORCE VS CONTESTED DIVORCE

UNCONTESTED DIVORCE

Agreement between the parties

Settlement Agreement is signed

Reflects the **Agreement** between the parties

2 - 4 Months in most cases

Co-operative

AGREEMENT



FIRST STEP



ORDER



TIME-FRAME



APPROACH



CONTESTED DIVORCE

No agreement between the parties

Summons is issued and served

The **Court** will grant the Order it considers just

1 - 4 Years in most cases. 5 Years and upwards in extreme cases

Adversarial



SCAN ME



Scan this QR with your phone to learn more about The Differences Between Contested and Uncontested Divorce

WHY UNCONTESTED DIVORCE IS THE SENSIBLE OPTION

MINIMIZE COSTS

1

Uncontested divorces offer significant cost savings compared to contested divorces, simplifying budgeting for divorce proceedings. Contested divorces are expensive and have unpredictable costs which can escalate rapidly.

SAVE TIME

2

Uncontested divorces are usually finalised within a couple of weeks, whereas contested divorces may span over several years due to Court backlogs and complex litigation processes.

GET RID OF UNCERTAINTY

3

In an uncontested divorce the parties control the outcome of their divorce. In contested divorces, the Court decides the outcome of the divorce. The decision made by the Court strictly follows legal principles and, while being legally sound, is not always the best thing for the parties.

AVOID CONFLICT

4

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

MINIMISE TRAUMA

5

Divorce is challenging, yet opting for an uncontested divorce can help avoid the heightened stress associated with high-conflict divorces.

CONSIDER YOUR CHILDREN

6

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



SCAN ME



Scan this QR with your phone to learn more about Why You Should Consider Uncontested Divorce

UNCONTESTED DIVORCE PROCESS

STEP 1 - SETTLEMENT AGREEMENT

In an uncontested divorce, the parties try to reach agreement on the terms of their divorce before taking any further steps.

Once the parties have reached agreement, a Settlement Agreement is drafted, and thereafter signed by both the parties. This Settlement Agreement regulates the terms of the divorce once it is made an Order of Court.



Scan this QR with your phone to learn more about Divorce Settlement Agreements

STEP 2 - DIVORCE SUMMONS

Since an uncontested divorce must still be approved by the Court, a divorce summons is issued and served.

The summons sets out the information the Court needs to take into account when considering the divorce. Among other things, it sets 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.

The summons is drafted and then issued at Court. This means that a case number is allocated to the divorce. Once this has been done, the summons is served on the Defendant by the Sheriff.

Once the defendant has been served with the summons, there is a mandatory two-week waiting period in accordance with court rules. This provides the defendant with an opportunity to contest the divorce if they wish.

STEP 3 - PREPARATION FOR COURT

In this stage of the uncontested divorce process, the matter is prepared for hearing at Court. This entails:

- 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

UNCONTESTED DIVORCE PROCESS

STEP 4 - HEARING AT COURT

The final step in the divorce process is the hearing at Court. The party who instituted the action (plaintiff) attends Court and testifies regarding the divorce matter.

The questions asked in open Court are fairly simple and self-explanatory (These are set out below).

A decree of divorce is granted and the settlement agreement is made an order of Court.

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

QUESTIONS ASKED IN COURT

- You will be asked to confirm your name and your spouse's name
- You will be asked to confirm your residential address
- Confirmation of the fact that you are married, as well as 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 if so, their names, genders and ages
- 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



SCAN ME



Scan this QR with your phone to see our Law In Three Minutes or Less Video on The Steps Involved in Uncontested Divorce

CONTESTED DIVORCE PROCESS

THE SUMMONS AND PARTICULARS OF CLAIM

The process is initiated by a divorce summons being served on the defendant.

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 their plea.

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 delivered their intention to defend they 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 that 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.

CONTESTED DIVORCE PROCESS

THE PLEA TO THE COUNTERCLAIM

In this document, the plaintiff answers to the allegations made by the defendant in their counterclaim. The plaintiff must admit or deny such allegations. If an allegation is denied, it is up to the defendant to prove the truthfulness of that allegation at trial.

DISCOVERY & EXCHANGE OF DOCUMENTS

The discovery process was designed to ensure that neither party ambushes 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 & TRIAL PREPARATION

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 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 judgment.

RULE 43/58 APPLICATIONS

Contested divorces can take a long time to finalize. 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 the significant amount of time it takes to get to trial. Rule 43 Applications were specifically designed with this in mind.

Rule 58 is the equivalent of Rule 43 in Magistrate's Court matters.

WHAT IS A RULE 43 APPLICATION

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

- Maintenance pending finalization of the divorce;
- A contribution towards the legal costs of one of the parties to the divorce;
- Interim care of children;
- Interim contact 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.

In the Johannesburg and Pretoria High Courts, the parties are required to deliver financial disclosure affidavits in addition to the affidavits referred to above.



SCAN ME



Scan this QR with your phone to watch our Webinar on Rule 43, presented on 5 August 2022

MATRIMONIAL PROPERTY REGIMES

In Community of Property



Community of Property

- All assets and liabilities form part of one communal estate.
- Both parties are co-owners in undivided and equal half-shares of all assets in the joint estate.
- Both parties are jointly responsible for the liabilities of the joint estate

Co-Administration of the Joint Estate

- The parties are both co-administrators of the joint estate

Default Position

- No Antenuptial Contract Required

Out of Community of Property - No Accrual

No Community of Property

- Each party's assets and liabilities form part of their own separate estate.
- Neither party has any claim to the assets of the other, nor are the parties liable for the debts incurred by the other.

Independent Administration of Separate Estates

- Each party is the sole administrator of their estate

Non-Default Position

- Antenuptial Contract Required

IMPORTANT TO NOTE

- A marriage out of community of property without accrual does not preclude spouses from buying assets together
- Authority suggests that parties can still allege and prove a Universal Partnership RD v TD 2014 (4) SA 200 (GP)



Out of Community of Property - With Accrual



No Community of Property

- Each party's assets and liabilities form part of their own separate estate.
- Neither party has any claim to the assets of the other, nor are the parties liable for the debts incurred by the other.

Independent Administration of Separate Estates

- Each party is the sole administrator of their estate, subject to the requirement that the parties must act in good faith.

Non-Default Position

- Antenuptial Contract Required

Accrual Sharing

- At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, **acquires a claim against the other spouse or his estate for an amount equal to half of the difference** between the accrual of the respective estates of the spouses = Section 3(1) MPA



SCAN ME

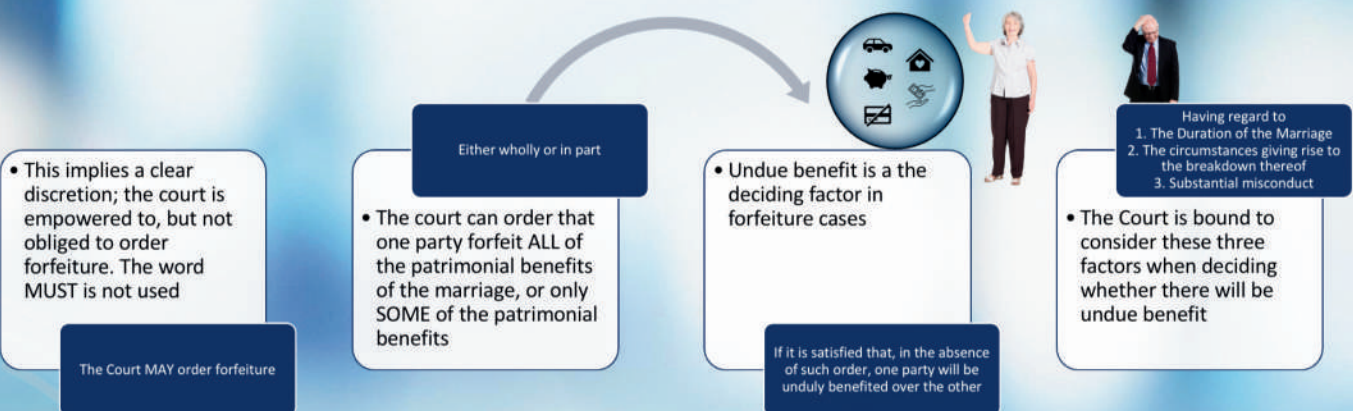


FORFEITURE OF PATRIMONIAL BENEFITS

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.



SPOUSAL MAINTENANCE

Spousal maintenance was introduced into our legislation 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 most probably fail with their claim.

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



Scan this QR with your phone to watch our Webinar on Spousal Maintenance, presented on 23 March 2022

PARENTAL RESPONSIBILITIES AND RIGHTS

DEFINITIONS CONTAINED IN THE CHILDREN'S ACT



CARE

- (a) within available means, providing the child with
 - (i) a suitable place to live;
 - (ii) living conditions that are conducive to the child's health, wellbeing and development; and
 - (iii) the necessary financial support;
- (b) safeguarding and promoting the wellbeing of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;




CONTACT


- (a) Maintaining a personal relationship with the child; and
- (b) if the child lives with someone else
 - (i) communication on a regular basis with the child in person, including
 - (aa) visiting the child; or
 - (bb) being visited by the child; or
 - (ii) communication on a regular basis with the child in any other manner, including
 - (aa) through the post; or
 - (bb) by telephone or any other form of electronic communication;

PARENTAL RESPONSIBILITIES AND RIGHTS

GUARDIANSHIP

- 
- (3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must
 - (a) administer and safeguard the child's property and property interests;
 - (b) assist or represent the child in administrative, contractual and other legal matters; or
 - (c) give or refuse any consent required by law in respect of the child, including
 - (i) consent to the child's marriage;
 - (ii) consent to the child's adoption;
 - (iii) consent to the child's departure or removal from the Republic;
 - (iv) consent to the child's application for a passport; and
 - (v) consent to the alienation or encumbrance of any immovable property of the child.

MAINTENANCE



In terms of the principle of "care", as set out in the Children's Act, holdets of parental responsibilities and rights must provide the minor child with "The necessary financial support".

Both parents are automatically co-holders of full parental responsibilities and rights in respect of the minor children born during the marriage.



DID YOU KNOW?

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

In terms of the definitions contained in the Domestic Violence Act:

'domestic violence' means-

- (a) physical abuse;
- (b) sexual abuse;
- (c) emotional, verbal or psychological abuse;
- (d) economic abuse;
- (e) intimidation;
- (f) harassment;
- (fA) sexual harassment;
- (fB) related person abuse;
- (g) spiritual abuse;
- (h) damage to property;
- (hA) elder abuse;
- (hB) coercive behaviour;
- (hC) controlling behaviour;
- (hD) to expose a child to domestic violence;
- (i) entry into the complainant's-
 - (i) permanent or temporary residence without their consent, where the parties do not share the same residence; or
 - (ii) workplace or place of study, without their consent, where the parties do not share the same workplace or place of study; or
- (j) any other behaviour of an intimidating, threatening, abusive, degrading, offensive or humiliating nature towards a complainant,

where such conduct harms, or inspires the reasonable belief that harm may be caused to the complainant;

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