

FAMILY LAW

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OUR SERVICE

STBB | SMITH TABATA BUCHANAN BOYES is a firm of business-minded lawyers which was established in 1900. At present the firm consists of approximately 50 professionals practising from 7 offices throughout South Africa.

By understanding our clients' needs and objectives, we strive to deliver cost-effective legal solutions to their business and personal matters. A vital aspect of the professional service we provide, is a commitment to developing close working relationships with our clients. This commitment enables us to consistently succeed on their behalf.



CONSIDERING DIVORCE

Making the decision to divorce a spouse is a complex issue, not only because of the accompanying difficult emotions, but because you are simultaneously also required to do a thorough consideration of your and your family's future financial, personal and legal needs. It is therefore to your advantage to understand what the process involves and what your legal rights are.

This is a brief guide to South African divorce law and is aimed at giving you a better understanding of the divorce process. We however strongly recommend that you consult with one of our family law attorneys who are experienced in the intricacies involved, bearing in mind that each divorce is different and requires diverse proposals to reach a fair and workable solution for you, your spouse and your children.

I CAN DO MY DIVORCE MYSELF - WHY PAY AN ATTORNEY?

You can similarly argue that you can also fix your car yourself or play midwife, but you would predictably prefer that a specialist in the field take over. The reason for this deference to a specialist is because of the importance of the risks at stake. In a divorce where your children, finances, home, mortgage bond and pension issues are concerned, an experienced attorney is crucial to ensure a workable divorce and settlement between you and your spouse whilst avoiding an escalation of costs.

GROUND FOR DIVORCE (DO I NEED MY SPOUSE'S CONSENT?)

In South Africa there are two grounds of divorce, the most common of which is the fact of the irretrievable breakdown of the marriage. There are a number of reasons why this can happen, including that:



- for a substantial period now, you and your spouse have no longer been living together as a married couple; or
- either party has committed adultery with the effect that you strongly believe that you cannot continue with the marital relationship; or
- communication between you and your spouse has broken down and you no longer love each other; or
- any physical, verbal, alcohol or drug abuse within the marriage.

If one spouse can show that a marriage has irretrievably broken down, then a Court will grant the divorce order. It is therefore irrelevant whether or not your spouse agrees to divorce: if you can show the Court that the marriage relationship with your spouse has failed and the Court is satisfied that there is no reasonable possibility that you and your spouse can be reconciled, then the Court will grant you the order.

The second ground for an order of divorce is the mental illness or continuous unconsciousness of a spouse. In such an instance you will have to prove that for a certain prescribed time period, your spouse was admitted to, or still is, in a mental institution; or that your spouse is in a state of continuous unconsciousness.

THE PROCESS

After proper consultation and obtaining the relevant information and documentation, your legal representative will issue a divorce summons on your behalf and have it served by the sheriff on your spouse. If you so wish, your legal representative can arrange that the summons is served on your spouse at his or her home, to avoid the possible embarrassment and discomfort that may arise if the divorce summons is served at your spouse's place of work. In the summons the following issues, amongst others, are usually stated:

- the reasons why you are requesting a decree of divorce;
- whether any minor children were born from the marriage; (If there are children, the office of the Family Advocate will become involved in the process. This office evaluates the parties' circumstances in light of the best interests of the child and makes a recommendation to the Court with regard to custody, access and/or guardianship where necessary.)
- who the children will live with post divorce;
- how the other parent will have contact with the children;
- is maintenance required? If so, how much and for what period of time; and
- how the assets (including pension interests, property and liabilities of the spouses) should be divided between them.



After issuing of the summons, your legal representative will commence settlement negotiations with your spouse (who may or may not be represented by another attorney) as soon as possible. In this regard your attorney's guidance is fundamental to ensure a fair and workable solution for you, your spouse and your children. Reaching a settlement agreement often takes time, since it needs to address your immediate future needs as well as long-term concerns.

As soon as a settlement agreement is reached, your attorney will request a hearing date from the Court. On the hearing day, if you are the party who initiated the process, you will need to appear in Court essentially in order to confirm to the court the allegations made in the summons. If the judge is satisfied that your marriage has irretrievably broken down, a divorce order will be granted, incorporating the settlement agreement.

If, however, you and your spouse still disagree on the terms of your divorce settlement, then the divorce action is said to be 'contested' and may lead to a trial. A trial can span several days in Court during to allow witnesses for both sides to come forward and testify in support of the relevant spouse's claims. After hearing and assessing the evidence, the Court will make a finding for the parties.

IS THERE ANY INTERIM RELIEF THAT CAN BE OBTAINED BEFORE FINALISATION OF THE DIVORCE?

Before the divorce has been finalised, you can apply to Court for various forms of interim relief. Such relief includes:

- interim residence and contact arrangements regarding minor children;
- maintenance for a spouse and/or the children;
- obtaining a contribution towards your interim legal costs in respect of the pending divorce action; and
- obtaining of a family violence interdict.

MY RIGHTS

ASSETS

Assets are divided in accordance with the rules of the property regime that applies to your marriage, in other words, whether you are married in community of property or out of community of property.



■ MARRIAGES OUT OF COMMUNITY OF PROPERTY - TWO OPTIONS

Without accrual

If you registered an antenuptial agreement before your marriage, it means that you chose to marry either:
out of community of property without accrual;
or out of community of property with accrual.

When parties have chosen the 'without accrual' system, it means that they have elected that each party keeps his own property, both that which was owned before the marriage and that which was acquired during the subsistence of the marriage. On divorce, each person retains the assets he or she owns and no division takes place.

With accrual

In terms of this regime, both spouses retain separate estates during the subsistence of the marriage and do not share in each other's profits or losses. However, whilst neither spouse will be liable for the other spouse's debts, the spouses share what they acquire during the subsistence of the marriage. Note that this sharing (accrual) only occurs upon dissolution of the marriage. The accrual is the extent to which the respective spouses have become richer by the end of the marriage, in other words, the amount by which the spouses' joint wealth has increased over the period of the marriage. The spouse with the smaller accrual has a claim against the one with the greater accrual for half of the difference between the two amounts.

■ MARRIAGES IN COMMUNITY OF PROPERTY

Marriages in community of property are the default matrimonial regime in South Africa - in other words, if you did not register an antenuptial agreement before your marriage, your marriage will be one in community of property. This means that upon divorce, everything you and your spouse owned is shared equally, including assets and debts.

■ FORFEITURE OF BENEFITS

It is possible for a party whose conduct lead to the marriage breaking down, to lose the benefits that he or she may be entitled to in terms of the marital regime (marriage in community of property or a marriage out of community with accrual). If you claim forfeiture, you must prove to a Court that it was the specific conduct of your spouse that lead to the marriage breaking down.

The underlying principle in respect of the forfeiture of patrimonial benefits is that no one should benefit financially from a marriage which he or she has caused to fail. The Court therefore has the discretion to order that a spouse forfeits his/her claim to the other spouse's assets or any other benefits to which the spouse would ordinarily have been entitled.



■ PENSION BENEFITS

A divorce settlement agreement will typically also include a provision whereby one spouse is awarded a share in the benefits of the other spouse's pension. Previously (if the spouses divorced before 2007)* the receiving spouse unfortunately had to wait for the other spouse to retire before being able to claim payment of the share in the ex-spouse's pension. However, the Pension Funds Act was since amended to allow the receiving spouse immediate access to the ex-spouse's pension, meaning you can claim payment of a share in your spouse's pension interest on the date of divorce. Certain pension funds are, however, not subject to this change in legislation.

*(Later amendments to the legislation made this provision retrospective. Therefore the position is now that even if you divorced prior to 2007 and was awarded a share in your ex-spouse's pension interest in the settlement agreement, you may be eligible to receive payment of the pension interest immediately. Much depends on the wording of the settlement order and we suggest that you consult with an attorney in our family law department to assist you herein.)

■ **CONTACT WITH THE CHILDREN:**

Care and contact arrangements with minor children (i.e., where the children will stay) is one of the foremost reasons for continuous tension flare-ups between spouses who are in the process of divorce. Child experts all agree that as a general rule, there should be as little disruption in the existing routines of the children as possible.

Reaching agreement on access rights is often equally distressing for the spouses. Your legal representative will assist you to come to an agreement with your spouse. It is advisable to take the agreement workable and convenient for both, so as to underscore both spouses' compliance therewith.

However, a spouse may not honour his or her undertaking in this regard and often disputes flare up when a spouse does not return children after a long week-end on the date and time as previously agreed. A divorcing or divorced parent therefore often finds that he revisits his attorney in order to manage the arrangement and ensure future compliance with arrangements. In instances where there are serious concerns regarding minors a recommendation by a qualified and experienced child psychologist is required.

This is where the experience of our family law attorneys is so beneficial to clients, as we can assist you in ensuring that the most comfortable arrangement is reached with regards to the children.



■ MAINTENANCE

In respect of the children

Both parents have an equal duty to support their children. When spouses divorce, however, one spouse is often in a better financial position than the other. In addition, the spouse who has care and residence of the children may have added expenses that the other parent does not have.

It is therefore crucially important to reach agreement on a fair amount of maintenance to be paid in respect of the children, taking the children's specific needs and the specific circumstances of both spouses into account, to ensure the continued well-being and nurturing of the children. Where spouses cannot agree on the amount of maintenance, the Court will make a determination.

Maintenance is not static and a settlement agreement will often include an automatic yearly percentage increase in the amount of maintenance payable. Moreover, a spouse may in changed circumstances, need to apply to a maintenance court for a reduction in the amount of maintenance being paid; or, on the other hand, a spouse may apply for an increase.

In respect of a spouse

Whether a spouse will be required to pay maintenance to the other spouse depends on the position during the subsistence of the marriage and the circumstances of the divorce.

The factors that are important and that a Court considers when awarding maintenance for a spouse are:

- the existing or future means of the spouses;
- the spouses' respective earning ability;
- the spouses' financial needs and obligations;
- the respective age of each spouse;
- the duration of the marriage: the longer the marriage, the more difficult it may be for a spouse, who did not have formal employment (such as a housewife) to re-enter the workplace and earn a living;
- the standard of living before the divorce. (Note that in the majority of cases, it is not possible for the parties to maintain their standard of living after divorce because the same incomes are now spread over two households.);
- the spouses' conduct in causing the breakdown of the marriage.



Our courts generally accept that the best way forward for divorced spouses is to make a “clean break” with each other, requiring spouses to be financially independent of each other after the divorce where possible. A Court may therefore award a lump sum payment to a spouse rather than requiring the other spouse to continue making maintenance payments to the ex-spouse.

On the other hand, where it is appropriate, a Court may order that so-called ‘rehabilitative maintenance’ is paid which is a maintenance amount that is payable for a certain period of time to facilitate the unemployed spouses’ re-entry in the workplace.

ONGOING ISSUES

Some of the issues decided in a divorce settlement are set in stone. Other issues, however, remain open long after the granting of the final divorce decree and as such, you may have a long-standing relationship with your legal representative. For instance, where it is necessary to increase or decrease maintenance or amend the arrangements with regard to access and contact with the children, you will need your attorney to manage the process and facilitate a new agreement.

Let the STBB team be on your side and assist you through the process. Christel Beukes is our family law specialist and can be contacted on christelb@stbb.co.za.



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