

**KNOW
YOUR
RIGHTS.**

60 QUESTIONS ANSWERED ON DIVORCE

Written by Bertus Preller - A Family Law Attorney

DIVORCE

1. What forms of divorces are there?

Generally, there are two main types of divorces: uncontested/unopposed divorces and contested/opposed divorces.

These types of types can take on a variety of forms, which include:

- Online Divorces
- Divorces by default
- International Divorces
- DIY Divorces
- Missing Spouse Divorces
- Mediated Divorces
- Collaborative Divorces

2. What are the grounds for divorce in South Africa?

The Divorce Act of 70 of 1979 (as amended) introduced three grounds for divorce:

- The irretrievable breakdown of the marriage
- Continuous unconsciousness of a spouse
- Mental illness of a spouse

3. What is implied by the irretrievable breakdown of a marriage?

Where a marriage relationship is permanently broken down and deemed to be beyond restoration, it is known as the irretrievable breakdown of the relationship. Marriages may break down for numerous reasons, not always through misconduct by either one of the parties. Generally, there are numerous circumstances that can contribute to the irreparable breakdown of a marriage, such as adultery, abuse, falling out of love or a lack of communication, not living together as husband and wife for more than one year, malicious desertion, alcoholism or drug addiction etc.

DIVORCE

4. In which kind of court can I divorce?

A court (the High Court or the Regional Court of the Magistrates Courts) have jurisdiction in a divorce action if one or both parties are:

- domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
- ordinarily resident in the area of jurisdiction of the court on the said date and has/have been ordinarily resident in South Africa for a period of not less than one year immediately prior to that date.

5. Exactly what documents do I require to file for my divorce?

The following documentation will commonly be requested by your divorce lawyer:

- Copy of Your ID Document and/or Passport
- Confirmation of Your Residential Address
- Copy of Your Antenuptial Contract (if married out of community of property)
- Your Marriage Certificate

Based on the contents of your divorce application, additional paperwork may also be requested, for instance:

- up-to-date valuations of immovable property;
- retirement insurance information;
- maintenance schedules;
- a list of assets and liabilities, etc.

6. Can I finalize a divorce without the need of an attorney?

It is a possibility, but since divorce law can sometimes be complex and challenging, it is usually recommended to get legal guidance from an attorney or at least obtain the input from an attorney. If finances happen to be a challenge an option like iDivorce might be the better option. By using iDivorce you can divorce for R 1000 and your documents will still be approved by an attorney, this is if you use their DIY option. There is also a managed divorce option where an attorney assist, draft and conclude your divorce at a fraction of the usual cost.

To learn more about iDivorce, [click here](#).

DIVORCE

7. Can I divorce without having to go to Court?

If you are the Defendant in an uncontested divorce you need not appear in court, only the Plaintiff appears in court. If the divorce is contested both parties need to appear at the trial and give evidence.

8. Who will get the engagement and wedding ring after divorce?

As a ring is perceived as a gift, the donor will not have a claim for the return of the ring, unless of course if one can prove an agreement to the contrary. If, however, both parties agree that the ring must be returned to the donor, the divorce settlement agreement or consent paper ought to make provision for this.

9. What is a mediated divorce?

In mediation, an independent third party will work with both sides to try to reach a settlement agreement and will guide the parties on the various scenarios they could face if the matter goes to court. A mediator acts as a neutral third party, and they usually have a legal and/or psychology background. A mediator does not make a decision about the case and has no power to make any determination or coerce any order onto the parties. The decision-making power remains with both spouses and the mediation process is without prejudice. The mediator will guide the parties in making reasonable decisions with regards to such things as the division of the joint estate and the maintenance of minor children.

10. What is a "round-table meeting"?

A round table settlement is typically carried out shortly once the summons is delivered in a contested divorce. Both parties' legal representatives colloquially exchange their clients' financial information and then get together on a convenient date with the parties present to settle the divorce. A settlement agreement or consent paper is then drawn up, and only the plaintiff appears in court to get the settlement agreement made an order of court.

11. What is a collaborative divorce?

The collaborative divorce process plays out in a series of 'all party' meetings with the clients and their collaborative lawyers present. Negotiations are carried out in a principled fashion, exploring interest rather than discussing positions, so that all participants form a team with a common goal: to concentrate all efforts towards reaching a settlement that is acceptable to both parties. As a team, they are less likely to give up; deadlock becomes a challenge rather than an opportunity to assign blame; and successful negotiations are much more likely. The team strategy also offers the opportunity for the lawyers to discuss the legal context and its application to the clients and to assist in brainstorming options for resolving of the issues. Collaborative law is a shift from 'warrior' to 'facilitator'.

DIVORCE

12. Is a divorce case confidential?

The Divorce Act imposes a criminal sanction in that a person who in contravention of the Act publishes any particulars or information shall be guilty of an offense and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

13. Who is the Plaintiff and who is the Defendant?

The Plaintiff is the one who initiates the proceedings. His/her name will be listed first on the Combined Summons, pleadings (formal court documents) and court notices.

14. What is an uncontested divorce?

An uncontested divorce is one in which you and your spouse work together to agree on the terms of your divorce. There is no formal trial, and only the plaintiff appears in court. In an uncontested divorce, the parties agree prior to the divorce on how to divide their assets and, if there are children involved, which parent will become the parent of primary residence and which will be the parent of alternate residence. A settlement agreement or consent paper is then drafted with the help of the attorney, entered into (signed) by both parties, and made an order of the court.

15. How long will it take to obtain an uncontested divorce?

A local, uncontested divorce, where both parties agree to the terms of the divorce, can be completed in as little as 3 - 6 weeks from date of signing the divorce papers.

16. What is the cost of a divorce?

An uncontested divorce can cost anything between R800 and R20 000. The cost mostly will depend on the complexity of the divorce settlement agreement and the complexity surrounding the care and contact of any minor children. In a contested divorce, the costs are diverse, time based and very much dependent on the behaviour of the parties. It can cost hundreds of thousands of rands in fees and disbursements. Often, a year or two after serving the summons, the attorneys and advocates on both sides will start to talk settlement. As the trial date approaches, the intensity of the settlement negotiations increases. In 95% of all divorce cases, a settlement agreement is usually reached before or on the day of trial.

DIVORCE

17. What is a contested divorce?

If you and your spouse are not able to agree to the terms of the divorce, the contested divorce process will be the only solution. A contested divorce is a lot more complex, drawn-out and expensive versus an uncontested divorce.

18. How long does it take to get a contested divorce?

Contested divorces can take many months, even years, to reach the divorce trial stage. The divorce trial usually only takes a few days. Fortunately, however, most contested divorces are settled before trial starts.

19. What is the cost of a contested divorce?

Contested divorces are usually charged in accordance with the divorce attorney's hourly rate. Disbursements (expenses) which include phone calls, emails, printing, scanning, copies, Sheriff's accounts, Advocate's accounts, etc. will also be for the client's account.

20. What are the stages of a contested divorce?

- pleadings
- application for and set down of trial date
- discovery of documents
- further discovery and particulars
- pre-trial conference
- trial
- judgment

21. Which steps should be taken to start a contested divorce?

The advisable step is to get a hold of a divorce attorney to schedule a consultation.

DIVORCE

22. What is the procedure for contested divorce?....continue

Summons

A divorce is commonly started by way of a summons. The divorce action is presumed to have been instituted on the date the summons was issued. Unless there is a settlement between the parties, the summons culminates in a trial and the delivery of a judgment. The trial involves the leading of evidence by both the plaintiff and the defendant. The summons informs the defendant that if he/she disputes the plaintiff's claim and wishes to defend the action, he/she must serve a notice of appearance to defend the claim on the plaintiff or his/her attorney within 10 days (where the parties live in the same jurisdiction) or 21 days (where the parties live in different provinces) after the date of service of the summons upon him/her. The summons also warns the defendant of the consequences if he/she fails to do so, i.e. it may be possible to obtain judgment by default against him/her.

A summons must comply with certain formalities and must state:

- the sex, occupation (if known) and address of the defendant;
- the sex, occupation and postal and residential addresses of the plaintiff; and
- the full address where the plaintiff will accept service of documents.

Before the summons can be issued, it must be endorsed with the following particulars of claim:

- The grounds on which it is stated that the court has jurisdiction in terms of the Divorce Act 70 of 1979.
- If a marriage subsists between the plaintiff and the defendant:
- The place and date of the marriage, as well as the matrimonial property system;
- The names, ages and sex of any minor children of the marriage;
- The name and address of the person in whose care the minor children are; and
- The nature and grounds of each claim and alternative claim.

The summons must be signed by the plaintiff or his/her legal practitioner and must state the address of the person who has so signed. A summons and other pleadings may be amended at any time before judgment. The divorce summons is served personally on the defendant by the sheriff of the court. A return of service must be produced by the sheriff stating:

- that the service has been duly effected and provide the date thereof; or
- that he/she has been unable to effect service and provide the reason for such inability.

In a divorce by default, i.e. where the defendant does not defend, a court must be satisfied that the summons was served personally.

Once the summons is served on the defendant, the defendant may, within the period stated in the summons, defend the action (i.e. contest the divorce) by delivering to the registrar and serving upon the plaintiff, at the address nominated by the plaintiff in the summons, a notice in writing that he/she intends to defend. The notice must be signed by the defendant or his/her attorney and must state the full address where the defendant will accept service of further pleadings and notices in the action.

If a divorce summons is not served within 12 months of the date of its issue or, having been served, the plaintiff has not, within 12 months after the date of such service, taken further steps to proceed, the summons will lapse.

DIVORCE**22. What is the procedure for contested divorce?...continue****Plea**

After serving a notice of defence, the defendant must, within 20 court days, deliver a plea. The plea must be dated and signed by the defendant or his/her legal representative. In the plea, the defendant must either admit/deny/confess/avoid all the material facts alleged in the particulars of claim, and must clearly state the nature and the grounds of his/her defence, including any exception that he/she may have to the summons.

The defendant should deliver his/her plea timeously. Essentially, the plea contains the basis of the defendant's defence, and the defendant may admit, deny, confess or avoid the allegations made in the summons and particulars of claim.

When a defendant fails to deliver a plea, the plaintiff may deliver a notice in writing calling upon the defendant to deliver a plea within 5 court days of the service of the notice (referred to as a 'notice of bar') and warning the defendant that his/her failure to do so will result in the case being set down without further notice. Furthermore, judgment may be given against the defendant in his/her absence.

Counterclaim

The defendant may deliver a counterclaim or claim in reconvention, setting out any counterclaim that he/she may have.

Plea to counterclaim and further pleadings

If the plaintiff intends to defend the claim in reconvention, he/she must deliver a plea to the counterclaim within 10 court days of delivery of the counterclaim. Once that is done, the pleadings are closed.

Application for and set down of trial date

The plaintiff then makes an application for a trial date, which the registrar will set down (allocate). If the plaintiff does not apply for a trial date within the prescribed number of days after the pleadings have been closed, the defendant may do so.

Usually, if a divorce is instituted in the High Court, the duration from start to finish can be up to three years. In the regional magistrate's court, the duration from start to finish will be shorter as the lower courts do not have the same trial backlog as the High Court.

DIVORCE

22. What is the procedure for contested divorce?...continue

Discovery of documents

In the period between close of pleadings and waiting for a trial date, there is a process called discovery, during which each party demands to see the documentation and other material like tape recordings the other party intends to use at trial. Our law does not allow documents to be brought to trial without the judge or magistrate's consent. Each and every document that a party will use at trial must be 'discovered', i.e. the other party must be given an opportunity to read the document before the trial commences. The documentation may include bank statements, shareholdings in companies, credit card statements, bond accounts and tax returns. It is usually during the discovery process that most of the hidden documents are found, as there are processes that can require specific documents to be brought forward.

An attorney may issue subpoenas to relevant financial institutions to deliver documents the other party failed to deliver. It often happens that at the commencement of the divorce, all the relevant documents disappear out of the house and the difficult task of following the paper trail begins. Often an attorney will advise a client to immediately make copies of all the relevant documentation that will be used later as evidence to prove the value of their spouse's estate.

After the close of pleadings either party may deliver a notice to the other calling on him/her to deliver a schedule (list) specifying the books and documents in his/her possession or under his/her control that relate to the action (case) and that he/she intends to use in the action or that tend to prove or disprove either party's case. The schedule, verified by affidavit, must be delivered by the party required to do so within a specified period of time stated in the court rules.

If privilege is claimed for any of the books or documents scheduled (i.e. if the party believes that he/she cannot be forced to disclose something), such books or documents must be separately listed in the schedule and the grounds on which privilege is claimed in respect of each must be set out. Each party must allow the other party to inspect and make copies of all books and documents disclosed or specified in a schedule delivered to them.

A book or document not so disclosed may not be used for any purpose at the trial by the party in whose possession or under whose control it is, without the leave of the court on such terms as to adjournment and costs as may be just. This means that if the other side needs time to read through and study the documents that were not disclosed before the trial, the court may adjourn the proceedings at the cost of the party that did not disclose the documents and rule that said party pay the wasted costs for the day. The other party may then call for and use such book or document in the cross-examination of a witness.

DIVORCE

22. What is the procedure for contested divorce?...continue

Further discovery and particulars

Further discovery is possible if a party believes that, in addition to the documents, books or tape recordings disclosed, other relevant documents or recordings may be in the other party's possession. If the whereabouts of such items are known, the party requesting them must state this in his/her notice for further discovery to the court.

Further and better discovery is a mighty weapon in a divorce proceeding to obtain additional information regarding a spouse's financial status. A major advantage is the fact that the party who receives the notice must reply under oath. Any false statements can lead to prosecution for perjury.

In terms of the court rules, a party may deliver a notice requesting such further particulars as are strictly necessary to enable him/her to prepare for trial, not less than 20 days before the trial. If a party does not adhere to such a request or fails to do so timeously and sufficiently, the other party may request for the case to be dismissed.

Pre-trial conference

The court may at any stage after close of pleadings, or at the request in writing of either party, direct that an informal conference be conducted in the presence of the judicial officer in chambers, in order to consider a settlement of disputes.

Trial

Trial proceedings commence with both parties or their legal representatives being given an opportunity to deliver an opening address, in which the court is informed of the issues that are in agreement and those that are in dispute between the parties. If, on the pleadings, the burden of proof is on the plaintiff, he/she must give evidence first. Where the burden of proof is on the defendant, the defendant will be first.

A witness who is not a party to the action may be ordered by the court to leave the court until his/her evidence is required or after his/her evidence has been given; or to remain in court after his/her evidence has been given, until the trial is terminated or adjourned. Any witness may be examined by the court as well as by the parties, and the court may decide to call a witness not called by either party if it thinks his/her evidence necessary in order to discover the truth or answer the question before it.

After both parties have given evidence, whoever went first may again address the court. The other party then has a chance and the party who went first may reply.

DIVORCE

22. What is the procedure for contested divorce....continue...?

Judgment

A divorce trial must culminate in the granting of judgment. The court may grant any of the following orders:

- judgment for a party in respect of his/her claim in so far as he/she has proved the same;
- judgment for a party in respect of his/her defence in so far as he/she has proved the same; or
- absolution from the instance if it appears to the court that the evidence does not justify giving judgment for either party.

Costs

In giving judgment or in making any order including adjournment or amendment, the court may award such costs as may be just. These costs may also be subject to taxation. While costs are generally awarded to the successful party, this is not an immutable rule. A court may decide not to award costs at all or may apportion the costs of the proceedings between the parties.

23. Which kind of experts may possibly be assigned during the contested divorce proceedings?

Dependant on the circumstances and issues in dispute, the following experts may possibly be employed:

- Clinical Psychologists or Childcare Experts
- Psychiatrists
- Forensic Accountants
- Actuaries
- Industrial Psychologists
- Valuation experts

24. What is an online divorce?

An online divorce, usually called an "internet divorce" is a divorce which begins with an online divorce application form. It is significant to remember that the final step will still be to appear in front of a Judge or Magistrate. In attorney-managed online divorces, the attorney will examine the application form, talk over the contents with the client, draft the appropriate documents and advise and assist the client through the particular steps. The attorney or his representative will be present at Court alongside the client to complete the divorce.

For an online divorce click [here](#).

DIVORCE

25. What is a DIY divorce?

Do-it-yourself ("DIY") divorces are usually divorces concluded without the help and support of an attorney. An excellent way to go is to make use of the iDivorce process at www.idivorce.co.za. The procedure commences online. The client will only get the divorce documents, examined by an attorney. The client will need to attend to almost all further arrangements at the Sheriff's office, Court and Family Advocate's office.

26. When is an online divorce advisable?

An online divorce, handled by an attorney or through the iDivorce process, is the ideal option when the divorce is uncontested and whenever at least one of the parties is domiciled (permanently residing) in South Africa. The online divorce process is commonly less costly than other kinds of divorce, swiftly and straight forward and effortless.

27. When is an online divorce never ideal?

If the divorce will undoubtedly be contested or the issues in dispute are extremely complex the online divorce process is perhaps not advisable.

28. What is an international divorce?

An international divorce in the South African framework is a divorce wherein only one party is domiciled in South Africa. Domicile does not mean that you have to live in South Africa. You can live abroad but still be domiciled in South Africa. In terms of the South African Divorce Act, a South African court will have jurisdiction where the parties or either of the parties are domiciled in the area of the court's jurisdiction on the date on which the action is instituted or ordinarily resident in the area of jurisdiction of the court on the date on which the action is instituted or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.

29. How long does an international divorce take to finalize?

Uncontested international divorces normally take about 2 – 3 months.

DIVORCE

30. What does the missing spouse divorce entail?

Substituted Service

Sometimes, married couples drift apart without ever getting a divorce, especially if they marry young or if the marriage was one of pure convenience. It often happens that neither spouse really bothers exactly where the other is until one of them starts thinking about marrying again and realises that there is some paperwork to be done. After all, to marry you have to be unmarried, otherwise you may be charged with bigamy. If you don't know where your spouse is, and hence cannot serve a divorce summons on him/her in person, you may divorce through a process called substituted service.

The Process

Substituted service is permitted when the defendant's exact whereabouts are unknown. In this instance, an application is made to court for substituted service, usually before the divorce summons is issued. The plaintiff must show in an affidavit that every possible attempt has been made to locate the defendant, indicating the steps taken to ascertain their whereabouts, and that the alternate method of serving the summons is likely to come to the defendant's attention. Before applying for substituted service you will have to at least:

- find the defendant's last known address (you will have to tell the court how, when and from whom you obtained it);
- check at that address - if the people living there have no information about the defendant's whereabouts, ask the neighbours;
- ask every relative, friend, former employer, and any other person you think might know where the defendant is (you will have to submit a written summary of your efforts in your affidavit to the court, listing the names, dates and results of your enquiries);
- search for the defendant online, using search engines such as Google and social networking sites such as Facebook and Twitter; and
- appoint a tracing agent, if all other avenues are exhausted.

You will use this information to show the court that you can't serve the summons on the defendant personally and that you are therefore entitled to obtain leave for substituted service. If a proper case is made, the court may then order any manner of service it deems appropriate, such as publication in a newspaper, service on family members or friends, by fax or email, or even through a social network like Facebook. This method of alternative service will depend on the facts of the case. The court will also determine the time period within which notice of intention to defend must be given.

DIVORCE

31. What is a divorce by default?

A default divorce is a form of uncontested divorce. A court will grant a divorce by default if you serve a divorce summons on your spouse and he/she does not respond. In a default divorce, the plaintiff prepares a summons setting out his/her claims with or without the help of an attorney. A court issues the summons and a sheriff serves the summons on the defendant.

The summons specifies the number of days in which the defendant has to file a notice of intention to defend, i.e. contest the divorce (10 days when the parties live within the jurisdiction of the court or 20 days if they live in different provinces). If the defendant does not answer by way of a notice of defense within the allotted time, the plaintiff may approach the court to enroll the divorce on the court roll and conclude the divorce on the defendant's default. In such a case, only the plaintiff appears in court.

32. What is the meaning of a marriage "in community of property" ?

A marriage in community of property is undoubtedly the cheapest and most popular form of all the matrimonial regimes, although deeply flawed. No antenuptial contract is required, so if you marry without an antenuptial contract, you will by default be married in community of property. In this form of marriage, the spouses' estates (what they own/assets and any debt/liabilities) are joined together and each has the right of disposal over the assets; they are equal concurrent managers of the joint estate. Each has an undivided or indivisible half share of the joint or communal estate.

33. What is the meaning of a marriage "out community of property without the accrual system"?

This form of marriage becomes effective when the parties enter into an antenuptial contract. This is a contract entered into by both parties and sets out the rules and conditions in respect of the division of assets, and which will apply during the marriage.

In the case of marriages out of community of property without accrual, the property owned by a person prior to the marriage, as well as all property accumulated during the marriage, belongs only to that person.

The same rule applies to liabilities. Each party's debt remains his or her responsibility. Consequently, each party may deal arbitrarily with his or her estate in a will.

DIVORCE

34. What is the meaning of a marriage “out community of property with the accrual system”?

In terms of this marital regime the difference between the net increases in the respective estates during the duration of the marriage is divided equally between the two parties when the marriage is terminated.

The calculation of the accrual can briefly and commonly be summarised as follows: It is important to determine the value of the estate at the time the marriage is contracted, for example R1m, and the value of the estate at termination of the marriage, for example R1.5m.

The amount by which the estate has increased (in this case R500 000) is then deemed the accrual.

The exact same calculation must be done for the other party to the marriage.

Say the value of the accrual (as calculated above in the other party's estate) is R300 000. The difference in accrual between the estates of the two parties is therefore R200 000 (R500 000 less R300 000).

The party whose estate accrued by the lesser amount will then have a claim against the other party's estate for half of the difference in accrual: therefore R100 000.

The accrual will therefore be divided equally (R300 plus R100 000 = R400 000 for the one party and R500 000 less R100 000 = R400 000 for the other party in the marriage).

Particular assets are excluded from the accrual in terms of the Matrimonial Property Act. These include, for example, the following:

- An inheritance received during the duration of the marriage;
- Donations made between the parties during the duration of the marriage;
- Assets explicitly excluded in terms of the conditions of the marriage contract.

35. What will happen to the children upon divorce?

Care and contact arrangements should be decided upon by both the parents. If no agreement can be reached, the Court will make a decision after evaluating the details of the matter as well as the suggestions by the Family Advocate, clinical psychologist and/or childcare specialist.

DIVORCE

36. What is a parenting plan?

The Children's Act offers parenting plans as a means to assist parents with how to exercise their parental responsibilities and rights following separation or divorce. Parenting plans are a fairly new concept in South Africa, but are already well-known in countries such as the United States and Australia, and in certain European countries. A parenting plan sets out how parents will exercise their respective responsibilities and rights. It must conform with the best interests of the child principle as set out in the Act, and must be in terms of a prescribed form and include the following issues:

- where and with whom the child is to live;
- the maintenance of the child;
- contact between the child and any other person; and
- the schooling and religious upbringing of the child.

A parenting plan is essentially a roadmap guiding how children will be raised after separation or divorce. As a co-parenting solution, it is a written agreement drafted by both parents with the help of a neutral third party, usually a social worker, psychologist or family lawyer, acting as a mediator. The Act requires that children also be consulted when such a plan is drafted so that they have an opportunity to give their input on who they wish to live with, how much time they wish to spend with each parent and where they wish to spend special occasions, as well as any other areas in which they feel they should have a say. The age of the child will determine the level of input allowed/required. Once the plan is finalised, it is signed by both parents. Parenting plans need to be continually reviewed, as children's developmental needs change over time. Reviews can range from every six months to every two years, depending on the child's age.

37. Who is the Family Advocate?

The family advocate assist parents in divorce proceedings to reach an agreement on disputed issues, namely care, contact and guardianship. If the parents are unable to reach an agreement, the family advocate evaluates their circumstances in light of the best interests of the child and makes a recommendation to the court regarding care, contact and guardianship.

The family advocate cannot be subpoenaed to court as a witness to give evidence on behalf of a parent, even if his/her recommendation was in favour of that parent. The recommendation is supposed to help the court in deciding a matter and arriving at a particular order. The recommendation by itself is not enforceable unless of course if it is incorporated in a court order.

In addition, as an neutral institution, the family advocate can't act as a legal representative for either parent. Their services are performed free of charge; however, parents may be required to obtain forensic evaluation or testing at their personal expense.

DIVORCE

38. What is the function of the Family Advocate in uncontested divorce proceedings?

In the framework of an uncontested divorce process, the Family Advocate does need to agree to the parenting plan in front of a Judge or Magistrate will grant the divorce.

39. What is the function of the Family Advocate in contested divorce proceedings?

In instances where there are disagreements concerning care and contact of children, the Family Advocate assists the parents to arrive at a desirable agreement.

The Family Advocate will examine the circumstances by doing interviews with the parents and occasionally the children involved. This will provide the children the opportunity to be listened to in a child-friendly space without having having to appear in Court.

The Family Advocate will use the information and facts gained to make suggestions that are in the best interest of the children.

40. Are the Family Advocate's recommendations enforceable ?

Until a recommendation is incorporated in a Court Order, it is not enforceable. The recommendations are only intended to assist the Magistrate or Judge who deals with the matter.

You are always entitled to employ your own child care expert if you are not in agreement with the recommendations of the Family Advocate.

41. Exactly how much does the Family Advocate charge for its work?

Family Advocates are employed to work for the Department of Justice and Constitutional Development of South Africa. Their services are totally free of charge to the public.

DIVORCE

42. What factors will impact the amount of maintenance?

Numerous factors such as affordability, the parent with whom the children spend most of their time, the standard of living and the children's ages will affect what is considered to be a reasonable maintenance amount per child. If the parties/parents can't come to an agreement on the monthly maintenance amount per child, the Court will have to give consideration to the above-mentioned factors to make a reasonable order. When it comes to maintenance, the law is fairly straightforward. It is in the application of the law that difficulties lie. One of the basic principles of child maintenance is that the extent of the obligation is based on the standard of living, income and means of the person/s obliged to pay.

The obligation does not rest solely on the father; it rests on both parents, according to their respective means. The fact that the father can adequately support the child on his own does not mean that the mother can avoid contributing. In fact, it would be contrary to public policy and invalid to insert a clause into a divorce settlement agreement stating that only one parent need maintain the child. Once a child has reached the age of 18, a parent cannot claim maintenance on their behalf. The child must institute action in his/her personal capacity. The fact that a child is visiting a parent temporarily does not entitle that parent to suspend or reduce his/her maintenance during that period, unless a court order contains a specific provision to the effect that this may happen.

43. Is it mandatory to pay maintenance?

Yes, it is mandatory to pay maintenance.

44. How frequently should maintenance be paid?

The maintenance money should be paid each month on the dates agreed upon by both the parties and granted by the court.

45. Until when must a parent pay maintenance for his/her child?

The duty to pay maintenance continues despite of the child's age, and endures until the child is self-supporting, adopted or dead. Once the child reaches the age of 18 years, the onus is on the child to prove how much maintenance he/she needs. A child that is self-supporting cannot claim maintenance from his/her parents. The duty to support a child ends at the child's death but not at the parent's death. In the event of the parent's death, the child may lodge a claim for maintenance against the deceased parent's estate.

DIVORCE

46. Can I withhold maintenance payments if I am denied contact to my child?

Your view of the other parent's behaviour has no effect on your child's right to maintenance. You still have to pay maintenance, even if the other parent:

- remarries;
- is involved in another relationship;
- does not allow you to see the child; and/or
- later has more children.

Your duty to pay maintenance and your right of contact to your child are two entirely separate matters, and one has no relation to the other.

47. Is there an obligation on grandparents to support a child?

It is acknowledged in our law that if neither parent can support or maintain the child, the duty passes on to the grandparents, both maternal and paternal. In circumstances where a father/mother does not pay maintenance to his/her child, the parent holding primary care of the child may lodge an application against the paternal/maternal grandparents.

48. Will a child have a maintenance claim when a parent passes away?

The child will have a claim against the deceased parent's estate. The child's claim enjoys preference over heirs but not creditors. A child's claim only exists in so far as he/she is unable to maintain him/herself, so if the child receives an inheritance that is large enough to meet the his/her needs, he/she cannot claim maintenance from the deceased parent's estate.

49. What will happen if the child reaches the age of 18 and she/he is still not self-supporting?

The payment of maintenance will continue until the child is self-supporting. Nevertheless, the maintenance payment should be deposited directly to the child's banking account.

50. Can I increase/decrease the maintenance amount after the order has been granted?

Yes, you can apply to the courts for a reduction, but this will be subject to a financial investigation to determine if the applicant really can no longer afford to pay the amount in terms of the order. The other party's circumstances, which may have changed, will be taken into account.

DIVORCE

51. What factors will a court consider when awarding post-divorce spousal maintenance?

Section 7(2) of the Act deals with the factors that a court will take into consideration when awarding maintenance. These factors also come into play when maintenance is negotiated between the parties or during a mediation process which precedes the drafting of a settlement agreement between the parties.

- The existing or prospective means of the parties.
- The respective earning capacities of the parties.
- The financial needs and obligations of the parties.
- The age of each party and the duration of the marriage.
- The parties' standard of living during the marriage
- The conduct of the parties in so far as it may be relevant to the breakdown of the marriage.
- Any other factor.

The following factors are among those that have been considered by our courts:

- The best interests of the spouses children;
- The childcare responsibilities of the dependent spouse;
- The high rate of inflation;
- The way in which each party conveyed his or her financial position and needs.

52. How to calculate the amount of a spouse's monthly maintenance needs?

Once it has been established that spouses entitled to maintenance section 7 (2) of the Act will determine the amount and duration of the maintenance. A study in England of divorce cases indicates that maintenance orders usually range between 14% - 34% of the maintenance debtor's income. There is however no formula in South Africa that one can use. The first step to determine the needs is to draft an income and expenditure for each of the parties. In cases where minor or dependent children have to be maintained by the divorcing parties it is impossible to calculate the parties monthly maintenance needs in isolation. Therefore one must include in the budget each party's specific expenditure in respect of the children.

The spouse with whom the dependent children will reside will obviously have more expenses in respect of the children. As a rule of thumb certain household expenses which are incurred for the benefit of both the care-giving parent and the children, such as bond installments, water and electricity accounts, and groceries, should be shared by apportioning one part to very young children in two parts to each of the older children and to the particular spouse. For example, if the care giving parent has three children, aged 4, 12 and 22, that reside with him or her, the youngest child will be allocated 1/7 of such expenses and the older children and the parent 2/7 each.

Other specific individual expenses which cannot be apportioned between family members, such as creche, school or university fees, the cost of extramural and/or recreational activities, club and professional membership fees should be allocated in full to the relevant child or spouse.

Maintenance payments is after-tax income and should be included in the expenses list. Although maintenance payments are deemed to be the income of the maintenance recipient in terms of the definition of "gross income" in the Income Tax Act 58 of 1962, they are simultaneously exempted from taxation.

DIVORCE

53. What is the difference between rehabilitative maintenance and lifelong maintenance?

Rehabilitative maintenance is for a specific, fixed period only. The fixed period cannot be reduced or prolonged.

Permanent / lifelong maintenance is payable from date of divorce and commonly on a monthly basis up until such time when the recipient of the spousal maintenance passes away.

54. What is a Dum Casta clause?

The so-called dum casta clause is a passage in a divorce settlement agreement which specifies that the spousal maintenance responsibility will end once the other party remarries or lives with each other as husband and wife with another person.

55. Must my spouse carry on to maintain me financially throughout the divorce process?

Absolutely Yes. If your spouse maintained you financially throughout your marriage, he/she should carry on doing so pending divorce litigation.

56. Would it be likely to change the spousal maintenance amount after divorce?

Except if there is a particular provision in the divorce order explicitly excluding this right, either/both of the parties may approach the Court subsequent to divorce to request that the spousal maintenance commitments be varied or even discharged. To be successful with such application, dramatically varied financial circumstances will have to be proven.

57. What should I do if my spouse stops maintaining me during divorce and I am left with no funds?

When a divorce is taking a long time to finalise or when one of the spouses is a homemaker with no income, the law provides a mechanism that can be used to assist spouses during a divorce to provide for the interim period until the divorce is finalised. Rule 43 of the High Court and rule 58 of the magistrate's court provide an interim measure to help an applicant quickly.

58. What is a Rule 43 Application?

In the law, this is called interim relief. Rule 43/58 can be used for one or more of the following:

- interim care or contact with the child;
- maintenance for the wife and/or children;
- enforcing certain payments, such as for the bond on the matrimonial home, vehicles, school fees, medical aid premiums and even deposits on new accommodation and relocation costs;
- interim contribution towards the costs of the divorce and legal fees; and/or
- an order for delivery of a car, furniture, etc.

DIVORCE

59. What does the Rule 43 procedure entail?

The spouse seeking an interim relief order (the applicant) will file a notice and affidavit (referred to as a founding affidavit) with the court setting out the facts relating to the divorce and why the spouse is of the opinion that he/she is entitled to relief from the spouse against whom relief is sought (the respondent).

The applicant will need certain prescribed documentation to lodge an application for interim relief, including:

- a notice in terms of rule 43/58, requesting the respondent to file an opposing affidavit within 10 days;
- an affidavit accompanying the rule 43/58 notice; and
- annexures proving income, expenses, assets, etc.

60. Can I claim a contribution to my legal costs from my spouse?

Often one party, usually the wife, will not be in a position to institute or defend a divorce due to a lack of financial means. Rule 43(1) and (6) provides a mechanism whereby a party can claim a contribution to legal costs at the commencement or prior to the divorce proceedings and two or more such applications can be made before the first date of trial.

An applicant must be put into a position to present his/her case adequately and if one party for example embarked on litigation on a luxurious scale by paying exorbitant amounts to his attorneys a court will assist the other party. In exercising its discretion in the determination of the amount of the contribution towards costs to be awarded, the court is bound by section 9(1) of the Constitution, Act 108 of 1996, to guarantee both parties the right to equality before the law and equal protection of the law - the equality of arms.