

THINKING OF

# DIVORCE

THINGS THAT YOU SHOULD KNOW  
**BEFORE YOU START**



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**e-divorce**  
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## 1. INTRODUCTION AND SOMETHING ABOUT THE AUTHOR

*"In everything we do, we believe in challenging the status quo. We believe in thinking differently, out of the box. The way we challenge the status quo is by making our services evolve around you, the client, being innovative in our thinking, supportive, fair and being part of the solution when the challenge of a divorce presents itself. We just happen to be great divorce attorneys as well. "*

Having been in legal practice for nearly two decades, I have been confronted with numerous questions that clients usually ask during or even before a first consultation. This e-book is a result of those questions to shed some light on this journey you are about to embark.

The divorce laws in South Africa might be complex and difficult to understand at times, but rest assured that we will guide you through these challenges to ensure that your rights are protected, that you are treated fairly and to reach that win-win situation: after all, at one stage or another your (soon to be former) spouse was exactly what you needed. But needs change and life goes on, so when the “I do” changes into “I don’t”, we will be here for you every step of the way.

After reading this e-book, you will be familiar with amongst other things:

1. The road forward and the steps that you would need to take to start the divorce proceedings;
2. You will be afforded the opportunity to choose (with legal guidance) the route you want to follow in the divorce proceedings being “**contested**” or “**uncontested**”;
3. You will gain some insight into which courts to use, how long it would take, the differences between DIY divorces and online divorces;
4. You would have some understanding as to your rights and what you are entitled to after the divorce;
5. Should there be minor children we would assist with a **parenting plan**, explain the role of the **Family Advocate** and offer assistance in claiming maintenance (now and in the future).
6. You would have a deeper understanding of the divorce procedures and how to equip yourself with all the necessary information to make this journey as unhampered as possible.



About the author: Eugene Opperman is the founder of Oppermans Inc which was established in 2000. Prior to his admittance as attorney of the High Court he graduated at UFS obtaining a B.Proc. degree and subsequently his LL.B. degree through UNISA. Post graduate studies include an Advanced Diploma in *Medicina Forensis* and an Advanced Diploma in Business Rescue Management. He is a Commissioner of the Small Claims Court (Helderberg) and a Court Annexed Mediator (Civil- and Commercial). He has strong ties with the community doing *pro bono* work at the Rape Crisis Centre and many other NGO's.

And finally.... He is an (ex) divorcee and have gone through the process personally.



## 2. GENERAL QUESTIONS

### 2.1 Does every divorce end up in a fight?

Due to the human dynamics between people it is almost impossible to predict how any divorce will go until it is done. Practice and experience has taught us that divorces are usually 80% emotional, 10% financial and only 10% legal. Being impartial, we can look from the outside in and assist the parties with guidance so that your divorce is finalised more effortlessly.

### 2.2 What if I do not want a divorce?

The days when you needed consent from both spouses to divorce are long gone. So are the days when you had to prove that your better half was the cause for the breakup or to prove that there was some kind of infidelity or funky monkey that you knew nothing about. If you find yourself in a situation where you really do not want a divorce, you can prolong the agony by playing for time or just incur more costs, but you can't stop it. As long as one spouse avers that the marriage has been irretrievably broken down, the Divorce Court would grant the divorce.

### 2.3 Do I have choices when it comes to divorce?



Nowadays married couples have some form of choice as to the manner in which the divorce will be done. All roads lead to Rome they say and all will eventually end up in an Order of Divorce, but how you get there might differ. Here are some options that you have:

#### 2.3.1 Negotiation

Just remember that at one stage your spouse was the person that you desired to have in your life, so if at all possible you should attempt to negotiate a settlement directly with him or her. Once you have reached some form of middle ground, you could have an attorney draft the settlement agreement. This might be a good idea because there might have been some things (legally) that you were not aware of such as taxes in the event that you own a property together, outstanding debt and pension entitlement and related issues.

#### 2.3.2 Mediation

When every conversation with your spouse turns into a Greek Satire Play or a screaming contest, it might be wise to opt for mediation. During mediation both parties will have the opportunity to have their say in front of an unbiased (and non-emotional) mediator. The mediator does not take sides and there is no judgment or verdict at the end. The main goal of mediation is to guide the spouses within the framework of the law to make them reach their own settlement. We found that mediation before the final separation will not only speed up the divorce process but will leave both spouses with some dignity and hopefully some understanding of where things had gone haywire.



#### 2.3.3 Collaborative divorce

This is fairly new in South Africa and we have completed this a number of times with great success. This is where you and your spouse works with divorce attorneys, divorce coaches or psychologists, financial professionals and child specialists (if needed) to help you resolve your divorce issues before it goes to court. Once an agreement is reached, the attorneys draw up the settlement and all court documents and guide you through the court system to finish your divorce. Because so many people might be involved, this could turn out very expensive.

### 2.3.4 Arbitration

This is where the parties hire an impartial arbitrator (usually someone with a law degree and understanding of the law pertaining to divorce). The arbitrator acts as a “judge” in the matter and gives his decision at the end. The attorney(s) will then include the arbitrator’s decision in the final court documents and draft all documents for Court.

### 2.3.5 Litigation



The final stage of a divorce is battled in a Divorce Court. This is the traditional way where you (and your spouse) need to go to court and present evidence that the marriage has been irretrievably broken down. Experience has taught us that very little matters eventually end up being a full-on trial and the parties usually settle before the matter escalates to litigation.

## 2.4 What types of divorces are there?

There are two main types of divorces: uncontested divorce (basically a divorce without a fight) and contested divorce (divorce where the attorneys and/or parties fight it out in court). These main types can take on various forms, which might include: online divorce, divorce where one of the parties are overseas, the DIY divorce and the divorce where you have been separated for so long that you don’t know the whereabouts of your spouse.

## 2.5 What are the grounds for divorce?

The Divorce Act of 70 of 1979 introduced 3 grounds for divorce:

- Irretrievable breakdown of the marriage (*this is the norm that is being used every day*)
- Continuous unconsciousness of a spouse (rarely used)
- Mental illness of a spouse (rarely used, unless your spouse is in a mental facility)

## 2.6 What is an “irretrievable breakdown”?

To get a divorce you need proof that your marriage is not working any longer. Irretrievable breakdown is referred to as a marriage relationship which is permanently broken down and believed to be beyond repair. A marriage may break down for multiple reasons, many of which will not involve wrong-doing by either party. Frequent reasons for divorce are emotional, verbal, sexual or physical abuse of yourself or of your children, alcohol or drug abuse, a lack of communication between the parties or the fact that you no longer love with your spouse.

And again, yes, it is enough to allege that you no longer love your spouse to create the basis or grounds for divorce. You must remember that you will be expected to give oral evidence in Court regarding the reasons for the breakdown which you have alleged to.

There are many ways a marriage can reach irretrievable breakdown:

The Divorce Act lists some of these circumstances in Section 4(2): when one spouse is a habitual criminal, if your spouse is in prison, mental illness, assault, cruelty or domestic violence, living apart for more than one year, malicious desertion or even alcoholism or drug addiction.

## 2.7 My spouse is cheating on me.

Adultery in itself is not a ground for divorce, but if you can prove that living together has become intolerable as a result of it, it will satisfy the court.



## 2.8 What documents are required to file for divorce?

The following documents will usually be requested by your divorce attorney:

- Proof of Your Residential Address
- Copy of Your Ante nuptial Contract (if any)
- Your Marriage Certificate (an original and not a copy)
- Copy of Your ID Document and/or Passport

## 2.9 Is it possible to finalize a divorce without an attorney?

It is possible, however due to the nature and complicity of the divorce process it is highly recommended to have a legal representative oversee the process to ensure all steps are finalized. Moreover, when it comes to your entitlement to benefits such as pension funds and joint custody of kids and maintenance, it would be advisable to have someone with legal knowledge on your side to make sure that everything is divided fairly.

## 2.10 At which Court will my divorce be heard?

The Regional Court and High Court with jurisdiction within the nearest proximity of where either of the parties is *domiciled* (permanent residence), will have jurisdiction to hear the divorce.

## 2.11 Can I get a divorce without going to Court?

Not always; in the case of uncontested divorces, only one party will need to appear at the hearing. However, a contested divorce (where the matter goes to trial before a judge or magistrate) will always take place in court – this sometimes happen when the parties does not agree on certain provisions or conditions that the other spouse has - and then it is up to the judge or magistrate to decide. Practice has shown that in 99% of the contested cases it usually is about money, where the parties do not agree on who gets what and who is entitled to what.

## 2.12 Who will get the engagement ring after divorce?



The engagement ring is viewed as a gift and thus, the giver of such a gift has no claim on the engagement ring. Although uncommon, an agreement can be reached in which the giver of the ring may have it returned to them. However this must be agreed upon by both parties involved. This should be clearly stated in the divorce settlement agreement.

## 2.13 What is a “roundtable meeting”?

You will in all probability hear this phrase when your other half is legally represented. This is simply a meeting of the divorce parties and their legal representatives (Attorneys and sometimes Advocates) to discuss a settlement or possibility of a settlement which takes place in a neutral space such as a boardroom or office.

## 2.14 Who is who in these proceedings?

The *Plaintiff* is the person who starts the proceedings by means of issuing summons on their spouse. His/her name will be mentioned first on the Combined Summons, further formal court documents and notices. In divorce proceedings, the *Defendant* is the Plaintiff's spouse. Just to clarify: the stigma that the person who sues the other party is in a better position than the person being sued is totally not true.



### 2.15 What is a divorce settlement?

This is a document drafted by the attorneys (usually) that explains how the parties have reached an agreement. The main issues in a divorce settlement are usually division of property, maintenance, and custody of the children. It is always advisable to reach a settlement with your spouse as this will save you both a lot of time, money, and energy. Reaching a compromise regarding how to divide the property, maintenance, and custody is prudent as this will shorten the court process. Both parties must sign this settlement, and the court will then make it an order. This will mean that if either party does not abide by it, you could be found guilty of contempt of court, and could be jailed.



### 2.16 What needs to be discussed?

If you and your spouse are on speaking terms (which could also include e-mails or *whatsapp* messages) then the divorce proceedings could be fast-forwarded if the parties could discuss and agree on the following:

- Possibility of reconciliation (maybe with professional help)
- Division of assets (house and furniture and everything of value)
- Primary care of the minor children
- Contact with children (a parenting plan could be drawn up later)
- Maintenance for children and, if needs be, spousal maintenance.

### 3 THE UNCONTESTED / UNDEFENDED / UNOPPOSED DIVORCE

#### 3.1 What is an uncontested or undefended divorce?

An uncontested, undefended or unopposed divorce is where both parties want a divorce and are willing to agree to the terms thereof. These terms give shape to an agreement called a settlement agreement, wherein the division of property, the care and contact arrangements in respect of the children, and maintenance obligations are clearly stated and agreed upon. This is the most amicable divorce option and rule out any fighting or disagreements – the parties talk to one another and come to some kind of agreement that suits them both. A settlement agreement is drafted which forms part of the court documents and only one of the parties need to appear in Court.

#### 3.2 How long will I be in Court?

If all goes well and all documents are in order and if the matter is uncontested or undefended, you may expect to be in Court for about 5 minutes (or less).

#### 3.3 What question will I be asked in Court?

Typically you will be asked the following questions in Court:

- Your full names and residential address
- Confirm the date and place of marriage and that the marriage still exists (this is where you hand up your marriage certificate)
- Confirm if there are any children born out of the marriage and their ages (we'll address this later on in a later chapter)
- State that the marriage has been irrevocably broken down in that the parties do not love one another, there are no communication, verbal and/or physical abuse (this is very general and you do not need to go into detail)
- Confirmation that you and your spouse signed the settlement agreement and that you wish to make the agreement an Order of Court



#### 3.4 How long does it take to get an uncontested divorce?

A local, uncontested divorce, can be finalized in as little as 4 - 7 weeks from date of signing the divorce papers, depending on individual circumstances and if the matter becomes contested due to dissatisfaction of terms by the defendant. The drafting of the documents and the serving of the documents are usually done within a week or two and the time delay usually lies with the next available date that the court can hear the matter. As South Africa has one of the highest divorce rates, Courts are literally flooded with divorce matters and the lead time for the next available Court date may well be within the far future with some very busy Courts.

#### 3.5 What happens if my spouse does not want to sign the divorce papers?

In many instances your spouse will informally agree to some of the conditions, only to change his/her mind after a day or two before the settlement agreement is signed. Contacting your divorce attorney is the first thing you should do before engaging with your spouse in any form of confrontation or conflict due to their reasons for not signing. If circumstances call for it the following options are on the table to resolve this issue:

- Roundtable Meeting
- Divorce Mediation
- Issue summons on a defended / contested basis
- Continue to the next step of the contested divorce process

### **3.6 What steps should be taken to start an uncontested divorce?**

The 4 basic steps for the uncontested, online divorce process:

- 1: Complete the divorce application form.
- 2: Pay the deposit.
- 3: Sign the divorce papers.
- 4: Attend the Court for hearing

## 4 THE DEFENDED / CONTESTED / OPPOSED DIVORCE

### 4.1 What is a contested or opposed divorce?



Your spouse cannot, just because he or she does not want to get divorced, contest or defend the matter because they “think” that there might be a chance of reconciliation. As said before, as long as one party feels that the marriage has been irrevocably broken down, the Court would usually grant the divorce order. Sometimes emotions get the overhand and a party opposes the divorce proceedings out of spite, but once the realization of the huge and exorbitant costs hits, he/she is usually quite eager to settle the matter. If you and your spouse don’t agree to the terms of the divorce, the contested divorce process will be the next step in the process of finalizing your divorce. A contested divorce is more complicated, drawn-out and costly than an uncontested divorce. In most contested divorces both parties will have attorneys and even Advocates to assist them with the paperwork. After the pleadings and discovery phase (where all the documents are shared), the attorney of the plaintiff will apply for a court date. If no settlement can be reached, pre-trials and the final trial before a judge or magistrate will follow together with evidence that needs to be led.

### 4.2 On what basis can a divorce be contested or opposed?

No Court would ever force parties to stay together, even if one of the parties does not want to get divorced. However, practice has taught us that in two main issues which run to trial are (a) the disputes of primary care of any minor children and (b) the division of marital assets – these would be valid reasons for opposing or defending a divorce matter.

### 4.3 How long does it take to get a contested divorce?

Contested divorces can take many weeks or months or sometimes years to reach the divorce trial stage. This is because of the overcrowded Court rolls of matters that are brought before Court. The divorce trial itself usually only takes a couple of days, however most, if not all, cases settle before reaching the final trial stage.

### 4.4 What is the cost of a contested divorce?

Contested or defended divorces are charged in accordance with the divorce attorney’s hourly rate or the prescribed tariffs of the Courts. 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. This is an expensive route to follow in order to get divorced and in all probability the average of such an account (which you will have to pay) could be anything from R10 000 to R50 000 or more.



### 4.5 If the matter is defended, do we have to go to trial?

It is never too late to settle a divorce and all attempts should be made to bring the divorce to an amicable end even on the day of the trial. At any time the parties could agree and a settlement drafted and signed by both spouses and the magistrate or judge could be requested to make the settlement an order of court.

### 4.6 Which steps should be taken to start a contested divorce?

Contact a divorce attorney to arrange a consultation. Avoid online divorce processes.

## 5 THE ONLINE DIVORCE AND THE D.I.Y. DIVORCE

### 5.1 Do you qualify for an online or D.I.Y divorce?

The short answer is that if you live in South Africa and you and your spouse agree on the settlement terms of the divorce, there are no disputes regarding your children and you are prepared to do all the admin yourself, you might qualify for these types of divorces.

### 5.2 What is an online divorce?

Also referred to as an “internet divorce”, an online divorce is a divorce process that begins with an online application form. This is basically a questionnaire that you need to complete in order for the reputable company and/or legal firm offering the online service to finalise the documents that starts the divorce process. Usually a qualified divorce attorney will scrutinize the legal documents (summons and/or settlement agreement) pursuant to the application form and then discuss the contents with the client (via email, telephone call, Skype or in person). The attorney will guide the client through the specific steps that needs to be followed, such as delivery of documents, and the timeframe of the divorce. With an attorney-assisted online divorce, the divorce attorney or his/her representative will attend Court with the client to finalize the divorce. Although much is done online and via e-mail, the final step of the online/internet divorce will still be in front of a Judge or Magistrate.

### 5.3 What is a DIY divorce?

The Do-it-yourself (“DIY”) divorces are divorces processed and finalized without the assistance of an attorney. These DIY processes usually start online; from there the client will only receive generic, default divorce papers, none of which are drafted by an attorney. The client will have to follow up on the process by attending all further arrangements at the Sheriff’s office, Court and Family Advocate’s office.

### 5.4 What are the benefits of an online divorce?

In today’s day and age things happen very quickly and mostly via electronic means. Why would you need to attend to an attorney’s office for a formal consultation when it could all be done online or via e-mail? An online divorce, overseen and handled by an attorney, is the recommended option when the divorce is uncontested and where an agreement has been made between the parties (settlement reached) and when at least one of the parties is domiciled (permanently residing) in South Africa.

On the whole the online divorce process is usually:

- Less expensive than any other forms of divorce
- Fast and simple as the parties agreed on the division of the assets and the care of the minor children (if there is children)
- Very convenient as much of the paperwork is e-mailed to you and could be signed at you leisure and even after hours



### 5.5 When is an online divorce not recommended?

If the divorce will definitely be contested or defended, the online divorce process is not recommended and you are advised to contact an attorney to assist you.

### 5.6 What steps should I take to start an online divorce?

Start your online divorce by completing an online divorce application form at [www.e-divorce.co.za](http://www.e-divorce.co.za)



### 5.7 What are the dangers of getting a divorce without an attorney?

While handling your own case might seem like a great way to save time and money, unless you happen to be a divorce lawyer yourself, you probably have NO idea how the divorce system works. That's a problem. No matter how smart or educated you are, the divorce system is unlike anything you've likely experienced before. It's full of rules, forms, and paperwork. Mess any of these things up, and you may end up paying a hefty price or being screwed out of what you are legally entitled to. Should you opt for a Walton's or CNA or internet template to be divorced by numbers, it might be a good idea just to consult with an attorney at least once before you complete these documents to find out what your rights are.

### 5.8 Getting the divorce forms at Court and doing it myself – is that an option?



Of course that is an option (it might not be the best option, but it is an option). Some courts have a roneo or template form of divorce that you can fill out to start the divorce proceedings. This is all good and well..... Until you run into the legal jargon and complexities of the court structures and rules of court. The pitfalls of formulating pleadings on precedents are eloquently stated by the Honourable Harms JA as follows:

*"pleadings and love letters have much in common. They are both personal and reflect somewhat of the author's personality. To use precedents in both instances can be dangerous because precedents tend not to be applicable to the facts under consideration. Both explain the position of the parties involved. If too much or too little is said, problems may arise. On the end of the day they provide embarrassing evidence of the original intent of the author".*

## 6 DIVORCE WHEN A SPOUSE IS MISSING OR HIS WHEREABOUTS UNKNOWN OR OVERSEAS

### 6.1 What does the “missing spouse divorce” entail?

In the unfortunate case of a missing/absent spouse, an additional application will be required before regular divorce processes will commence. In this application, the applicant must show evidence of the search for the missing spouse and use this to convince the Judge/Magistrate to issue an order for the divorce summons to be served in an alternative manner. This is called substituted service. Before applying for substituted service at Court you will have to at least do the following:

- Find the spouse’s last known address (take note of when and from whom you obtained it) and then check at that address – if the people living there have no information about the defendant’s whereabouts, ask the neighbours;
- Ask every known relative, friend, former employer, and any other person you think might know where the spouse is (keep notes of your efforts in your affidavit to the court, listing the names, dates and outcome 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.



When such an order has been granted, the divorce process will begin. The divorce papers will be served in the manner the court may decide, such as publication in a newspaper, service on family members or friends, by fax or email, or even through a social network like Facebook and the Defendant will have the opportunity to defend the divorce. If the Defendant defends the divorce, the contested divorce process will be followed. If the Defendant never appears or gives notice to defend, a default divorce will be granted.

### 6.2 What if my spouse is living overseas?

An international divorce in the South African context is a divorce where only one party is domiciled (permanently residing) in South Africa and the other spouse is living abroad. For obvious reasons this might cause some problems as documents need to be signed. The biggest problem however is when the whereabouts of the spouse living abroad are vague or not sure – then one needs to approach the court by way of an “edictal citation” application. This gives the plaintiff permission to serve the divorce summons on a spouse in a foreign country, but only after the court is satisfied that there is no other way to serve the summons and that service of the summons will be done properly by an official of the court in the foreign country. If you and your spouse are still on speaking terms and could come to an agreement or settlement, you could have a settlement drafted and signed by the spouse abroad and have the original documents sent to you via courier – the matter can then proceed as if uncontested or unopposed.

### 6.3 How long does an international divorce take to finalize?

Uncontested international divorces usually take about 3 – 6 months as one needs to bear in mind the speed of the courier services, the Sheriff’s workload and the Court’s recess schedule. Contested international divorces can take many months, even years, to finalize.

#### **6.4 What is a default divorce?**

A default divorce is a type of uncontested or undefended divorce. When a spouse/party simply ignores the divorce summons and fails to file any notice of intention to defend, that party will be “in default”. The Judge or Magistrate will then grant a default divorce if you serve a divorce summons on your spouse and he/she does not respond.

## 7 IT IS IMPORTANT TO KNOW HOW YOU ARE MARRIED

### 7.1 What is the meaning of a marriage “in community of property”?

This is probably the easiest and most popular way that people get married. This means that you and your spouse's assets and liabilities automatically merged into one joint estate upon marriage. You and your spouse are now the co-owners of the joint estate. Using simple terms: you share all your assets and all your debts. When couples are married this way their assets are tied up in the one joint estate and when the court grants a divorce, all these assets need to be divided – either the court decides or what normally happens is that the parties pick and choose what assets go to which spouse beforehand and before the matter goes to court. A settlement agreement could be reached between the parties and then you may request the judge or magistrate to make that agreement an order of court.

### 7.2 What is the meaning of a marriage “out community of property without the accrual system”?

This entails that the spouses have divided estates (property and debts). The estate acquired prior to and during the marriage remain divided. Each spouse is liable to pay their individual creditors (debt) separately. A commonly used term to explain this is: “What's mine is mine. What's yours is yours.”

Marriage out of community of property requires an ante nuptial contract (before the marriage is entered into). The division of property during a divorce if married this way should be easy as each party could keep what they bought and pay their own debts. In practice this is not always practical as spouses might have shared the expense of buying something big or the spouse earning the most buys goods for the common household and it would be unfair for him / her to keep that item if it was bought for both parties to share. Again, it is advisable to talk to your spouse and come to a kind of agreement in terms whereof the property should be divided that seems fair to all parties. A settlement agreement could be reached between the parties and then you may request the judge or magistrate to make that agreement an order of court even if your marriage regime states differently – remember that a settlement agreement trumps the marriage regime, with other words no matter how you are married, the settlement reached between the parties would always be adhered to.

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

This entails that the spouses have their own individual estates (property and debts). Each spouse is separately liable to pay his/her individual creditors similar to that of marriage out of community of property however the accrual system will apply. The accrual system is an algorithm / formula that is used to determine how much the party whose estate with a bigger increase in value or growth during the marriage will have to pay to the party whose estate showed a smaller increase in value / growth.

An ante nuptial contract (before the marriage is entered into) is also required in this regard. This could be quite tricky in practice and again a settlement agreement could be reached between the parties and then you may request the judge or magistrate to make that agreement an order of court even if you are married with the accrual system.

## 8 CHILDREN AND HOW THEY ARE AFFECTED BY DIVORCE

### 8.1 What will happen to the children upon divorce?



How children are affected by divorce is a question of huge importance to your children and, of course, to you and your spouse. These are uncertain times for any child and the golden rule we have for our clients is to NEVER to discuss or fight or even argue in front or in hearing distance of your children. This is sometimes easier said than done! When you and your spouse have come to that stage where a divorce is inevitable, arrangements should be agreed upon by both spouses before the final steps of divorce as to some arrangements with regards to the minor children. Discussions with your spouse should include:

- Who will be the primary caregiver?
- With whom will the child(ren) stay after the divorce?
- Where will the child(ren) stay during the day when you are at work?
- Where will the child(ren) go to school?
- Who (and how much) will support and contribute to maintenance?
- How will visitation rights work?

This is where mediation is super beneficial as one of the outcomes of the mediation would be that both parties are in agreement about the way forward with the kids. If no agreement can be reached to some of the abovementioned questions, the Judge or Magistrate will make a decision after considering what is best for the child. The facts surrounding the divorce as well as the recommendations by the Family Advocate and other specialised parties can offer a valued insight into the best outcome for the child.

### 8.2 What is a parenting plan?

This is applicable only to minor children (under the age of 18). A parenting plan is a written agreement based on agreements between two people / parents who hold parental rights and responsibilities. In plain terms it means that it is a written document that outlines how parents will raise their child after separation or divorce. The parenting plan forms part of the divorce papers in the event of minor children being implicated in the divorce. Everything that is decided should be to the best outcome for the child. Most parenting plans focus on describing parenting arrangements such as:

- How decisions about the child are made (for example, jointly or individually but in consultation with the other parent)
- How and when information is shared between parents
- When each parent will spend time with the child (visitation rights and holidays)
- How other parenting issues may be addressed, such as religion, boyfriends / girlfriends etc.

This is where mediation is ultra-beneficial as one of the outcomes of the mediation would be that both parties are in agreement about the way forward with the kids. For more information or what might be contained in a simple parenting plan, please have a look at annexure "A" at the end of this e-book.

### 8.3 Who is the Family Advocate?

The Family Advocate is a non-biased Family Law specialist whose main interest is protecting the children. They are employed by the South African Department of Justice to ensure that the rights of children are maintained.

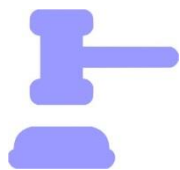
#### **8.4 What is the role of the Family Advocate in uncontested divorce proceedings?**

With the situation of uncontested or undefended divorce proceedings, the Family Advocate will have to agree to / approve the parenting plan before a Judge or Magistrate will grant the divorce. The reasoning is that by approving of the parenting plan, he / she confirm that the arrangements are in the best interest of the children (minor children) involved. Every court is different and in some instances the Family Advocate would require to see the parenting plan or settlement agreement containing the details pertaining to the minor child(ren) about a week before the court date, where other Family Advocates would scrutinize it the morning before the court starts. Your divorce attorney would know the preference of the Family Advocate, or you could contact the court to find out.

#### **8.5 What is the role of the Family Advocate in contested divorce proceedings?**

When it comes to situations where there are disputes about care and contact of children, the Family Advocate will assist the parties / parents to reach a suitable and mutually satisfactory agreement. The Family Advocate goes about this by evaluating the circumstances through doing separate interviews with all the parties concerned – parents and children and even teachers if necessary. And yes, it is here where the child(ren) could also voice their opinions as to where they want to live and how they see the living arrangements etc. The Family Advocate will make recommendations in favour of the best interest of the children based on the information gathered.

#### **8.6 Are the Family Advocate's recommendations enforceable?**



The recommendations are only intended to help the Magistrate or Judge who deals with the matter. Unless a remark or recommended action has been included in a Court Order, it is not enforceable by any means, but as a Magistrate or Judge has to deal with legal issues and the Family advocate works with these type of matters on a daily basis, chances are very good that the Magistrate or Judge would follow the recommendations of the Family Advocate.

#### **8.7 How much does the Family Advocate charge for his/her services?**

Family Advocates are legal officers that are under the employment of the Department of Justice and Constitutional Development of South Africa. A Family Advocates' services are free of charge.

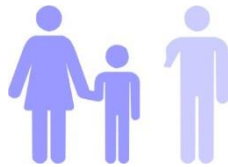
#### **8.8 We adopted or have children together?**

If you have children, you are going to need a parenting plan and a parenting schedule. You will have to determine who will have legal custody of your children and decide who will make major decisions for your children after the divorce. You also need to figure out where your children will live, and set some basic post-divorce parenting ground rules. There are also separate forms that need to be completed before you get to the Court-stage and a Family Advocate needs to endorse all the decisions about the minor children.



## 9 MAINTENANCE FOR MINOR CHILDREN

### 9.1 What is meant by maintenance?



Each parent has the obligation to support their children according to their financial means. The needs of the child / children have to be established eg. roof over their head, food, schooling, medical costs, etc. The children's needs must be to the standard of living the children are used to if the parents can afford it. The obligation does not solely fall upon the father but a *shared* responsibility between both parents/parties. Even if the father can fully support the child, this does not mean that the mother is excused from such responsibility. Both parents must use their income and capital to support their child/children. If a father/mother has no current income but has movable assets, he/she will be unable to avoid paying maintenance. The court may order that assets be sold in order to pay for child maintenance to satisfy the obligation to pay maintenance. This prevents either parent from avoiding the duty of paying maintenance. Example: giving up work to become a full-time student.

### 9.2 Which factors will influence the amount of maintenance?

Many factors will be taken into account such as:

- The reasonable monthly needs of the child.
- The monthly income and expenses of both parents. The assets of the parents should also be considered should they not have an income or be unemployed.
- What can each parent reasonably contribute towards the monthly expenses of the child?
- The parent with whom the children spend most of their time,
- The standard of living
- The children's ages would also play a role in the maintenance amount.

These factors will affect what is considered to be a reasonable maintenance amount per child.

If the parties / parents cannot agree on a reasonable monthly maintenance amount per child, the presiding Judge / Magistrate will have to consider the above-mentioned factors to make a reasonable order.

### 9.3 If my financial circumstances change after divorce, would it be possible to change the maintenance amount?

Indeed, the children's maintenance as stipulated in the divorce order can always be changed post-divorce. To change said amount contact your attorney or your nearest Magistrate's Court's clerk or maintenance officer for assistance. They will help guide you through the process. It is not compulsory to have an attorney with you - however having one ensures the process is finalized and followed through faster than sitting in long queues and waiting your turn (yes, the attorneys are helped first) Please note: You will have to provide proof of your changed financial circumstances.

### 9.4 Can I go to any magistrate court in RSA to lodge maintenance?

Yes, you can go to any local magistrate court where you and/or the child reside. If the ex-spouse that needs to contribute towards maintenance lives in another province, it means that he / she needs to make arrangements to attend the court where the child lives.

### 9.5 What should I do if my ex-spouse does not pay maintenance after divorce?

Firstly, you will have to provide evidence that the maintenance is outstanding by submitting your bank statements, etc. Also have your divorce order handy as well as the settlement agreement or parenting plan that was made an order of court. Secondly, proceed to contact your attorney or your nearest Magistrate's Court's clerk or maintenance officer for guidance and information on other related information that you may need. It is not compulsory to have an attorney for this however, once again, this process can be extremely time-consuming compared to that of those who do use an attorney for this process.

### 9.6 After divorce, may my ex-spouse be denied contact with the children if he/she does not pay maintenance?

Contact with children and paying maintenance are two completely separate instances. One party should not deny the other contact with the children if he/she does not pay maintenance. To enforce a maintenance agreement/obligation as set out in the divorce order, the correct process must be followed. Contact your attorney or your nearest maintenance officer to gain insight into the steps you should take to retrieve maintenance. Refusal of contact with the parent and child does not entitle them to stop paying maintenance.

### 9.7 When does maintenance stop?

Maintenance will be stopped or relinquished once the child/children reach the age of maturity (18 years old) but the child/children may institute action himself/herself. A court may stipulate specific provisions in a court order if the child/children are in temporary custody of one parent and that parent is not entitled to reduce/suspend his/her maintenance during such a period. Maintenance may very well also include tertiary education during which time there will still be a duty to support the child during their studies.

### 9.8 Can my ex-spouse be locked up for not paying maintenance?

If the ex-spouse fails to pay within the specified times, you should report the matter to the Maintenance Offices. The court will follow one of the following two options: either a civil case for enforcement of maintenance, where the Magistrate makes an order to deduct it from his / her salary or issue an order that goods or furniture be sold to pay for the maintenance or criminal prosecution. A warrant of arrest can be issued if the respondent failed to comply with an order of court.



## 10 CAN I CLAIM MAINTENANCE FOR MYSELF?

### 10.1 What is spousal maintenance?

Personal/spousal maintenance is the maintenance that is paid by one spouse (normally more financially secure) to his/her (soon-to-be) ex-spouse during and/or following a divorce.

### 10.2 Am I entitled to spousal maintenance?

Negative. Neither spouse has a **right** to spousal maintenance upon divorce. If the parties cannot reach agreement in this respect, the residing Magistrate/Judge has discretion to make a ruling in respect of spousal maintenance if he/she believes that it will be fair given the circumstances. South African divorce law favours the 'clean break' principle, which essentially means that after a divorce the parties should become economically independent of each other as soon as possible without the ties of paying maintenance towards the other spouse.



### 10.3 Factors that influence spousal maintenance.

Courts are issued with a discretionary power to grant spousal maintenance (in the absence of a formal agreement between the parties). In such cases the courts looked at the following factors to decide:

- The duration of the marriage;
- Was the other spouse the sole breadwinner in the marriage and what are the prospects of the claimant spouse to get employment?
- Did the claimant spouse become used to a certain standard of living that s/he would be deprived of after the divorce?
- Age of the parties;
- The educational qualifications of the parties.

### 10.4 What is the difference between rehabilitative maintenance and lifelong maintenance?

Rehabilitative maintenance is for a specific, fixed period only. The fixed period cannot be shortened or extended. This is generally granted to those who require to a helping hand to get back on their feet financially after/during the divorce process.

Permanent / lifelong maintenance is payable from date of divorce and on a monthly basis until such time when the receiver of the spousal maintenance declared deceased.

### 10.5 When does spousal maintenance stop?

This needs to be discussed in the divorce settlement agreement as to when the spousal maintenance obligation will halt/cease. This usually happens when:

- The other party remarries
- The other party lives together as husband, wife or life-partner with another person.
- Similar restrictive conditions may be added if both parties can agree on this.

### 10.6 Must my spouse continue to support me financially during the divorce process (pending divorce)?

Indeed. If your spouse maintained you financially during your marriage, he/she should continue doing so pending divorce litigation. Note: this is support DURING the divorce proceedings.

### 10.7 Would it be possible to change the spousal maintenance amount after divorce?

Unless there is a specific stipulation in the divorce order excluding this right, either of the parties may approach the Court post-divorce to request that the spousal maintenance responsibilities be amended or even pardoned. To be successful with such application, drastically changed financial circumstances will have to be proved via evidence such as bank statements, etc.

### 10.8 What should I do if my spouse stops supporting me during divorce and I am left without funds?

During a divorce it very often happens that your spouse will stop paying certain expenses. Or your spouse is spiteful and drags out the divorce proceedings. Our South African law allows you to apply to the divorce court for a court order for maintenance for your child(ren), maintenance for yourself (spousal maintenance), and a contribution towards your legal costs (if need be). The first step would be to confront and ask your spouse to make payment. If this fails, contact your divorce attorney. Your attorney will send a formal letter to your spouse directly or to your spouse's attorney if he/she has legal representation. If this fails your divorce attorney will have to assist you with a Rule 43/58 Application. You will file an affidavit stating your financial circumstances and why you require financial assistance and your spouse will reply to your affidavit with his/her own affidavit. Thereafter, the case will be argued in front of a judge who will make an interim order that will in place until the divorce is finalised.



### 10.9 What is a Rule 43 or 58 Application?

Rule 43 deals with many of the issues that will ultimately be dealt with in the final divorce action. It is an interim measure (in other words it is only temporary) to give certainty to the parties before the divorce is finalised. Sometimes divorces can take a long time and it is necessary to clarify and stipulate certain issues between the parties. Rule 43 typically covers interim primary care of the minor children, and contact or visitation by the non-primary carer. Furthermore it can deal with maintenance for minor children and if necessary, for a spouse. It can be used to enforce payment of for instance, the bond of the matrimonial home and vehicles, school fees and medical aid premiums. A special application is necessary before the Court will grant such an order and you will need the assistance of an attorney. A Rule 43 application is heard by the High Court and all the provisions above is also done by the Regional Court, but then it is referred to as a Rule 58 Application.

### 10.10 What does the Rule 43 or 58 procedure entail?

This is normally quite straight-forward and a fast process that could possibly be completed in one to two months. The appointed divorce attorney will draft a Notice of Motion and Affidavit. The affidavit is provided to offer more information about the case and explain why an order for interim maintenance is necessary. After the issuing of the documents as well as serving of the application (on the Defendant's attorneys), the Court will designate a court date for the Rule 43 / 58 hearing upon request.

## 11 COST OF A DIVORCE

### 11.1 What is the cost of divorce in South Africa?

Contested divorces are frequently charged in accordance with the divorce attorney's unique hourly rate. The time / fee structure would depend on a number of factors, but below are few important ones to be considered:

- whether your divorce will be contested or uncontested;
- whether the divorce parties are in agreement or not before the commencement of the divorce proceedings;
- which jurisdiction either of the parties reside in;
- and which court (i.e. High Court or Regional Court) the parties will be divorced in.



In all cases you will be liable for disbursements (expenses) such as: phone calls, emails, printing, Advocate's accounts, scanning, copies, Sheriff's accounts, etc. Many law firms offer **uncontested divorces** services at **fixed, all-inclusive rates**.

### 11.2 What should I do if I cannot afford a divorce attorney?

If you cannot afford divorce services, you have the following options:

- The recommendable choice is to contact Legal Aid for assistance.
- Since it is not required to have a legal representative/divorce attorney to assist you with your divorce, you can attempt to do it yourself.

However note: This process by your own hand may take excessively longer if there are missing documents, ambiguity of what to do next, etc.

## 12 DIVORCE AND PENSION

### 12.1 Can I lay claim to my ex spouse's pension fund?

Previously a divorced spouse had no claim to the spouse's retirement fund benefits – the reason for this was that the pension fund of a spouse was not regarded as an asset in the joint estate of the parties. Since 1989 this has changed to allow the non-member spouse the right to share in the retirement fund benefits or more correctly the “pension interest” of the member spouse, depending on what type of marital system the couple had entered into.

‘Pension interest’ is defined in the Divorce Act for every type of fund except a preservation fund. According to the Pension Funds Act, ‘pension interest’ may be any one of the following types:

#### Pension and provident fund

The benefits to which a member would have been entitled to in terms of the rules of the fund if his/her membership had terminated, due to resignation, at the date of the divorce.

#### Retirement annuity

The sum of the member's contributions to the fund up to the date of divorce plus simple annual interest at the prescribed rate.

### 12.2 How much pension can I get?



The Divorce Act states that the non-member spouse is allowed to be entitled to “the portion of the pension interest which is assigned to the non-member spouse in terms of a decree of divorce or the dissolution of a customary marriage and is deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of a customary marriage is granted”.

Married in community of property: the pension interest of the member spouse is considered as part of the joint estate and the non-member spouse is entitled to claim 50% of the pension interest of the member as at the date of the divorce.

Married by ante-nuptial contract with the accrual system: the value of the spouse's pension fund is used to calculate the value of his/her estate. If the couple is married out of community of property with the accrual system, and if they excluded the pension benefits in the ante nuptial contract, then the pension interest would not be part of the estate when the marriage ended.

### 12.3 What does the “clean break principle” mean?

The Pension Fund Act favours a clean break principle. In laymen's terms it means the right of a non-member spouse who is married in community of property to receive immediate payment or transfer of the portion of the other spouse's pension interest on divorce.

“In terms of the Pension Fund Act, the non-member spouse can choose to have the pension interest award paid out in a lump sum in cash or can have it reinvested into another retirement fund. Should the non-member spouse opt to have the monies paid out to him or her as a lump sum, there are tax implications. If the monies are transferred to another retirement fund, it will be done tax-free. Hence this decision (to receive the money as a lump sum) should be carefully thought out. Practice has taught us



that in most cases the fund has 45 days, after receiving the divorce order, to request the non-member spouse to elect how the pension interest must be paid. The non-member spouse then has 120 days in which to make a decision.

#### **12.4 What if a spouse resigns before the divorce is finalized?**

If the member spouse resigns from his or her employment before the divorce order is finalized, and no notification has been given to the fund by the non-member spouse that fifty percent of the proceeds is due to the non-member spouse, the fund will not be required or held liable to ensure that the non-member spouse's rights in this regard are protected.

#### **12.5 The wording is of utmost importance:**

It is of utmost importance that you get the correct details of your spouse's pension fund the detailed fund name, policy or fund number and full address and details of the pension fund. If the fund is not properly cited in the divorce pleadings the court will not be able to make any such order. For that reason, it's important to ensure that your attorney is competent in divorce proceedings so that the fund is correctly cited to ensure that the court can indeed make the appropriate order regarding the pension interest of the member spouse.



## 13 ANNEXURES

### Annexure A: What to Consider When Making a Parenting Plan

1. Living arrangements and parenting schedules
  - Residential arrangements (Will the child live mainly in one residence or will the child move between two homes?)
  - Geographical considerations (Will the parents live within a certain distance of each other?)
  - Movement of your child between homes (What are the details about drop-off and pick-up? Consider specifying times, days, location, and person responsible for pick up and drop off)
  - Moving away (What if one parent proposes to move? What if one parent proposes to move with the child? How much notice should be given e.g. 30, 45, 60 days? How will notice be given e.g. e-mail, letter? Will consent of the other parent be required when the move of a child is proposed? How will parenting arrangements be affected?)
  - Childcare and babysitting arrangements
  - Communication with child while with the other parent (Will communication be through phone, e-mail, pictures, Skype?)
  - Changes to the parenting schedule (Discuss circumstances that might require schedule changes: illness, lateness, social events, special occasions, unforeseen events. How will schedule changes be managed? How much notice of the change is required? Will there be make-up time?)
  - Child's belongings (Will belongings move between homes with your child? Will your child have two sets of some items? Who will purchase which items for your child?)
  - Child's social life (How will the child spend time with friends? Who will take the child to social events such as birthday parties or sleepovers? Who will buy gifts for the child to give?)
2. Vacation, holidays and special days
  - Arrangements for holidays (Consider school breaks, summer vacation, school holidays, statutory holidays, religious holidays. Will the child spend certain holidays with one parent every year? Will holidays alternate between households?)
  - Arrangements for other significant days (Consider birthdays, Mother's Day, Father's Day, and other events such as weddings, graduations, funerals, etc.)
3. Health care
  - Decisions about medical or dental care (How will decisions be made about dental or medical treatment? What about vaccinations or other preventative treatments?)
  - Emergency medical treatment (How will parents notify each other?)
  - Arrangements for medical or dental check-ups (Who will take the child to doctor or dentist's appointments?)
  - Care of child if child is ill (Who will take time off work?)
  - Health card arrangements (Who will hold the child's health card? Will the card move between homes with the child?)
  - Access to medical records (How will medical information be accessed or shared?)
  - Medical insurance arrangements (Will there be medical insurance for the child? Who will obtain the insurance? Who will submit claims for insurance? Who will pay any extra costs?)
  - Arrangements for any special needs of your child (Consider orthodontic treatment, counselling, physiotherapy, speech therapy, diet, glasses, prescription drugs.)

4. Children with special needs

- Decisions about any testing or assessments (Consider assessments for special accommodations in school, psychological or psycho-educational testing. Which parent will attend appointments? How will costs be dealt with? Will both parents follow through on any recommendations outlined in test results or assessment reports?)
- Arrangements for any special treatments, therapies or services needed now as well as in the future (Consider ongoing physical or occupational therapy, counselling or frequent medical appointments. Who will make the arrangements? Which parent will attend and/or participate? Which parent will handle insurance issues?)
- Decisions about any treatment required (Consider diet, medication, supplements and vitamins. Will both parents follow through on requirements? Are there special instructions regarding compliance with taking prescribed medication, dosage, or times to be administered? Are there certain foods which need to be restricted?)
- Arrangements for any supplies of equipment or medication (Consider assistive devices, mobility equipment, medication and whether these should be available in both homes.)
- Decisions about which parent is available if the child requires care.
- Decisions about rules of communication (Consider whether rules should be put in place about the best method of communication and how quickly communication from a parent should be responded to (this could be especially important when a child has special needs))
- Decisions about who will advocate for the child if parents do not agree on a treatment plan (Consider naming a family doctor, a specialist or a counsellor)

5. Education

- Decisions about any choice or change in school, school program, special educational needs, tutoring etc. (How will these decisions be made?)
- School records (How will this information be accessed or shared?)
- Attendance at parent-teacher conferences and school events (Who will attend?)
- School trips (Consider signing of permission forms, payment for trips, parent attendance)
- School absences (Under what circumstances will your child be removed from school? By whom?)

6. Extra-curricular activities

- Extra-curricular activities (How many? What type?)
- Schedule of activities for children (Consider whether one parent can schedule activities during the child's time with the other parent. Who will pay? Who will transport your child to and from activities?)

7. Religion

- Religious upbringing and activities (How will these decisions be made?)

8. Culture

- Cultural events, education and activities (How will these decisions be made?)
- Language instruction

9. Grandparents and extended family

- Visits (How often and when will visits with extended family take place? Who will be in attendance?)
- Communication (How and when will children communicate with their extended family?)

10. Travel

- Notice of travelling with the child (Will notice of travel be given to the other parent? Should notice be given for all travel or just travel that is out of province? What type of information is to be shared? Consider flight information as well as contact information for children during time away in case of emergency.)
- Written consent for child to travel out of the country may be required (Consider: Recommended consent letter for children travelling abroad.)
- Child's passport (Who will keep the child's passport? Will each parent have a copy of the passport number?)

11. Communication between parents

- Type of information to be communicated (Consider medical information, school information, change of address, telephone numbers, travel plans)
- Method of communication (Consider e-mail, communication notebook, text-message, telephone, internet tools)
- Frequency of communication
- Emergency communication

12. Making changes to parenting plan

- Process for making changes to the parenting schedule or other parts of the parenting plan (Consider a process for reviewing arrangements as circumstances of you and your child change.)

13. Solving Problems

- Method for resolving disagreements over the parenting plan (Consider the use of counsellor, therapist, mediator, or lawyer)
- Payment of costs (Who will pay for these services?)

14. Other parenting issues

These issues may not apply to every family situation and some will depend on the age of your child. You may choose to discuss these issues on an ongoing basis rather than dealing with them in the parenting plan.

- Basic safety requirements, including supervision (Consider the use of helmets, car seats, motorcycles, a car, drugs or alcohol, etc., and the age when child can stay home alone)
- Discipline and lifestyle expectations (Consider rules on bedtimes, homework, allowance, piercing, tattoos, dating, part-time employment, etc.)
- Child's use of the computer, including social networking, or other electronic devices such as cellular phones, e-tablets, or gaming systems (Consider what type of rules around supervision or access are needed)
- Child's use of the phone
- Diet and nutrition
- Gifts (Should gifts to the child be coordinated? Who will purchase gifts for the child to give to others?)
- Photographs (Can the child's photo be posted on a parent's social networking site?)
- Family pets (Where is the pet going to live? Can the pet move between homes with the child?)
- Involvement of new partners and family (Consider when to introduce new partner or sibling to child.)

## Annexure B: Maintenance Forms

### Documents to be used for an application for maintenance order:

J101 E Application for maintenance order

J107E Substitution or discharge of existing maintenance order

J214E Consent and maintenance order

J256E Application for variation

### Application for enforcement of maintenance order:

J435E Application for setting aside of a warrant of execution

J438E Application for suspension amendment or rescission of an order

J458E Application for suspension amendment or rescission of an order

### Documents to be completed when your spouse is in arrears:

J470E COMPLAINT FORM ARREAR MAINTENANCE

All forms are available for download on the internet: [http://www.justice.gov.za/forms/form\\_mnt.htm](http://www.justice.gov.za/forms/form_mnt.htm)



## Annexure C: How to apply for a maintenance order in the maintenance court

If the child is not living with the mother or the father, the person who is looking after the child can also apply for maintenance costs from the parents. For example, if a child is living with their grandparents, they can apply to get maintenance from the father and the mother of the child.

Once there is a court order instructing a parent to pay child support, it is a criminal offence not to pay.

### Important steps to follow when applying for child maintenance:

- Firstly, you need to apply for a maintenance order at the Magistrate's Court (also called District Court) in the district where you live.
- If you're unsure, your local court will give you advice and tell you exactly at which court to apply for maintenance.
- Go to the relevant court, and complete and submit Form A: Application for a maintenance order (J101).
- You'll also need to bring the following:
  - Your ID, or a certified copy.
  - Certified copies of the child/children's birth certificates.
  - Proof of your monthly income and expenses, such as receipts for food purchases, electricity and/or rent payments.
  - Three months' latest bank statements.
  - Three months' latest payslips.
  - Full name and proof of the physical and/or work address of the person responsible for paying the maintenance money.
  - If you were married and are now divorced, a copy of the divorce order.
- The court will set a date on which you and the respondent, (the person whom you wish to pay maintenance) must go to the court.
- A maintenance officer and an investigator will investigate your claim and look into your circumstances.
- The court will serve a summons (a letter instructing a person to come to court) on the respondent (the person against whom the claim is brought) to appear in court on a specific date to discuss the matter.
- The respondent then has a choice between:
  - Agreeing to pay the maintenance as claimed, or
  - Contesting the matter in court.
- If the respondent agrees to pay the maintenance as claimed, a magistrate will review the relevant documentation. He or she will then make an order, and may decide to do so without requiring the parties to appear in court.
- If the person who is allegedly liable to pay maintenance does not consent to the issuance of an order, he or she must appear in court, where evidence from both parties and their witnesses will be heard.

### Getting a child maintenance order:

- If the court finds the person liable for paying maintenance, it will make an order for the amount of maintenance to be paid. The court will also determine when and how maintenance payments must be made.
- The court can order maintenance money to be paid in one of the following ways:



- At the local magistrate's office or any other government office designated for this purpose.
- Into the bank or building society account designated by the person concerned.
- Directly to the person who is entitled to the money, or
- By means of an order that directs the employer of the person who is liable for paying maintenance to deduct the maintenance payment directly from the employee's salary, in accordance with the 1998 Maintenance Act.

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

- has remarried,
- is involved in another relationship,
- does not allow you to see the children, and/or
- if either party later has more children.

#### How long will child maintenance be paid?

The duty to pay maintenance continues regardless of your child's age, and lasts until the child is self-supporting, adopted or has died.

- Once your child reaches the age of 18 years, the responsibility is on him or her to prove how much maintenance he or she needs.  
Note: If your child is self-supporting he or she cannot claim maintenance from any of his or her parents.
- The duty to support a child ends at the child's death but not at the parent's death. However, in the event of the parent's death, the child may lodge a claim for maintenance against the deceased parent's estate.

Cost: Applying for a maintenance order is free.



(Info on how to apply for a maintenance order courtesy of : <https://www.westerncape.gov.za/service/getting-maintenance-order>)

## Annexure D: Civil unions and same sex marriages

**NOTE: A separate e-book is available that extensively covers civil union divorce proceedings**



The Civil Union Act 17 of 2006, which came into force on 30 November 2006, provides for the recognition of civil unions between certain classes of persons, such as same sex partners, enabling them to enter into lawfully recognised civil unions with the same consequences as marriages in terms of the Marriage Act.



Section 1 of the Civil Union Act defines a civil union and section 8 of the Act sets out the requirements for the solemnisation and registration of civil unions. The most important feature of the Act, as far as legal practitioners are concerned, is section 13, which places civil unions in the same legally recognised category as civil marriages in terms of the Marriage Act and further decrees that any reference to marriage in any other law, including the common law, is also a reference to a civil union.

The significance of this provision is obvious, and its consequences include the following:

- (a) both the Divorce Act and the Matrimonial Property Act apply to civil unions;
- (b) parties to a civil union may institute divorce proceedings against each other in terms of the Divorce Act; and
- (c) the same patrimonial consequences applicable to civil marriages in terms of the common law, the Divorce Act and the Matrimonial Property Act.

The Divorce Act and the Matrimonial Property Act, both of which antedate the Civil Union Act, have the following implications pertaining to the patrimonial consequences of civil unions:

- (a) Where the parties fail to enter into an ante nuptial contract, the civil union is a union in community of property and the parties are able to sue for divorce and division of the joint estate or for the forfeiture of the benefits accruing from the marriage in community of property, as the case may be.
- (b) The parties may enter into an ante nuptial contract and exclude community of property, profit and loss, with or without the application of the accrual system as regulated in terms of the provisions of chapter 1 of the Matrimonial Property Act 88 of 1984, with all the consequential claims against each other in the case of a divorce action.
- (c) Because a claim in terms of section 7(3) of the Divorce Act 70 of 1979 can be instituted only where the parties were married to each other out of community of property in terms of a duly registered ante nuptial contract prior to the commencement of the Matrimonial Property Act – that is, 1 November 1984, such claim will not be competent between parties to a civil union because the Civil Union Act commenced after that date and because civil unions are not recognised retrospectively.
- (d) Parties to a civil union may change their matrimonial regime in terms of section 21 of Act 88 of 1984.

Any reference to a claim instituted in divorce proceedings in this publication, therefore, also refers to a claim for divorce in proceedings between parties to a civil union in terms of the Civil Union Act.



## Annexure E: Example of a settlement agreement used in divorce proceedings

**IMPORTANT:** This settlement agreement is just an example and does not constitute legal advice or a template. Settlement agreements need to be drafted by a qualified legal professional in order to ensure that all bases are covered and that the settlement agreement is indeed valid, binding and enforceable.

### 1 Parties

1.1 The Parties to this agreement are:

1.1.1 ( ) ("Plaintiff"); and

1.1.2 ( ) ("Defendant").

### 2 Definitions and Interpretations

2.1 These terms have the following meanings assigned to them:

2.1.1 Days: business days which are calculated by excluding the first day, public holiday, Saturday, and Sunday.

2.1.2 Effective date: the date this agreement shall take effect, being the date the High Court / Regional Court issues a decree of divorce.

2.1.3 Child/ren: the minor children born of the marriage between the Parties namely:

---

2.2 When words and figures conflict, the words must prevail.

2.3 The words "shall", "must" and "will" in this agreement are mandatory obligations.

2.4 One gender includes the other gender.

2.5 The singular includes the plural and vice versa.

2.6 The headings of the clauses in this agreement are for convenience and reference only; and shall not be used in the interpretation, modification or amplification of the terms of this agreement.

### 3 Preamble

3.1 The Parties on \_\_\_\_\_ entered into a marriage with the matrimonial regime \_\_\_\_\_.

3.2 The Parties acknowledge that their marriage has irretrievably broken down.

3.3 The Parties have reached an agreement relating to legal guardianship, custody, access, maintenance, property, and other consequences of the divorce.

### 4 Legal Guardianship

4.1 It is agreed that both Parties shall remain as legal guardians of the minor children.

### 5 Custody of the Children

5.1 Custody of minor child/ren will be granted to the \_\_\_\_\_, who will reside with this Party at his residential address.

### 6 Access to and Contact with the Children

6.1 The \_\_\_\_\_ will have access to the child/ren as follows:

---

6.2 Access to and contact with the children shall be exercised in their best interest, with a minimum degree of disturbance to their routine, education, and schooling activities.

### 7 Maintenance

7.1 The \_\_\_\_\_ will contribute R \_\_\_\_\_ per child, per month, until the minor child/ren reaches the age of majority (18 years).

7.2 The monthly amount shall include: school fees; aftercare facilities; school uniforms, school tours, textbooks, and other expenses relating to school activities; medical, optometry, and dental expenses; casual clothing; and (other) \_\_\_\_\_.

7.3 The maintenance amount shall be free from set-off, deductions, and bank charges.

7.4 Spousal maintenance is / is not granted by the \_\_\_\_\_ to the \_\_\_\_\_ in the sum of R\_\_\_\_\_.

## 8 Property

8.1 The movable and immovable property shall be defined and distributed as follows:

\_\_\_\_\_

\_\_\_\_\_

## 9 Costs

9.1 Each Party shall pay their own legal costs.

## 10 Breach

10.1 If a Party breaches a material provision of this agreement, and fails to remedy such breach within 10 Days of the date of receipt of a written notice from the aggrieved Party requiring him to do so, the aggrieved Party will be entitled to any remedy available in law, without further notice.

## 11 General

11.1 This agreement constitutes the whole agreement between the Parties.

11.2 This agreement may only be amended if the Parties agree to the amendment in writing, and sign the written document – which must be attached to this agreement as an Annexure.

11.3 No Party shall be bound by any express or implied term, representation, warranty, promise, or the like not recorded in this agreement.

11.4 All legal documents, notices or other communications must be delivered to the following address of the Plaintiff, which will act as his domicilium citandi et executandi:

\_\_\_\_\_

\_\_\_\_\_

11.5 All legal documents, notices or other communication must be delivered to the following address of the Defendant, which will act as his domicilium citandi et executandi:

\_\_\_\_\_

\_\_\_\_\_

11.6 Non-legal documents, notices or other communication between the Parties may be by electronic communication; where a “read receipt” must be attached to each and every electronic communication sent so it can be determined that the electronic communication was received and read by the other Party.

## 12 Signatories

Signed at \_\_\_\_\_ on this the \_\_\_\_ day of \_\_\_\_\_ 20\_\_18\_\_:

\_\_\_\_\_  
Plaintiff

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Witness:

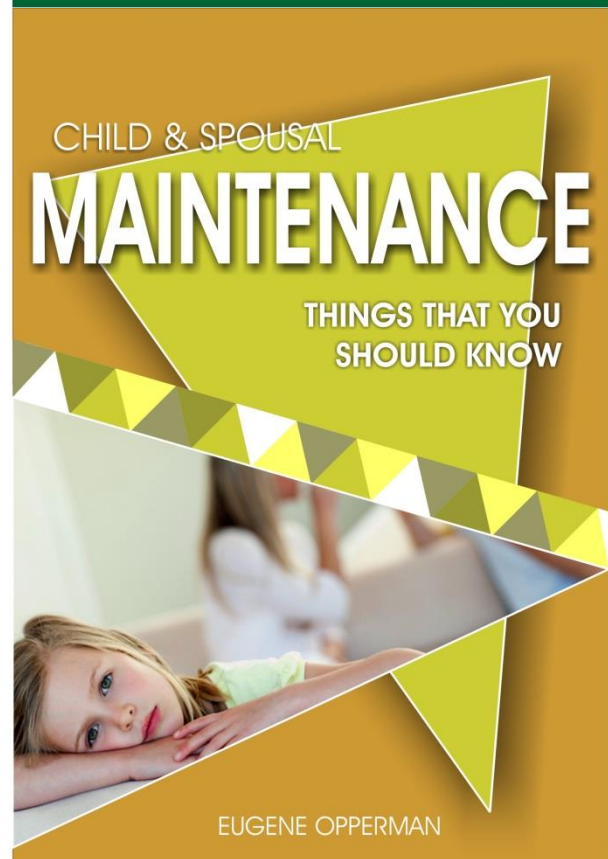
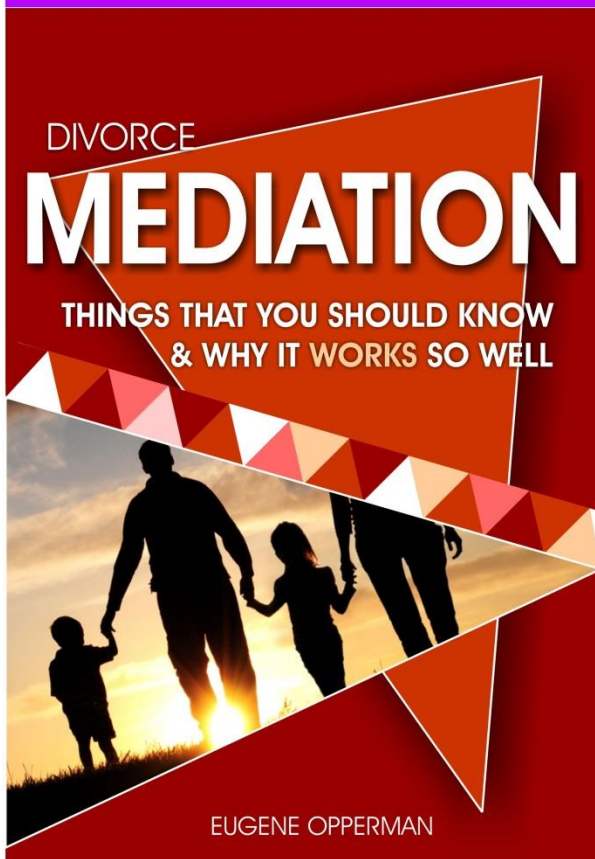
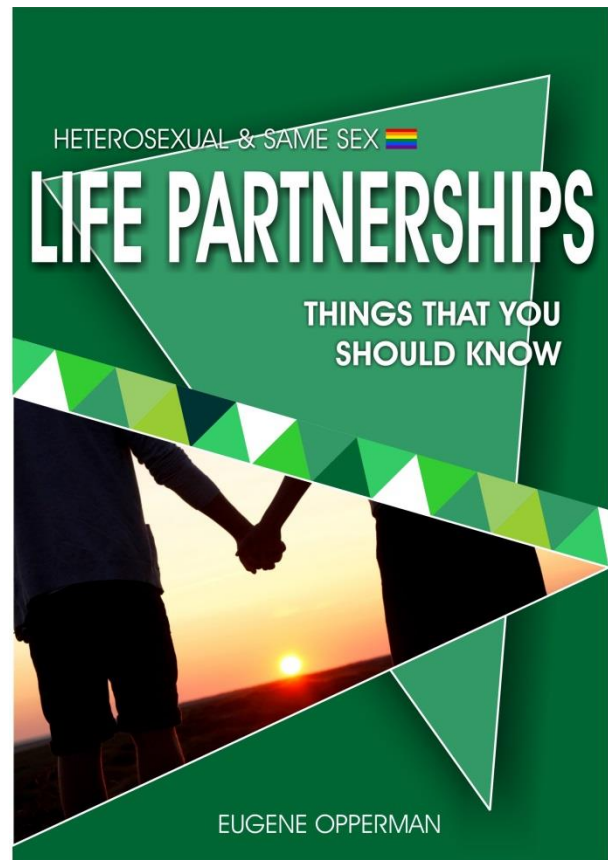
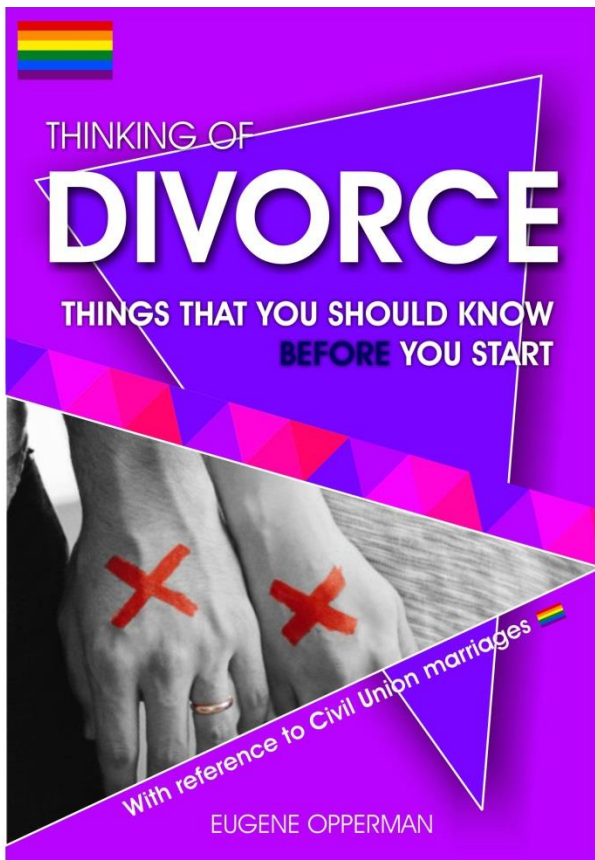
\_\_\_\_\_  
Witness:

\_\_\_\_\_  
Witness:

\_\_\_\_\_  
Witness:

(Example courtesy of: <https://www.legalwise.co.za/files/1413/7466/9988/Divorce.Settlement.Agreement.pdf>)

If you have found this e-book useful, please let us know: [eugene@oppermansinc.co.za](mailto:eugene@oppermansinc.co.za)





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