



# FAMILY LAW

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## Introduction

Most people are members of a family – by birth, marriage, adoption, foster care or living together. Family law is about matters like marriage, husbands and wives, parental rights and responsibilities, care and protection of children, foster care and adoption, divorce, and death.

Traditionally, the idea of a family was of a working father, a mother working in the home and dependant children. But it is not so common to find this kind of family anymore. For example, many married women go out to work, and in some families, especially in rural areas, the children also work to support the family, illegitimate children (children born out of marriage) and divorces mean that there are many 'single-parent families' and gay and lesbian couples can now legally form a civil union. It is hard to say what a typical South African family is.

The Constitution and Bill of Rights guarantee non-discrimination and equality regardless of factors such as race, sex, gender, sexual preference, marriage and religion. This means that different types of families and marriages must be treated equally.

## Marriage

### **Draft Marriage Bill (2023)**

South Africa's law on marriage is fragmented and there are different laws that deal with different forms of marriage, such as the Marriage Act, the Civil Union Act, and the Recognition of Customary Marriages Act. The Draft Marriage Bill will consolidate all laws relating to marriage into one piece of legislation and recognise all types of intimate partnerships regardless of gender, sexual orientation, or religious, cultural and other beliefs. All South Africans and residents in the country of all sexual orientations, as well as religious and cultural beliefs, will be allowed to have legal unions in line with constitutional principles. The Bill outlines measures to prevent unions such as child and forced marriages and those done in the absence of the other party.

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## Civil marriages

Marriage is a contract between a man and a woman entered into in terms of the *Marriage Act 25 of 1961*. According to this contract, they agree to live together as husband and wife. Like other contracts, a marriage contract has rights and duties for each partner.

South African law recognises civil marriages, civil unions and customary marriages. Marriages, according to Muslim or Hindu rites, are not 'legal' marriages but enjoy limited recognition in certain circumstances. For a civil marriage, certain rules have to be obeyed in order for the marriage to be valid. For example:

- Both parties must agree to marry each other
- If you are already married civilly, you cannot enter into another civil marriage again until your first spouse dies or until the first marriage ends in divorce. While you are civilly married and you marry someone else civilly, you are guilty of the crime of bigamy
- You cannot marry and/or have sex with close relatives, e.g. a grandfather cannot marry his granddaughter. If you do, you are guilty of incest
- Boys under 18 and girls under 15 cannot marry unless they have permission from their parents and the Minister of Home Affairs
- Minors (persons under the age of 18 years, as the Children's Act defines a child as a person under 18 years) also need their parent's permission to marry
- A marriage officer must conduct the civil marriage ceremony to make it legally valid

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## Civil unions

In November 2006, following a long line of court cases recognising certain rights and responsibilities in same-sex partnerships, the *Civil Union Act 17 of 2006* came into effect. This law provides for the legal recognition of marriages and civil partnerships, collectively referred to as civil unions, between two persons regardless of their sexual orientation or gender identity.

The *Civil Union Act* is in line with the Constitutional Court judgement in the case of *Lesbian and Gay Equality Project and Eighteen others v Minister of Home Affairs and others*, which found that the common law definition of marriage in the *Marriage Act* was inconsistent with the Constitution and was invalid to the extent that it did not allow same-sex couples to enjoy the same status, benefits and responsibilities given to heterosexual couples.

## REQUIREMENTS FOR REGISTERING A CIVIL UNION

The *Civil Union Act* specifies the following requirements for registering a civil union.

- Anyone who is 18 years or older may enter into a civil union (in terms of the *Civil Union Act*) and can choose to register it as a marriage or civil partnership. When it has been registered a certificate will be issued with the details of the union.
- A person may only be a spouse or partner in one marriage or civil partnership.
- A person who enters into a civil union is not allowed to also enter into a marriage under the *Marriage Act* or the *Recognition of Customary Marriages Act 120 of 1998*. In the same way, a person who is already married under the *Marriage Act* or the *Recognition of Customary Marriages Act* may not register a civil union in terms of the *Civil Union Act*.
- If a person wants to enter a civil union and they have previously been married under either the *Marriage Act*, *Recognition of Customary Marriages Act*, or registered as a spouse in terms of the *Civil Union Act*, the person must present a certified copy of the divorce order or death certificate of the former spouse or partner as proof that the previous marriage or civil union is no longer valid.
- A civil union may only be registered by two civil union partners who would, apart from the fact that they are the same sex, not be prohibited by law from marrying each other under the *Marriage Act* or *Recognition of Customary Marriages Act*.
- A valid South African identity document is necessary for the registration of a civil union.
- All the legal and material benefits and responsibilities that flow from marriages entered under the *Marriage Act* will also apply to marriages or civil partnerships registered in terms of the *Civil Union Act*.
- Any civil marriage officer, for example, a Magistrate, selected government officials and/or special justice of the peace, recognised by the *Marriage Act* are automatically entitled to conduct marriages and civil partnerships under the *Civil Union Act*. A minister of religion and the religious organisation must first get authorisation from the Minister of Home Affairs to register a civil union. (See pg 568: Problem 2: Entering into a civil union)

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## African customary marriages

When Africans marry, they can choose to marry by African customary law (traditional customs) OR by the ordinary civil law of the land. An African customary marriage takes place without a civil marriage officer. The families agree on the *lobola* or bride price. The ceremony takes place after the man's family has paid all or part of the *lobola*.

The *Recognition of Customary Marriages Act* 120 of 1998, which came into effect on 15 November 2000, gives full legal recognition to customary marriages. If you got married before the Act came into effect, your marriage would still have legal recognition and protection if it complies with the customary law and was still in existence after the implementation of the Act. If your spouse died or you got divorced before the Act came into force, your marriage is not protected by this Act.

### DOES THE LAW DISTINGUISH BETWEEN CUSTOMARY MARRIAGES ENTERED INTO BEFORE AND AFTER THE IMPLEMENTATION OF THE ACT?

Yes, there are different legal implications. Women married before the implementation of the Act fall under the customary law prevailing at the date when the marriage took place. However, in the *Gumede case [Gumede (Born Shange)] v President of the RSA and others [2008] JOL 22879 (CC)*, which challenged the failure of the legislature to make the provisions of the *Recognition of Customary Marriages Act* retrospective, the court ruled that this differentiation was unfairly discriminatory. The practical result was that all marriages entered into before the Act came into force, which were still regarded as being out of community of property, were now regarded as being in community of property.

As a result of this case, the law does not distinguish between monogamous customary marriages before and after the implementation of the Act with regard to being in community of property.

The *Recognition of Customary Marriages Act* states the following:

**Equal status and capacity:** The wife in a customary marriage is no longer regarded as a minor. She has equal status and capacity to her husband. This means she can buy and sell assets, enter into contracts and take a case to court.

**Validity:** Both partners in a customary marriage must consent to the marriage, and they must be 18 years or older. If a person under the age of 18 wants to enter into a customary marriage, they must first get permission from the Minister of Home Affairs.

**Registration:** The marriage must be registered with a registration officer at the Department of Home Affairs. The main purpose of registering the marriage is to provide proof that a customary marriage exists, which will help the parties if any dispute arises about the validity of the marriage. Failure to register a customary marriage does not affect the validity of the marriage.

**Property and assets:** All marriages concluded after the Act and monogamous marriages concluded before the Act, according to African custom (as a result of the Gumede case), will automatically be in community of property unless the parties draw up an ante-nuptial contract. Polygamous unions concluded before the Act are governed by customary law. Partners in a customary marriage can apply to the High Court to change the property system of their marriage. If the husband wants to enter into another customary marriage, the husband, existing wife/wives, and the future wife must enter into a contract to develop a new property system and ask the High Court or Regional Magistrates Court (Family Court) to approve the contract. The court will try to look after the interests of all the parties by deciding what the assets are worth and making sure that the existing wife and children get a fair deal. All marriages formed after the Act will automatically be in community of property unless the parties draw up an ante-nuptial contract.

**Inheritance:** The *Recognition of Customary Marriages Act* does not change the law on inheritance, but a new law that deals with this was passed in 2009 called the *Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009*. This legislation does away with the rule of primogeniture (the rule that the oldest male relative inherits all) that was challenged in the case of *Bhe and others v The Magistrate, Khayelitsha and others* 2005(1) SA 580 (CC). In this case, the Constitutional Court held that the customary law rule of primogeniture is unconstitutional and that the estates of all black people who die without leaving a will should be dealt with as set out in the *Intestate Succession Act*.

**Custody of children:** The court can decide who will have custody of children born into a customary marriage and what maintenance should be paid. The decision will be based on what is best for the children. A customary union is still recognised for these cases:

- The partners can claim support money from each other if they are divorced
- A wife can claim inheritance rights if her husband dies
- A wife can claim benefits under a pension scheme if her husband dies



- A wife can claim compensation under the *Compensation for Occupational Injuries and Diseases Act* if her husband dies in an accident at work.

**MAY A WOMAN WHO IS MARRIED BEFORE THE IMPLEMENTATION OF THE ACT, HAVE HER CUSTOMARY MARRIAGE GOVERNED BY THE PROVISION OF THE ACT?**

Yes, the Act makes provision for these women to change the legal consequences of their marriage in order to create equal status and capacity for both the husband and the wife. The parties must apply to court stating good reasons for the change and show that no third person will be prejudiced.

**DOES THE ACT MAKE PROVISION FOR POLYGAMOUS MARRIAGES?**

The Act does allow a man to enter into multiple marriages. However, this has to be done under the provisions of the Act. The Act states that if a man wishes to enter into a polygamous marriage, he has to apply to the court for permission. In his application, he must set out the property systems for all of his wives. All interested parties must be represented in the application, particularly the existing and future wives. The court must consider the circumstances to ensure that the contract fairly divides the existing marital property. The court has the power to accept, add a condition or refuse to accept a contract. This provision is intended to protect all wives, children and family members.

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## **Muslim and Hindu marriages**

### **MUSLIM MARRIAGES**

Muslim marriages are now legally recognised by South African law. Up until 2022, they were not legally recognised. This changed after a Constitutional Court decision in *Women's Legal Centre Trust v President of the Republic of South Africa and others* (2022), which ruled that Muslim marriages must be legally recognised and that certain sections of the *Divorce Act of 1979* and *Marriage Act of 1961* are unconstitutional.

The Court judgement noted that various human rights, such as the right to equality, dignity and access to courts for women in Muslim marriages, were infringed. It noted that the rights of children born from Muslim marriages were also infringed. The Court held that:

- The common law definition of marriage was invalid, where it excludes Muslim marriages.
- Specific sections of the Marriage Act and the Divorce Act were not consistent with the Constitution because:
  - Both these Acts did not recognise Muslim marriages, which have not been registered as civil marriages, as valid marriages in South Africa
  - The Divorce Act fails to provide for the redistribution of assets when a Muslim marriage is dissolved
  - The Divorce Act fails to provide for mechanisms to protect the welfare of minor or dependent children from Muslim marriages when a Muslim marriage is dissolved
  - The Divorce Act fails to make provision for the forfeiture of the patrimonial benefits of a Muslim marriage at the time when it is dissolved.

The Constitutional Court judgement gave Parliament time (up to June 2024) to amend these Acts according to its ruling. The judgement specifically said Parliament must make laws that recognise Muslim marriages as valid marriages and regulate the consequences of such marriages.

As a result of this Court judgement, the *Divorce Amendment Act* (No. 1 of 2024) has been passed, and it provides recognition and protection of Muslim marriages in South Africa. It integrates specific provisions for Muslim marriages into the existing *Divorce Act* and addresses critical legal issues that were previously lacking for Muslim marriages. (See pg 535: *Ending a Muslim marriage*)

The *Draft Marriage Bill* (2023) aims to consolidate all laws relating to marriage into one piece of legislation and recognise all types of intimate partnerships regardless of gender, sexual orientation, or religious, cultural and other beliefs. All South Africans and residents in the country of all sexual orientations, as well as religious and cultural beliefs, will be allowed to have legal unions in line with constitutional principles. This includes Muslim and Hindu marriages. The Bill outlines measures to prevent unions such as child and forced marriages and those done in the absence of the other party.

## **COURT DECISIONS DEALING WITH RECOGNITION OF MUSLIM MARRIAGES**

In the case of *Amod v Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 (SCA), a surviving spouse from a Muslim marriage was given the right to claim damages for loss of support from the Fund when her husband died in a motor accident.

In the case of *Daniels v Campbell N.o. and others* 2004 (5) SA 331 (CC), the plaintiff was given the right to claim maintenance and inherit from the estate of her deceased husband to whom she had been married by Muslim law, in terms of the *Maintenance of Surviving Spouses Act*.

In the case of *Khan v Khan* TPD case no: 82705/03/A 2705/2003 (not yet reported), a Muslim woman who was party to a polygamous Muslim marriage was given the right to claim maintenance from her spouse in terms of the *Maintenance Act*.

In the case of *Mahomed v Mahomed* (2008 ECP), and in *Hoosain v Dangor* (2009 CPD), the courts recognised the right to claim interim maintenance while waiting for the outcome of the main action which asked the court that Muslim marriages be governed by the *Divorce Act*.

The courts have recognised the right of a spouse married according to Muslim rites to inherit from her deceased husband's intestate estate.

In the case of *Hassam v Jacobs N.O. and others* [2008], where the Applicant was the wife of the deceased in a polygamous marriage, the court allowed both wives to inherit a child's share of the estate.

## **HINDU MARRIAGES**

Traditional Hindu marriages are not recognised by civil law. But if spouses go through a civil marriage ceremony either in terms of the *Marriage Act* or the *Civil Union Act* or are married by a Hindu priest who is a marriage officer, the law will recognize their marriage. The husband then cannot marry any other woman by civil law.

The *Draft Marriage Bill* (2023) aims to consolidate all laws relating to marriage into one piece of legislation and recognise all types of intimate partnerships regardless of gender, sexual orientation, or religious, cultural and other beliefs. All South Africans and residents in the country of all sexual orientations, as well as religious and cultural beliefs, will be allowed to have legal unions in line with constitutional principles. This includes Muslim and Hindu marriages. The Bill outlines measures to prevent unions such as child and forced marriages and those done in the absence of the other party.

### **COURT DECISIONS DEALING WITH THE RECOGNITION OF HINDU MARRIAGES**

In the *Prag matter* (Wynberg court ref.31008MAI000680) the maintenance court recognised the duty to maintain where the parties were married according to Hindu rites.

In the Govender matter (*Govender v Ragavayah No and others (Women's Legal Centre Trust as amicus curiae)* [2008] joL 22653 (D)), a wife was entitled to inherit from her deceased's husband's intestate estate to whom she was married according to Hindu rites.

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## The rules of civil marriage

Marriages create certain rights and duties for the husband and wife. In all marriages, couples have a legal duty to **support** each other. This means that they must look after any children, the home and provide the family with food and clothing, medical care and other 'household necessities'. Either or both partners work to earn money.

All civil marriages are automatically in **community of property** unless the parties sign an **ante-nuptial contract** before the marriage (except African marriages before 1998, which were automatically out of community of property, unless the partners clearly chose to marry in community of property).

### MARRIAGES IN COMMUNITY OF PROPERTY

This is the automatic system of marriage. In other words, if you get married without signing any contract, you will automatically be married in community of property.

'In community of property' means that everything the couple own, and their debts from before their marriage, are put together in a joint estate. Everything they earn or buy and any debts incurred after their marriage are also part of this **joint estate**.

There is **joint administration** of the things the couple owns. This means the husband and wife share in controlling their joint property. To protect each spouse, the other partner's written permission is necessary for big things like buying or selling a house, signing credit agreements, withdrawing money from accounts in the other spouse's name and so on.

If they get divorced, the joint estate gets divided in half. One half belongs to the wife, the other to the husband. Any debts are also shared. The court does have the discretion to order that one spouse will not get their half share that they will be entitled to by granting an order of forfeiture of benefits or redistribution of the assets if, taking into account various factors, it believes it would be unfair for everything to be split equally.

In terms of the *Matrimonial Property Act* (No 88 of 1984), the marital power of a husband over his wife was scrapped. Now a woman married in community of property:

- Has equal rights to administer the joint estate
- Can enter into contracts without her husband's permission
- Can sue or be sued in her own name

Both men and women must now say what their marital status is when they fill in forms.

## MARRIAGES OUT OF COMMUNITY OF PROPERTY WITH AN ANTE-NUPTIAL CONTRACT

Before they marry, two people can make an agreement called an **ante-nuptial contract**. Usually, this agreement excludes (or cuts out) community of property. This means the husband and wife each own and control their own things – they have **separate estates**.

Under the *Matrimonial Property Act of 1984*, the **accrual system** automatically applies to their marriage, UNLESS they agree in their ante-nuptial contract that they do not want the accrual system.

'Accrual' means increase. The accrual system recognises that during a marriage, the husband and wife keep on adding to their joint property. For example, They may add to their property by both working and bringing money into the marriage. Or one spouse may add indirectly by staying home and looking after the home and children so that they do not need to employ someone to do that. The accrual system allows both partners to benefit from the growth of either of their properties during the marriage.

While the marriage lasts, the husband controls his own separate estate, and the wife controls hers. But if they divorce or when one spouse dies, any increase in the value of both estates gets shared equally by the partners. If the couple chooses not to have the accrual system, in their divorce, the partners keep their own things and are responsible for their own debts.

### **This is how the accrual system works:**

- Certain things are excluded from the accrual system, such as inheritances and gifts.
- At the beginning of the marriage the property of each spouse is valued.
- During the marriage, each spouse controls and adds to their own property.
- When the marriage ends through death or divorce, the value of each spouse's property before the marriage gets compared with the value at the end of the marriage. This shows the increase in each spouse's property. (Inflation is taken into account.)

- Take the smaller increase in value away from the larger increase in value. Divide this amount in half. The spouse with the smaller increase in value has a claim against the other spouse for half of this difference so that they end up with the same accrual.

#### EXAMPLE OF ACCRUAL SYSTEM

<b>Husband</b>	<b>Wife</b>	
R30 000	R4 0000	(Value at end of marriage)
R10 000	R2 000	(Value at beginning of marriage)
R20 000	R2 000	(Increase)

*In this example, the husband's estate has grown by R18 000 more than the wife's estate during the marriage (i.e. R20 000 – R2 000). She has a claim against him for half of this difference i.e. R9 000 so that they each end up with an accrual of R11 000.*

#### CIVIL MARRIAGES OF AFRICANS BEFORE 1988

Africans married by civil marriage ceremonies before 2 December 1988 were automatically married out of community of property with no accrual and the husband had marital power in terms of the *Black Administration Act* (38 of 1927). So, each partner kept their separate property and each partner owned any property they got during the marriage. But the husband had the marital power, so he managed both his property and his wife's property.

In 1988, the *Marriage and Matrimonial Property Amendment Act* (No. 3 of 1988) changed the laws for civil marriages of Africans and made them the same as any other civil marriage. This meant that marital power was scrapped, the automatic marriage is in community of property unless couples sign an ante-nuptial contract, and out of community of property marriages have the accrual system unless couples choose not to have it.

Since 1998, the *Recognition of Customary Marriages Act* (No. 120 of 1998) has recognised all African customary unions as legal marriages. All new marriages formed after the Act will automatically be in community of property unless the parties draw up an ante-nuptial contract. In terms of this Act, the husband has no marital power. (See pg 525: *African customary marriages*)

## CHANGING THE WAY YOU WERE MARRIED

Even though the laws may have changed since you were married, your marriage is still governed by the way you were married and the rules of marriage for that kind of marriage at that time (except that marital power is automatically scrapped).

Married people can apply to the High Court and ask the court to change their marriage from being in community of property to one out of community of property, or the other way around. Both husband and wife must apply together, they must prove that no other party will be disadvantaged, notice of the change has been given to all their creditors, and they must give the court good reasons for wanting to change the way they were married.

## Divorce

Divorce can affect the spouses and their children for the rest of their lives. Before getting a divorce, the husband and wife should try to get help from social welfare agencies or marriage counsellors. (See pg 1080: *Resources: Family and Marriage Society of South Africa (FAMSA)*; See pg 564: *Problem 1: Getting a divorce*)

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### Divorce in a civil marriage

A divorce legally ends a marriage. Once a divorce is granted, each partner may legally marry someone else. (See pg 536: *Family Court*)

There are only two grounds for divorce:

1. The 'irretrievable breakdown' of the marriage, or
2. The mental illness or continuous unconsciousness of one partner

### IRRETRIEVABLE BREAKDOWN

This means the couple can no longer live together as man and wife. Both partners or one partner must prove to the court that the marriage broke down so badly that there is no reasonable chance of getting back together.

These are examples of the kind of evidence the court will accept as proof of irretrievable breakdown:

- The couple has not lived together like husband and wife for a period of time

- One partner had sexual intercourse with somebody else, and because of this, the other partner finds it impossible to continue living together as husband and wife
- One partner is in prison after being declared a 'habitual criminal'. (This means they keep committing crimes and because of this, was sentenced to 10–15 years in prison.)
- One partner deserted the other
- One partner abused the other, for example, the husband keeps assaulting the wife
- One partner is an alcoholic or a drug addict
- The partners no longer love each other – they may be too different, or they married when they were too young
- One of the partners finds it impossible to live together as husband and wife for any other reason

#### **MENTAL ILLNESS OR UNCONSCIOUSNESS**

The person wanting the divorce must show the court that the other spouse was admitted to or detained in a mental institution. The person must also show that the spouse has been in the institution for at least two years and that the doctors do not think they can be cured.

A person can also get a divorce if the other spouse is permanently unconscious. The spouse must have been unconscious for at least 6 months, and the doctor must see no hope of recovery.

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#### **Ending an African customary marriage**

Customary marriages can only end if there is a court order. The same grounds for divorce that apply for civil marriages now apply to customary marriages. In other words, if the court agrees that there has been an 'irretrievable breakdown' of the marriage, then it will agree to dissolve the marriage. The spouses are free to settle on any terms they choose, but the court will make an order regarding the custody and guardianship of any minor children and may make an order for maintenance to be paid, taking into account any arrangement that may have been made in terms of customary law.

#### **CUSTOMARY PRACTICES**

Lobolo plays an important role in Customary law. Lobolo is a negotiated sum of money that the groom pays to the bride's family. This payment is done in good faith and is an indication that the groom will be able to provide a good life for the bride and that the bride will be a good wife to the groom.



If the customary marriage ends, the husband may, on certain grounds, claim the return of part or all of his lobolo from the wife's family. As there are many African traditions in South Africa, the grounds for the return of lobolo might vary from tradition to tradition.

Possible grounds on which the husband can claim lobolo:

- If the wife absconds for no reason
- If the wife cannot have children
- If the wife neglects her household duties and neglects the children

Possible grounds on which a husband cannot claim the return of lobolo:

- If the husband publicly rejects his wife for no reason
- If the husband and husband's family accuse the wife of witchcraft
- If the husband abuses the wife
- If the husband abandons the wife

When the parties apply to the court for a divorce, and there is a dispute regarding the return of lobolo, the parties can ask the court to assist, or the parties can approach the Community courts and courts of Chiefs and Headmen. It is likely that a claim for the return of lobolo, without approaching the court for divorce first, would be subject to challenge on a number of grounds, the most important being that the court would not have jurisdiction to grant an order that is equivalent to dissolving a marriage.

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## Ending a Muslim or Hindu marriage

### ENDING A MUSLIM MARRIAGE

The *Divorce Amendment Act* (No. 1 of 2024) provides for the recognition and protection of Muslim marriages in South Africa. It integrates specific provisions for Muslim marriages into the *Divorce Act* and addresses issues that were lacking for Muslim marriages. Key changes introduced by the *Divorce Amendment Act* and their implications for Muslim couples include:

- **Definition of Muslim marriages:** A Muslim marriage can now be ended by a court order, just like any other marriage. This gives Muslim couples access to the same legal procedures and protections when they are ending their marriage.
- **Maintenance and care of children:** The Act gives courts the power to make orders regarding the maintenance, care, guardianship or contact with children from Muslim marriages. Courts can now make fair and just decisions

about child custody, care and support, allowing Muslim parents to seek legal support when needed.

- **Redistribution of Assets:** The Act allows for the redistribution of assets if a Muslim marriage is dissolved. The courts can order assets to be transferred between the parties, taking into account their direct or indirect contributions to the maintenance or increase of the estate during the marriage. This supports a fair division of marital assets.
- **Forfeiture of patrimonial benefits:** Courts can order a party in a Muslim marriage to forfeit or lose their benefits if this is just and equitable. The courts will consider the duration of the marriage, the circumstances that led to its breakdown, and any misconduct by either party when making the decision.

The *Divorce Amendment Act* applies to all existing Muslim marriages or Muslim marriages that are in the process of being terminated.

## ENDING A HINDU MARRIAGE

If a man and woman were married by a priest in the Hindu religion, but they did not also have a civil marriage, the law says they were not lawfully married. So, they don't need to use the court if they want to get divorced. The current law does not protect Hindu women and children born into such marriages if they dissolve.

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## The Family Court

The Family Court combines issues of maintenance, Children's Court matters, guardianship, parental rights and responsibilities relating to custody and care, and domestic violence. (See pg 547: *Custody, guardianship and support of the children*)

All Regional Courts are now Family Courts. One of the purposes of the Regional Court is to make it easier and cheaper for people to get a divorce. In the Regional Court people can choose not to have an attorney or advocate to represent them. The procedures used in the Regional Court are simple and cheap (if no lawyers are used). (See pg 564: *Problem 1: Getting a divorce*)

A divorce can be finalised in a month if the parties have signed a settlement agreement at the outset, this is called a Consent Paper. However, if there are children, the Family Advocate who is appointed to look specifically at the needs of children in family matters, may become involved to make sure that the arrangements for the children are satisfactory.

If there are any disputes about the children or if they have any concerns about the arrangements proposed for the children in the summons, the divorce will take a bit longer

to finalise. It will also take longer if it is defended. (See pg 1077: Resources for Divorce Court Centres)

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## **Arrangements made at the time of divorce**

When a couple gets divorced, they have to make a number of arrangements. The most important arrangements the couple must make are:

- Custody (now called care) of the children
- Access (now called contact with) to the children
- Maintenance of the children
- Maintenance for one partner, usually the wife
- Dividing up the family property

Care and maintenance of children are the most important things to arrange. A court will not let a couple get divorced until it is sure that there are satisfactory arrangements for the children.

## **CARE OF THE CHILDREN**

This means the primary person taking care of the children. The law says that children must always have an adult to look after them. The court always takes into account the best interests of the children, not just the interests or wishes of the parents. So if the parents cannot agree on who should have care of the children, then the court looks to see which parent can best look after the children. The courts will ask the Family Advocate to hold an enquiry to see what would be in the best interests of the children who are under 18.

## **THE FAMILY ADVOCATE**

The Family Advocate can look at guardianship and parenting agreements, which make provision for care and contact and other parental rights and responsibilities.

There is a Family Advocate's office in each division of the High Court. They assist the parties to come to an agreement that will be in the best interests of the child. If the parents are unable to agree they evaluate the case and make a recommendation based on the best interest of the child. The Family Advocate will then produce a report for the court. The Family Advocate's recommendations are not binding unless it is approved by the court. The Family Advocate cannot act for either of the parties, and they cannot be subpoenaed to court to be a witness for either party.

## STEP-BY-STEP GUIDE TO USING THE FAMILY ADVOCATE

1. Either of the parties or the court can apply to the Family Advocate to hold an inquiry. So, for example, if the husband sues for divorce and asks for care of the children but the wife also wants custody, then either of them can complete an 'Annexure B' form, which asks the Family Advocate to enquire into the problem. You can get an 'Annexure B' form from the Registrar of the High Court, an attorney, Legal Aid or the Family Advocate's office.
2. The Family Advocate will interview the parties either together or separately, where necessary, to find out their personal circumstances and background details.
3. The Family Advocate also interviews the child with the assistance of the Family Counsellor to get the child's views on the matter. The aim is to protect the child from testifying in a potentially harsh court environment.
4. The Family Advocate helps the parties reach an agreeable solution through mediation.
5. If the parties reach an agreement, the Family Advocate will then help them draft a parenting plan or responsibilities and rights agreement, which can be registered with the Office of the Family Advocate or made an order of court.
6. If the parties cannot reach an agreement, the Family Advocate will then compile a report for the court and make a recommendation based on the enquiry that was conducted.

The Family Advocate does not charge the parent for holding the enquiry.

Divorces can take a long time. If one of the parties wants care of the children (for example, if the children are being threatened) while the divorce is happening, the party can make an application for interim care. This means asking the court for full-time care of the children until the divorce is settled. If the party is really worried that the children are suffering or if there is a threat that one of the parties is going to kidnap the children, the other party can make an urgent application for care and that any contact be supervised.

After the divorce, if the parent who doesn't have care of the children tries to take the children, the parent with care can ask the court for an interdict. This is an order for the parent to return the children.

In African customary marriages, the court also decides which parent should have custody and guardianship on divorce, based on the best interests of the children. The *Children's Act* and the *Maintenance Act* make provision for equal rights and duties of parents of children of religious marriages in terms of which the fact that the marriage is not legally recognised is not an issue. (See pg 547: *Custody, guardianship and support of children*)

## CONTACT WITH THE CHILDREN

The court usually gives the parent who does not have the children in their care a right to contact (this used to be called the right of 'reasonable access') with the children. The law aims to maximise the amount of contact children have with both parents. This is where the parents share time with the children without impacting their routine, which is in their interest. This usually means that the children spend at least every second weekend and every second long and short school holiday with the parent who does not have care of the children.

However, this arrangement may not be appropriate for very young children and depends on the circumstances. If the order does not specify how often and for how long the access should take place, then a parental plan must be drawn up. A parental plan is an agreement that specifies when a parent can have access to the child. The Family Advocate can assist the parents in drawing up a parental plan.

If the parent asking for care does not think the other parent should have unrestricted contact with the children, they can ask the court that contact be supervised or restricted. The parent with custody of the children must give good reasons why access should be restricted, for example, that the parent abuses the children or has a serious drinking problem and will not look after the children. That parent's access would then have to be supervised by the mother or another adult person.

Also, if one parent has contact rights, this does not mean that he has the right to see the children in the other parent's home. (See pg 547: *Custody, guardianship and support of children*)

## MAINTENANCE OF THE CHILDREN

Although maintenance for the children is paid to the parent who has care of the children, maintenance is a right that the children have, not the parent. Both parents have a duty to support their children, including illegitimate children (according to civil law). There is no longer a distinction made with children regarded as illegitimate.

When the court gives one of the parents custody, it usually also makes an order for the other parent to pay maintenance.

If a party does not pay maintenance for the children, even though the court has ordered this, then the other party can go to the Maintenance Court to have the order enforced. A maintenance order is an order of the court and so it is a criminal offence to break the order by not paying. (See pg 547: *Custody, guardianship and support of children*; See pg 572: *Problem 5: Maintenance is not paid*)

## MAINTENANCE FOR THE WIFE

Maintenance is often just called 'support'. In a marriage, both partners have a duty to support each other and any children. It is usually the woman who takes care of the home and children more than the man. So, the wife often cannot earn as much as the husband. Then the husband has a duty to support the wife and children with money to buy the things they need.

If they get divorced, the wife can claim maintenance for **herself** from the husband, at least until she finds a decent job. The court considers a number of factors to establish whether she can get spousal maintenance, like the duration of the marriage, whether she worked during the marriage, her age, what type of work she did/does, etc. She must always claim this money **at the time of the divorce**.

The wife and the husband can agree on what amount he will pay her. If they cannot agree, she should tell the court what amount she wants. If the court agrees that the wife should get maintenance, then the court will order the man to pay a specific amount. The woman can always ask the court to increase the amount later if her needs change.

If the wife earns more than the husband, he can apply for maintenance from her at the time of the divorce.

Although religious marriages are not legally recognised, the courts have acknowledged the duty to maintain, a spouse can claim for maintenance from her deceased's spouse's estate, claim interim maintenance pending divorce and maintenance during marriage where they were married according to religious rites.

## DIVIDING UP THE FAMILY PROPERTY

This happens in different ways depending on how the marriage took place. (See pg 522: *Marriage*)

If the couple were married in community of property:

The joint estate is divided into two equal parts, which includes both assets and liabilities (debts). One half belongs to the husband and the other to the wife. If they cannot agree on how to share the property, the court must decide.

***Non-Africans married before 1 November 1984 out of community of property:***

Each partner keeps their own property. They also take any property that the ante-nuptial contract says they must get. The court can give the wife a share of the husband's property if she helped financially to bring up the children or supported the husband in other ways.

***Africans married before 2 December 1988 out of community without an ante-nuptial contract:***

Each partner keeps their own property. The court can give the wife a share of the husband's property if she helped bring up the children or supported the husband in other ways.

***Non-Africans married after 1 November 1984, and Africans married after 2 December 1988 out of community of property with an ante-nuptial contract which KEEPS IN the accrual system:***

Each partner keeps their own property which they brought into the marriage. Any increase during the marriage in the value of either partner's property is shared equally between them.

***Non-Africans married after 1 November 1984, and Africans married after 2 December 1988 out of community of property with an ante-nuptial contract which EXCLUDES the accrual system:***

Each partner keeps their own property. They also take any property that the ante-nuptial contract says they must get. The court has no discretion to order that one spouse shares the property of the other spouse.

## HOUSING

A big problem for women is that they might lose their houses when they divorce. There are some things women can do to make sure that they and their children have a place to stay.

### **BOUGHT HOUSES**

When a couple buys a house it is a good idea to have the house put in both names. If married in community of property, the house has to be registered in both names. In a divorce situation, it is important that the person who has care of the children is given the sole right to stay in the house until the children are grown up and that, at that stage, it be sold and the profits

divided between the two parties. Alternatively, the person who is the primary carer of the children keeps the house instead of sharing in some other assets such as a pension fund interest. If the parent with only contact rights keeps the house, then the other parent (who has care) should ask to be paid out half the value of the house. Alternatively, the house can be sold and profits shared in half.

In the case of *Solarie v City of Cape Town*, Cape High Court number 26186/09, Ms Solarie challenged the former housing policy of the City of Cape Town to register houses in the name of the husband only when spouses married according to Muslim rites applied for housing as a couple. She argued that this position clearly discriminates against women on the basis of gender and religion. The Court held that the policy was inconsistent with the Constitution, as it unfairly discriminated against women and limited women's ownership of property and constitutional right to access to land. The policy created additional criteria for women to become property owners, made them vulnerable to eviction, and did not protect their right to security of tenure. The Judge also found that the agreement, which gave the ex-husband the sole right to ownership of the property, was contrary to the values enshrined in the Constitution and, therefore, could not be enforced.

### **RENTED HOUSES**

If you are renting a house and you get divorced, you can ask your landlord to put the house in your name. The landlord will want to make sure that you have enough money to pay the rent, for example, that you have a job. If you are renting from a local council, it is a good idea to get the house put into your name.

## Care and protection of children

This section deals with the laws that apply to child care and protection.

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### **Laws that apply to child care and protection**

- Age of Majority Act (No. 57 of 1972)
- Child Care Act (No. 74 of 1983)



- Children's Status Act (No. 82 of 1987)
- Guardianship Act (No. 192 of 1993)

However, over the past years, it has become clear that these laws are not sufficiently able to protect and support children. As a result of a long process of consultation, the *Children's Act* (No. 38 of 2005) and the *Children's Amendment Act* were passed.

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## **The Children's Act and Children's Amendment Act**

On 1 April 2010, the *Children's Act 38 of 2005 (as amended by the Children's Amendment Act 41 of 2007)* and the Regulations came into full force. The purpose of this Act is to:

- Give effect to certain rights of children as contained in the constitution
- Set out principles relating to the care and protection of children
- Define parental responsibilities and rights; to make further provision regarding Children's courts
- Provide for partial care of children
- Provide for early childhood development
- Provide for the issuing of contribution orders
- Provide for prevention and early intervention
- Provide for children in alternative care Provide for foster care
- Provide for child and youth care centres and drop-in centres
- Make new provision for the adoption of children
- Provide for inter-country adoption
- Give effect to the Hague Convention on inter-country adoption
- Prohibit child abduction and to give effect to the Hague Convention on International Child Abduction
- Provide for surrogate motherhood, and
- Create certain new offences relating to children and to provide for matters connected therewith

In summary, the Act makes, inter alia, provision for the following:

- The Act sets out principles relating to the care and protection of children and defines parental responsibilities and rights. The best interests of the child are a key consideration in determining disputes with regard to parental responsibilities and rights.
- The Act also contains provisions on the parental responsibilities and rights of unmarried fathers relating to access to the custody of their children. The Act aims to give unmarried fathers the same rights to parental responsibility that biological mothers have. For example: unmarried fathers who are living with the mother of

their child at the time of the birth of the baby have the same rights as the biological mother. Additionally, if the father is not residing with the mother at the time of the baby's birth, he can apply for his rights by giving consent to be identified as the child's father.

- The Act makes provision for children's courts, adoption, child abduction and surrogate motherhood.
- The Act determines that a child becomes a major on reaching the age of 18 and allows children over the age of 12 access to HIV testing and contraceptives.
- The Act now allows for what is known as open adoption so the adoptive family and the biological family can enter into an agreement which caters for the rights of the child and the biological family to know each other.
- The Act also deals with child trafficking, virginity testing and circumcision.
- The Act enables children to approach the court independently of a parent or guardian.
- The Act makes provision for the development of a National Child Protection Register. This register lists the names of people who are unsuitable to work with children as well as all reports of abuse or deliberate neglect of a child made to the Director-General in terms of this Act and all convictions of all persons on charges involving the abuse or deliberate neglect of a child.

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## Summary of the Children's Act

The chapters in the Children's Act are as follows:

- **Chapter 1:** Interpretation, objects, application and implementation of the Act.
- **Chapter 2:** General principles underlying the Bill and the best interest of the child; it provides for children's rights and deals with issues such as child participation, harmful social, cultural and religious practices, access to children's courts and the age of majority.
- **Chapter 3:** Parental responsibilities and rights and court orders linked to parental responsibilities and rights; this chapter also provides for the rights of fathers, presumption of paternity, parenting plans and the rights of children conceived by artificial fertilisation.
- **Chapter 4:** The functioning, powers and jurisdiction of children's courts and proceedings before the children's courts.
- **Chapters 5, 6, 11, 13 and 14:** Partial care, the definition of early childhood development and early childhood development services, children in alternative care, child and youth care centres and shelters and drop-in centres.

- **Chapters 7, 9 and 10:** Protection of children, the National Child Protection Register and the identification of children in need of care and protection and contribution orders.
  - **Chapter 8:** Provides for prevention and early intervention as a first layer of services provided to children and families in need of assistance.
  - **Chapter 12:** Foster care and care by family members.
  - **Chapters 15 and 16:** Adoption and adoption between countries.
  - **Chapter 17:** Gives effect to the Hague Convention on the Civil Aspects of International Child Abduction.
  - **Chapter 18:** Gives effect to the UN Protocol to Prevent Trafficking in Persons.
  - **Chapter 19:** Surrogate motherhood.
  - **Chapter 20:** Enforcement of the Act through powers of inspection and the creation of offences.
  - **Chapters 21 and 22:** General administrative issues and other matters
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## Overview of important sections of the Children's Act

*All spheres of government and their departments must work together to deliver services*

The Act requires all spheres of government and their departments to work together in an integrated and coordinated way to deliver services to children. This means there is a duty for national, provincial and local governments to work together to ensure that services are provided to children.

The Act brings together all laws relating to children in South Africa and does away with the need for each province to pass its own legislation on children's issues. It should, therefore, streamline provincial governance. This Act does not, however, have any direct implications for local government.

## RIGHTS OF CHILDREN WITH DISABILITY OR CHRONIC ILLNESS

Special care must be taken of a child with a disability or chronic illness by:

- Providing the child with parental care, family care or special care
- Making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have (for a disabled child)
- Providing the child and the child's caregiver with the necessary support services
- Providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.

## **BEST INTERESTS OF THE CHILD**

The principle of the best interests of the child must always be considered when making decisions about children. Some of the factors that should be taken into account include:

- The nature of the personal relationship between the child and the parents or caregiver
- The attitude of the parents towards the child
- The capacity of the parents or care-giver to provide for the needs of the child, including emotional and intellectual needs
- The possible effect on the child of any change in the child's circumstances, including being separated from both or either of the parents, any brother or sister or other child, or any other care-giver or person, where the child has been living with the person
- The practical difficulty and expense of a child having contact with the parents regularly
- The need for the child to remain in the care of their parent, family and extended family; and to keep a connection with the family, extended family, culture or tradition
- The child's age, maturity, stage of development, gender and background
- The child's physical and emotional security
- Any disability that a child may have
- Any chronic illness that a child suffers from
- The need for a child to be brought up in a stable family environment and, where this is not possible, in an environment that is as close as possible to a caring family environment
- The need to protect the child from any physical or psychological harm that may be caused by exposing the child to maltreatment, abuse, neglect, exploitation, degradation, violence, or any other harmful behaviour
- Any family violence involving the child or a family member of the child.

## **RIGHT OF PARTICIPATION**

All children have a right to participate in decisions that affect them.

## **AGE OF MAJORITY**

The age of majority is 18 years.

## **PROTECTIVE MEASURES RELATING TO THE HEALTH OF CHILDREN**

Children over the age of 12 years can consent to HIV testing without involving their parents. Children over the age of 12 years can ask for contraceptives without the consent of their parents or care-giver.

# Custody, guardianship and support of children

Parents have custody and guardianship of their children, and a legal duty to support them.

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## Custody or care

Custody or care means:

- Providing a home for the children
- Feeding and supporting the children
- Looking after the day-to-day needs of the children
- Educating the children

When parents are married and live together, they share the custody/care of the children. When they separate or divorce, the court usually gives custody to one parent, either the father or the mother. Often, the mother gets custody, and the mother and father have joint guardianship of the children.

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## Guardianship

In terms of the *Children's Act*, a person who acts as a guardian must:

- Administer and safeguard the child's property and property interests
- Assist or represent the child in administrative, contractual and other legal matters
- Give or refuse any consent required by law in respect of the child, including:
  - Consent to the child's marriage
  - Consent to the child's adoption
  - Consent to the child's departure or removal from South Africa
  - Consent to the child's application for a passport; and
  - Consent to the sale of any immovable property of the child

The parents are usually joint guardians and are called the 'natural guardians'. A natural guardian has a duty to support their children. If for some reason the natural guardian cannot carry out their duties, the court appoints a 'legal guardian' for the children.

## NOTE

***The Guardianship Act (No. 192 of 1993) is repealed by the Children's Act.***

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### **The duty to support children**

Both parents have a legal duty to support their children. Where children are not given reasonable care, then the court may remove the child from the parent's care in terms of childcare provisions.

The duty of parents to support their children ends when the children become independent, for example, when they marry or when they become self-supporting.

If the children are not living with the mother or the father, the person who is looking after them can apply for maintenance from the parents. For example, if a child is living with the grandparents, the grandparents can apply to get maintenance from the father and the mother of the child. (See pg 570: *Problem 4: Getting maintenance through the Maintenance Court*)

### **STATE CHILD SUPPORT GRANTS**

Apply to the Department of Social Development (the SASSA offices) for these grants. The parents will have to go through a means test to qualify for Child Support or Care Dependency Grants.

- **Child Support Grant:** Any parent or whoever is looking after a child can apply for financial help if they cannot afford to support the child. You can apply for this grant for any child who is 0-17 years old.
- **Foster Care Grant:** This is for children who are placed in the care of foster parents by the Children's Court because they are considered to be children at risk. The foster parent is not the biological parent of the child.
- **Care Dependency Grant:** You can apply for this if you support a child who is severely disabled and needs special care. (See pg 482: *Child Support Grant*; See pg 484: *Foster Care Grant*; See pg 486: *Care Dependency Grant*)

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### **Parental responsibilities and rights**

When people become parents they have legal responsibilities and rights in respect of their children. Parents must give their children enough support to live at the same standard of

living as the parents. This duty continues until the children are self-supporting. This support includes food, clothing, housing, medical and dental expenses, and education. Children are minors until they reach the age of 18.

### **GENERAL PARENTAL RESPONSIBILITIES AND RIGHTS**

The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right to:

- Care for the child
- Maintain contact with the child
- Act as guardian of the child
- Contribute to the maintenance of the child

### **PARENTAL RESPONSIBILITIES AND RIGHTS OF MOTHERS**

The biological mother (in other words, the person who gave birth to the child) of a child, whether married or unmarried, has full parental responsibilities and rights with respect to the child.

### **PARENTAL RESPONSIBILITIES AND RIGHTS OF MARRIED FATHERS**

The biological father (in other words, the physical father) of a child has full parental responsibilities and rights with respect to the child if:

- He is married to the child's mother, or
- He was married to the child's mother at the time when the child was conceived (in other words, when the mother fell pregnant) or at the time of the child's birth; or any time between these events.

### **PARENTAL RESPONSIBILITIES AND RIGHTS OF UNMARRIED FATHERS**

Unmarried fathers have full parental responsibilities and rights with respect to the child:

- If, at the time of the child's birth, he is living with the mother in a permanent relationship
- Even if he is not living with the mother or has never lived with her, he:
  - Is identified as the child's father or pays damages in terms of customary law
  - Contributes or has tried to contribute to the child's upbringing for a reasonable period
  - Contributes or has tried to contribute towards the child's maintenance for a reasonable period.

However, this does not affect the duty of a father to contribute towards the maintenance of the child.

If there is a dispute between the unmarried father and the mother of a child regarding any of these conditions, the matter must be referred for mediation to a family advocate, social worker, social service professional or any other qualified person.

Any party to the mediation can ask a court to review the outcome of the mediation.

This section applies regardless of whether the child was born before or after the Act was passed.

The *Natural Fathers of Children Born out of Wedlock Act* (No. 86 of 1997), which gave unmarried fathers the right to go to court to ask for access, custody or guardianship of their children, has been repealed by the *Children's Act*. The Act no longer makes a distinction between illegitimate and legitimate children.

## **PARENTAL RESPONSIBILITIES AND RIGHTS AGREEMENTS**

The mother of a child or any other person who has parental responsibilities and rights in respect of a child can enter into an agreement with:

- The biological father of a child who, for some reason, does not have parental responsibilities and rights with respect to the child, or
- Any other person who has an interest in the care, well-being and development of the child.

A parental responsibilities and rights agreement must be registered with the family advocate or made an order of the High Court, a divorce court in a divorce matter or the children's court.

Before registering a parental responsibilities and rights agreement or making it an order of court, the family advocate or the court must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child.

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## **Children of African customary unions**

If a couple was married by African customary law, but they did not also have a civil marriage, the law says the children are legitimate. The natural father has rights over his children and a duty to support them. The *Children's Act* gives parental responsibilities and rights to all fathers if certain specified conditions are present, whether they are married or not.



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## Children of Muslim or Hindu marriages

If a couple was married by religious rites only (i.e. by an Imam in the Muslim religion, or a priest in the Hindu religion), they used to be considered to be illegitimate. However, under the *Children's Act*, it removed the status of calling children illegitimate. Both parents have a legal duty to support them. In terms of the *Children's Act*, whether fathers are regarded in law as married or unmarried, they automatically have parental responsibilities and rights if certain specified conditions are present. (See pg 548: *Parental responsibilities and rights*; See pg 549: *Parental responsibilities and rights of unmarried fathers*)

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## Adoption of children

### NOTE

***The Children's Act deals with adoption as well as inter-country adoptions. The sections in the Act on adoption came into force on 1 April 2010.***

Adoption is a legal way for an adult single person or a married couple to become the legal parents of a child. The Constitutional Court has decided in *Du Toit and Another v Minister of Welfare and Others* 2003 (2) SA 198 (CC) that the *Child Care Act* was unconstitutional in not providing for partners in same-sex life partnerships to adopt children jointly.

Adoption usually takes a long time. Parties must apply to the Children's Court for an order of adoption under the *Child Care Act*.

A child who is adopted must be under 18. A child can be adopted:

- Jointly by a husband and wife
- By a widow or widower or an unmarried or divorced person
- By a person who married the natural parent of the child
- By the natural father of a child born out of wedlock
- By a couple in a same-sex life partnership
- By the foster parent of the child

## CONSENT TO ADOPTION

Proper consent (permission) is needed to make an adoption order legal. Consent is written permission that is given to people wanting to adopt a child. Consent can be

given by the parents, the guardian of the child or the child. A child older than 10 years can consent to their own adoption.

### **LAWS ON ADOPTION**

Adoption laws in South Africa are outlined by the *Child Care Act of 1983*, which requires social workers and adoption agencies to 'give due consideration' to language, religion and culture when matching prospective parents with children. A child who is to be adopted must be under the age of 18 years and must be legally free to be adopted. This means that the biological parents of the child must either consent to the adoption or have had their parental rights terminated by a court. In some cases, a child may be placed for adoption by a children's home or other institution.

### **CONSENT TO ADOPT**

A child whose parents are both dead is available for adoption. Where the parents are alive, they must both consent to the adoption.

### **CHILD BORN OUT OF MARRIAGE**

In the case of the child born out of marriage, consent must be given by both the mother and the natural (birth) father, provided that he has acknowledged himself in writing to be the father of the child and has made his identity known on the child's birth certificate. Where only one parent has given consent, the commissioner will issue a notice to be served on the natural father within 14 days, informing them of the consent that has been given, and giving them the opportunity to also give or withhold consent.

The Children's Court does not need to issue a notice of an intended adoption of a child born out of marriage if the commissioner is satisfied that the natural father:

- Deserted the child and/or no one knows where he is
- Did not acknowledge that he was the father of the child or has failed without good reason to carry out his parental duties with regard to the child
- Was in an incestuous relationship with the mother of the child, and the child was conceived as a result of this
- Was convicted of the crime of rape or assault of the mother
- Was, after an inquiry by the Children's Court following an allegation by the mother of the child, found on a balance of probabilities, to have raped or assaulted the mother

## **WHO CAN ADOPT A CHILD?**

- A married couple can jointly adopt a child
- Partners in a life partnership (including same-sex partners) can jointly adopt a child
- A person who has married the natural parent of a child can adopt the child (adoption of a step-child)
- A single person (a widow or widower or an unmarried or divorced person) can adopt a child as a single person if they get the consent of the Minister

## **WHEN IS CONSENT NOT REQUIRED?**

Consent is not required when:

- The parents of the child have died, and no guardian has been appointed for the child.
- The parent:
  - Is not competent to give consent as a result of mental illness
  - Has deserted the child and it is not known where the child is
  - Has physically, emotionally or sexually assaulted, ill-treated or abused the child or allowed assaults or ill-treatment
  - Has caused or assisted in the seduction, abduction or sexual exploitation of the child, or has caused or helped the child to commit immoral acts
  - Withholds consent unreasonably
  - Of a child born out of marriage has failed to acknowledge himself as the father of the child or, for no good reason, did not fulfil parental duties about the child
  - Is the father of a child who was born out of marriage and was conceived in an incestuous relationship with the child's mother
  - Is the father of a child who was born out of marriage, and was convicted of the crime of rape or assault of the mother of the child
  - After an enquiry by the Children's Court following an allegation by the mother of the child, found (on a balance of probabilities) to have raped or assaulted the mother of the child: provided that such a finding does not constitute a conviction for the crime of rape or assault
  - Of a child who was born out of marriage has failed to respond within 14 days

## NOTE

*A parent of the child who has consented to the child's adoption has the right to withdraw consent within 60 days of giving the consent.*

## CASE STUDY

### FRASIER VS CHILDREN'S COURT, PRETORIA NORTH

Lawrie Frasier had a child with his partner. They were not married. By the time the baby was born, the couple had separated. The mother of the child arranged for the child to be adopted by people that the father did not know and without getting his consent to the adoption. She also didn't ask him whether he wanted to look after the child.

Mr Frasier claimed he had rights as the father of the child even though they weren't married. But the Child Care Act said a mother didn't need to get permission from the father of an illegitimate child. If they had been married, then she would have to get his consent. As a result of this case going to the Constitutional Court, the Child Care Act was changed and the Natural Fathers of Children Born out of Wedlock Act was passed. (See pg 549: Parental responsibilities and rights of unmarried fathers)

The law regards an adopted child exactly **as if** they are the legitimate natural child of the **adoptive** parents. So there are the same rights and duties, for example the duty of support. All rights and duties between the child and its **natural** parents end.

Illegal adoption, for example, paying to adopt a child, is a criminal offence. (See pg 568: Problem 3: Adopting a child)

### THE ADOPTION PROCESS

The adoption process consists of an assessment by a social worker, a police clearance, and a court application. This will usually need the support of an adoption lawyer.

## Child abuse and neglect

The Constitution guarantees that everyone has the right to be free from all forms of violence in the home. The government and the police have a duty to protect children and implement measures that will prevent abuse of children in the home. For example, the police have established *Family Violence, Child Protection and Sexual Offences Units (FCS)*, which investigate physical and sexual abuse of children and child neglect. They are specially trained to deal sensitively with children.

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### Laws protecting abused and neglected children

There are laws that provide specific protection for children who are abused. The most important Acts that deal with the protection of children who are or have been abused or neglected are the *Children's Act* and the *Children's Amendment Act*. There are wide-ranging provisions that include the provision of child protection services and keeping a National Child Protection Register. The Acts also make provision for children who are in need of care and protection. (See pg 544: *Summary of the Children's Act*)

The main laws that aim to protect abused and neglected children are as follows:

- The *Children's Act* says that it is a criminal offence:
  - If a parent, guardian, or other person who has parental responsibilities and rights in respect of a child, caregiver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or caregiver or other person abuses or deliberately neglects the child, or abandons the child.
  - If a person who is supposed to maintain a child doesn't provide the child with clothes, lodging and medical care.
  - The *Domestic Violence Act* defines the different forms of domestic violence against adults and children and says how a child (or other people on behalf of the child) can get a Protection Order against the abuser. (See pg 592: *Domestic Violence Act (No. 116 of 1998)*)
- The *Criminal Law (Sexual Offences and related matters Amendment Act (No. 32 of 1996)* gives a new definition of rape and includes a sexual offences register.
- The *Films and Publications Act (1996)* protects children from exploitation in child pornography and by being shown pornographic material.

- Criminal law allows a child who was abused to lay a charge against the abuser, for example, of assault, rape and assault with intent to do grievous bodily harm. (See pg 203: *Criminal charges*)
  - The *Basic Conditions of Employment Act* makes it illegal to employ a child under the age of 15 years.
- 

## **Reporting child abuse**

Many children don't report the abuse they are experiencing. There are many different reasons for this. But the law says that people must report child abuse, and it is a criminal offence not to report in these circumstances. This law is in terms of the *Children's Act*.

The *Children's Act* says any doctor, nurse, teacher or person managing a children's home or place of care must report any suspicion of child abuse in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.

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## **Stopping child abuse using the Domestic Violence Act**

The *Domestic Violence Act* covers domestic violence, sexual abuse, economic abuse and emotional and psychological abuse. This Act covers people who have or had a domestic relationship - for example, children, partners, ex-partners, parents, etc.

The *Children's Act* says any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care must report child abuse immediately to the police or a designated child protection organisation. It is an offence not to report child abuse. (See pg 592: *The Domestic Violence Act*)

The following people can apply for a Protection Order under the *Domestic Violence Act* to stop someone from abusing a child:

- Family members
- Parents of a child or people responsible for a child
- A child under the age of 18, without the help of a parent or guardian

- Any person, including a health service provider, police officer, social worker, teacher, neighbour, friend, relative, or minister, who has a material interest (not just being a busybody) in a child's wellbeing

The *Domestic Violence Act* says if a person has a material interest in the wellbeing of a child and believes that the child (under 18 years) is being abused, they don't have to wait for the child to give consent to apply for a Protection Order, they can bring the application for the Protection Order themselves. It is enough if the person believes that the child is being abused. (See pg 605: *Problem 3: Getting a Protection Order*)

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## Child sexual abuse

If a child has been raped or otherwise sexually assaulted, the criminal law can be used to lay a charge against the person who assaulted the child. During the criminal trial, it is sometimes difficult to prove 'beyond a reasonable doubt' that a child was sexually abused in order to convict the accused. If it is clear that the child needs protection, the case goes to a Children's Court enquiry to decide the best way of protecting the child. But the Children's Court may not try or convict a person in respect of a criminal charge and thus cannot prosecute the child abuser. (See pg 583: *Rape, incest and indecent assault*; See pg 601: *Problem 1: Reporting rape or assault and going to court*)

If the person who sexually abused the child, lives or recently lived with the child, is a member of the child's family by blood or adoption or is or was a partner/spouse of the child's parent, you can use the *Domestic Violence Act* to protect the child. (See pg 605: *Problem 3: Getting a Protection Order*)

## THE SEXUAL OFFENCES ACT

The *Criminal Law (Sexual Offences and Related Matters) Act* (No. 32 of 2007) – also referred to as the *Sexual Offences Act* – defines a number of sexual offences in relation to children. Some of the most important provisions are as follows:

- Sexual exploitation of children (under the age of 18 years). The Act says that the following actions are offences in terms of sexual exploitation:
  - If a person uses a child to engage in sexual activities for money, even if the child consents to this
  - If a person offers the sexual services of a child to another person, with or without the consent of the child, for money or any kind of reward
  - If a person (who is a primary caregiver) allows another person to commit a sexual act with a child, even if the child consents;
  - If a person allows another person to commit a sexual act with a child, with or without the child's consent and is paid for this

- Displaying child pornography
  - If a person displays child pornography or pornography to a child, with or without the consent of the child, they are guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a child.
- Using children for child pornography
  - If a person uses a child, with or without the child's consent, for the purposes of creating, making or producing any image, publication, depiction or description of child pornography or assists in any manner in this regard is guilty of an offence of using a child for child pornography.
- Committing a sexual act with a child between 12 and 16 years
  - The age of consent to sex or sexual activity is 16 years
  - Children under the age of 12 are unable to consent to any sexual acts
  - Committing a sexual act with a child under the age of 12 years is statutory rape or sexual assault, even if the partner is a minor.
  - A person (over 18 years) committing a sexual act with a child that is 12 years or older but under the age of 16 is statutory rape, even with the child's consent. This amounts to a sexual offence, and the adult will face statutory rape charges.

The *Sexual Offences Act (2007)* and the *Sexual Offences Amendment Act (2015)* provide the following approach to consensual, underage sex between adolescents:

In terms of the *Sexual Offences Act*, consensual sex or sexual activity with children between the ages of 12 and 16 years was a crime and had to be reported to the police. This was challenged in court in the *Teddy Bear* case, which held that it was unconstitutional and caused more harm than good for children of these ages.

The Constitutional Court held that adolescents have a right to engage in healthy sexual behaviour, and that criminalising consensual sex or sexual activity between adolescents of 12 and 16 years violated their rights to privacy, bodily integrity and dignity. In response to this, the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015* was passed. The amendments to the *Sexual Offences Act* mean that it is no longer a criminal offence for adolescents to engage in consensual sex with other adolescents if they are 12 years or older and under the age of 16 years. It will also not be a criminal offence if one adolescent is between the ages of 12 and 16 and the other is 16 or 17, provided there is not more than a 2-year gap between the two people. For example, a 13-year-old and a 15-year-old can legally have sex if it is agreed to by both partners and not forced in any way. However, if



anyone older than 16 years has sexual contact with someone younger than 16 years and the age gap is bigger than 2 years, they are committing statutory rape.

## INCEST

The law says that people who may not get married to each other because they have a blood relationship or an adoptive relationship with one another also may not engage in acts of sexual penetration with each other. If they do, then they are guilty of the crime of incest.

The rules about incest are mostly the same as for rape. But the people involved are usually an adult and a child in the same family where the adult forces the child to have sex. According to the *Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2021*, incest includes the act of sexual penetration or sexual violation where one of the parties is a child, and the action of the adult was so bad that even if there was mutual consent, the adult would be guilty of incest.

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## Removing children from abuse or neglect

The *Children's Act* is designed to look after the interests of children and protect them if their parents abuse or neglect them. The Act says police or a designated social worker can take abused or neglected children away from their homes to a 'place of safety' without a court order in certain circumstances. The Children's Court will hold an enquiry to decide whether the parents or guardians are fit to have custody of the child. The court says they are unfit if they:

- Are so mentally ill that they cannot provide for the child
- Assaulted or ill-treated the child or allowed someone else to assault or ill-treat the child
- Let the child commit crimes or be seduced, kidnapped, or used as a prostitute
- Do not support the child by providing maintenance
- Neglect the child or let someone else neglect the child
- Cannot control the child, for example, to make sure they go to school regularly
- Abandoned the child
- Do not seem to have any means of support

If the court finds that the child has **no** parent or guardian, or an **unfit** parent or guardian, then the court can say the child must go to a foster home or a children's home. Or the court can say the child must go back to their parents, and the parents must follow any conditions the court gives them, or they will lose the child. (See pg 195: *Children's Courts*)

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## Foster care

The *Children's Act* deals with foster care. In terms of the *Children's Act*, a child is placed in foster care when the Children's Court makes an order that it is in the child's best interests of the child to be placed in foster care or when the provincial head of social development in the relevant province by order in writing transfers a child to foster care.

The foster parents' rights and responsibilities with regard to the child are set out in the Court Order made by the Children's Court or in a foster care plan made between the parents/guardian of the child and the foster parents. But the natural parents can visit their child at reasonable times, unless the court says they may not.

Foster parents have a duty to give the child food, clothing and education and generally promote the child's wellbeing.

Foster parents have the right to discipline the child. But they cannot deal with the child's property, consent to the child's marriage, consent to adoption, consent to the removal of the child from the country or consent to the application for a passport of the child unless they are entitled to act as guardian of the child and in such a case they must consider the views and wishes of the child, bearing in mind the child's age, maturity and stage of development. Foster parents can apply to the Department of Social Development for a state Foster Care Grant. (See pg 484: *Foster Care Grant*)

## Abortion

### When may a woman have an abortion?

The *Choice on Termination of Pregnancy Act* says a woman can get a termination of her pregnancy:

- **In the first 12 weeks of pregnancy**
  - If she asks for one during this period
- **From week 13 up to and including week 20**, if a doctor, after consulting with the pregnant woman, thinks that:
  - The continued pregnancy would seriously affect the social or economic circumstances of the woman
  - The continued pregnancy would pose a risk of injury to the woman's bodily health or her mental health

- There is a serious risk that the foetus would suffer from severe mental or physical abnormalities
    - The woman is pregnant from rape or incest
  - **After the 20th week**, if a doctor, after consultation with another doctor or a registered midwife, thinks that:
    - The woman's life is in danger
    - The foetus would be severely malformed
    - There is a risk of injury to the foetus
- 

## **Consent to an abortion**

The termination of pregnancy can only take place once the woman has given her informed consent. No consent other than that of the pregnant woman is necessary for the termination of pregnancy unless she is so mentally ill that she doesn't understand what abortion is about or what happens as a result of an abortion, or she is continuously unconscious and therefore cannot give consent.

In the case of a pregnant minor (a person under the age of 18 years), a medical practitioner or a registered midwife must advise the minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated. However, if the minor chooses not to consult them, she is still allowed to have the abortion in terms of the Act.

A woman is entitled to counselling before and after the abortion. The counsellor may not force her, nor tell her whether or not she should have the abortion. (*See pg 38: Bill of Rights, Section 12*)

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## **Who may perform an abortion?**

- In the first 12 weeks of pregnancy:
  - A registered midwife who has completed the prescribed training course
  - A doctor
- From week 13 to the end of the pregnancy:
  - Only a doctor

Government hospitals should provide facilities to carry this out.

# Death

When a person dies, the family must report the death to the Registrar of Births and Deaths at the Department of Home Affairs. They must do this as soon as they can practically do so.

As soon as the Registrar is satisfied that everything is in order, they will give the family a burial order. This is a certificate that says the dead person can be buried. Usually, a burial cannot take place without a burial order.

The family must also report the death to the Master of the High Court within 14 days if the person who died left any property or left a will.

When people die, their belongings and property are given to people called their **heirs**. These are usually members of their family. The way this is done depends on whether or not the dead person left a **will**. A will is a document setting out how someone wants to share their property after death.

The property a dead person leaves is called an **estate**.

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## Dying without a will

When a person dies without leaving a will, the law says the person died **intestate**. The law of **intestate succession** is followed in dividing up their property.

If a married person dies intestate, their property is shared equally by the other spouse and their children, except that the spouse will get at least R250 000, so if the estate has less value than this, the children won't get anything.

There are complicated rules for deciding who gets the property if the dead person leaves no spouse or children. You should ask an attorney for advice on this. If the dead person leaves no blood relatives at all, the property will go to the government.

If a couple are married according to African customary law, the same intestate rules set out above will apply. They will follow the same intestate rules set out above.

## DOMESTIC PARTNERSHIPS ("VAT EN SIT")

There is a common misunderstanding that the law recognizes common-law marriages. Many people who have lived together for a period of time believe that they are entitled to a portion of what their partner owns. This is not true. It does not matter how long the parties have lived together there is no automatic legal protection for people who live together. If the people who live together are not

married to each other, the partners cannot inherit property from one another without a will. No valid marriage means no legal protection.

Domestic partners can apply to the court to have a universal partnership declared. This is not easy because the person seeking a universal partnership must prove to the court the contributions that they made to the deceased person's estate. A will is the best way for people in domestic partnerships to protect themselves.

Children born in domestic partnerships can claim maintenance from both parents.

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## Dying with a will

People need to make a will. In a will, people can say what they want to happen to their property after they die.

Any person over 16 can make a will, as long as they know and understand what they are doing. In a will, you can leave your property to anyone you wish – wives, husbands, children, relatives, friends or strangers. When you decide how to divide up your property, you must decide who will do this for you when you die. The person you choose is called an executor. If you don't choose an executor, the Master of the High Court will name someone executor, usually a member of your family.

You must make a will in writing. You can choose any two people older than 14 years as witnesses, but they must not be people that you left anything to in the will. You must initial the will on every page and, at the end, in the presence of the witnesses, sign in full. The witnesses must also initial on every page and sign in full at the end. (*See pg 575: Example of a simple will*)

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## Winding up a dead person's estate

A member of the dead person's family or a close friend must report the death to the Master of the High Court within 14 days if the deceased person had any property or left a will. If they do not do this, it is a criminal offence. They must get a form called a **Death Notice** from the Master's office and fill it in. Anyone who has a copy of the will must also send it to the Master of the High Court.

The dead person's husband or wife, or nearest relative or close friend must also send an **inventory form** to the Master within 14 days of the death. This is a list of all the property that belonged to the dead person.

All this property is called the **estate**. The estate has assets and liabilities. Assets are all the things the person owns. Liabilities are the person's debts.

The dead person's estate does not go straight to the heirs. It first goes to the executor.

The executor must draw up an account, adding up all the person's assets. Then, the executor subtracts all the debts from this amount. The executor must pay any income tax the dead person owed and also pay the 'death duties' tax on the estate. The executor sends the account to the heirs and to the Master of the High Court. When the Master is satisfied and the debts are all paid, the rest of the property goes to the heirs.

If things are complicated, for example, if the estate cannot pay all the debts, the executor should consult an attorney to help.

If the dead person's property is worth less than R250 000, the Master may say an executor is not necessary and appoint a representative and issue a letter of authorisation to confirm their appointment. The Master then gives directions as to how the estate is to be dealt with and usually gives the dead person's husband or wife permission to keep all the dead person's property unless they leave a will giving it to someone else.

## Problems

### 1. Getting a divorce

My husband and I want to divorce. Where do we start? How can we get help with attorneys, legal fees and so on? What steps must we follow to get a divorce?

#### WHAT DOES THE LAW SAY?

Divorce cases are heard in the High Court and in regional divisions of the Magistrate's Court. These are also called Family Courts. The regional courts hear divorce matters on certain days of the week. A divorce can be simple and cheap in a Family Court. This means that people wanting to get a divorce do not have to go to the cities to use the High Court to get a divorce. You can choose whether to do your divorce in the Family Court or the High Court.

#### WHAT CAN YOU DO?

Even when there is serious marriage trouble, the couple can sometimes avoid a complete breakdown. Before going to an attorney or the court for a divorce, the married couple could speak to a social worker or marriage guidance counsellor to see if they can solve their problems. Divorce is a last resort.

The Family Advocate helps the Regional Court or High Court with divorce cases where there are minor children involved.

The Family Advocate works together with family counsellors in divorce and similar cases. Their main role is to work out what will be the best arrangement for children when the parents want a divorce. The Family Advocate is important because it allows the two sides to meet together with an independent person to sort out differences in the arrangements for the children. If the case goes to court, then the Family Advocate will represent the best interests of the children in the trial. A divorce can be defended or undefended.

- A **defended** divorce means that one partner wants a divorce and brings the case to court, but the other partner does not want the divorce OR does not agree on how the property should be shared, or about the maintenance and custody arrangements. The other partner wishes to argue in court about these things. This is called defending the divorce action.
- An **undefended** divorce means the other partner agrees to the divorce AND agrees to the arrangements suggested by the divorcing partner. If a divorce is undefended, the cheapest and quickest way to get a divorce is to use the Regional Court. (See pg 536: *The Family Court*)

If you cannot afford a divorce attorney, you can get legal aid if you qualify according to the means test. (See pg 257: *Applying for legal aid*; See pg 576: *Model letter: Request for social worker's report to assist with application for legal aid*)

A wife who wants to divorce her husband but does not have enough money to pay for an attorney can ask her attorney to claim some money towards her legal costs from her husband. If she needs support for herself and the children, she can ask her attorney to claim maintenance from her husband. A woman can also claim maintenance at the Maintenance Court from a husband who deserted her and the children. She can do this without consulting an attorney. (See pg 537: *Arrangements made at the time of the divorce*)

If the divorce is undefended and there are no complications, you can cut out legal expenses and do the divorce yourself. To do this, you should check with the Registrar of the High Court or Regional Court.

## STEPS IN A DIVORCE ACTION

### 1. CONSULTATION WITH AN ATTORNEY

The spouse (husband or wife) who wants the divorce takes their marriage certificate and goes to see a lawyer. The spouse explains why they want to get divorced. The attorney gives advice on whether there are proper legal grounds for divorce. You can also go to one of the volunteers at the Regional Family Court, and they will assist you in filling out the forms.

### 2. SUMMONS

The attorney or divorcing spouse draws up a summons against the other spouse. This is a document which tells the other spouse about their right to defend the divorce. The Registrar of the Court issues (stamps) the summons.

### 3. PARTICULARS OF CLAIM

The summons is attached to the Particulars of Claim. This document sets out the reasons for the breakdown in the marriage. It also sets out what the divorcing spouse claims, for example, custody of the children.

### 4. NOTICE OF INTENTION TO DEFEND

The other spouse usually has 10 days to file (send to court) a Notice of Intention to Defend. If they do not do this within 10 days, the court sets a date for an undefended court hearing. If they do file the Notice within 10 days, then the spouses must send in their Pleadings. Pleadings are legal documents in which the husband and wife try to work out exactly what their claims and defences are.

### 5. CONSENT PAPER

If the other spouse does not file a Notice of Intention to Defend or if the parties reach a settlement where they agree on what should happen to the property, children and maintenance, they can write their agreement down in a Consent Paper. Then, only the spouse seeking the divorce action has to go to the court hearing. Even if the divorce is defended at first, the parties can reach a settlement at any stage. They also write this down in a Consent Paper. Both the husband and wife sign the Consent Paper. When the divorce is granted, the magistrate makes the agreements in the Consent Paper an order of court. This means that if either person breaks the agreement on purpose, the court can send him or her to jail for contempt of court. Regardless of what the parties put in the consent paper, the court will make sure it is in the best interests of the children and ask for the recommendation of the Family Advocate.



## 6. THE COURT HEARING (TRIAL)

In an **undefended** case, only the spouse who seeks the divorce must attend the court hearing. The divorce only takes a few minutes.

If the case is **defended**, both spouses must attend the court. If the spouse bringing the action proves their case, the court will grant a Divorce Order and also an order about the marriage property, care and contact in relation to the children, and maintenance.

The court sends a copy of the Divorce Order to each spouse. At the Family Courts, the Divorce Order must be collected.

## USING THE REGIONAL COURT

A person using the Regional Court does not need to have an attorney. A person wanting a divorce can go to the court and ask for assistance. An assistant will help complete the necessary forms. A summons will be issued and then served on the spouse.

The divorce will take longer to settle if:

- The other spouse chooses to defend the matter
- There are children, and this usually involves a Family Advocate.

If a couple doesn't have children, a divorce can be finalised in about two weeks if either of the parties does not contest it. They must both fill in a notice of non-defence. This only gets signed by the defendant when the summons is served on them. A date for the court appearance is then set. If one spouse refuses to sign the notice of non-defence when it is served with the summons but does not defend the matter, it can take about five weeks to finalise. However, certain courts are so busy that people sometimes wait longer than 6 months for a date for an undefended divorce. If the couple has children, the Family Advocate will be involved to ensure that the children's interests are seen to.

The costs of using the Regional Court are very low. Contact the Regional Court that is closest to you for information on up-to-date costs and procedures and times when they are open for divorce matters. (*See pg 536: The Family Court*)

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## 2. Entering into a civil union

Riana and Charlene, both South Africans, have a lesbian relationship and want to get married. Riana is 21 years, and Charlene is 25 years old. Riana has been married before but is now officially divorced.

### WHAT DOES THE LAW SAY?

Riana and Charlene are not legally allowed to marry each other in terms of the *Marriage Act*. The *Civil Union Act*, however, allows them to enter into a civil union, which can be either a marriage or civil partnership. If they do this, they will get a certificate that indicates that they have either entered into a marriage or a civil partnership, depending on their choice. This registration certificate shows that the civil union has been registered under the *Civil Union Act* and is not a marriage certificate under the *Marriage Act*. The certificate will serve as legal proof that the two partners are married or have become civil partners.

Riana and Charlene will be able to register a civil union because (a) they are both over the age of 18 years, (b) while Riana was previously married, she is divorced and has divorce documents to prove this, and (c) both women are South African citizens.

### WHAT CAN THEY DO?

Riana and Charlene can get married or enter into a civil partnership in terms of the *Civil Unions Act* at any public office, including the Department of Home Affairs and magistrate's court in their area, in any private dwelling, including their own home, or any other place that is used for marriages or civil partnerships.

They will need to supply the following documents:

- Identity documents (or an affidavit if an ID or passport is not available to confirm their identity)
- Application forms specific to the *Civil Union Act* which can be obtained from the Department of Home Affairs in their area
- Riana's divorce documents

Finally, they will need to have two witnesses to the ceremony.

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## 3. Adopting a child

"My husband and I wish to adopt a child. What must we do to find a child to adopt? What are all the steps to follow before we can bring a baby home?"

## WHAT DOES THE LAW SAY?

(See pg 551: *Adoption of children, which briefly sets out the law about adoption*)

## WHAT CAN YOU DO?

There are many different places you can approach to adopt a child, for example, the Child Welfare Society in your area or voluntary or charitable adoption agencies.

## STEPS IN AN ADOPTION

- Make an application for adoption at one or more adoption agencies.
- Social workers from the agency check that you are suitable people to be adoptive parents.
- If the agency finds a child, you must apply to the Children's Court in the district in which the child lives.
- The court holds a formal court hearing, which is not open to the public.
- The Commissioner of Child Welfare sits in the court. You must satisfy the Commissioner that you have a good reputation and are fit to have custody of the child. You must also show that you can support and educate the child.
- The social workers from the agency also make a report to the Commissioner, saying if they think you are suitable parents. The Commissioner **can** consider the religion, culture and race of the child's natural parents and its adoptive parents. BUT the Child Care Act **does not** say the Commissioner **must** match these matters. The welfare of the child is most important.
- The Commissioner must see a consent form signed by the natural parents. Usually your names as the adoptive parents are filled in on the consent form. But you can have a 'secret adoption'. This means the adoptive parents and the natural parents agree that the natural parents will not know the names of the adoptive parents.
- If the Commissioner is satisfied with everything, they give an **order of adoption**. This can happen months after you first apply to adopt a child.

## CANCELLING AN ADOPTION

The natural parents, adoptive parents or the Minister responsible can apply to the Children's Court for a Rescission (an order cancelling the adoption) within two years of the date of the adoption if:

- The adoption is not in the interests of the child

- The child was mentally ill at the time of the adoption, and the adoptive parents did not know this
- There was some fraud or mistake that persuaded the adoptive parents to adopt the child
- The natural parents did not give proper consent

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#### 4. Getting maintenance through the Maintenance Court

*"I have two children of four and seven years. How can I get the father of the children to pay me support money for them?"*

##### WHAT DOES THE LAW SAY?

Both parents have a legal duty to support their children, including children from unmarried fathers. This duty of support ends when the children become independent, for example, when they marry or when they become self-supporting. One parent can apply to the Maintenance Court for the other parent to pay support for their children. Once there is a court order instructing a parent to pay child support, it is a criminal offence not to pay. The parents have to pay in proportion to their income. *(See pg 548: The duty to support)*

For children up to the age of 17, you can also apply to the Department of Social Development (represented by the South African Social Security Agency (SASSA) for a Child Support Grant if they comply with the means test. *(See pg 482: Child Support grant)*

There are special Maintenance Courts at every Magistrate's Court. Maintenance clerks working in these courts help people who want to apply for maintenance and also deal with applications to get more or to pay less maintenance.

##### WHAT CAN YOU DO?

Check when applications can be made at the Maintenance Court, as some Maintenance Offices are only open on certain days of the week. These are the steps you must follow:

- Go to the Maintenance Office at the Maintenance Court in your area. Take with you:
  - The name and address of the father, as well as details of where he works
  - Photographs of the father (if available) so that the court can identify him
  - If you were married and are now divorced, a copy of the divorce order

- Proof of your income (like a wage slip)
- Your papers, receipts and accounts, showing all the things you must pay every month. (*Se pg 578: Monthly expenses*)
- The maintenance officer sends a letter, called a **summons**, to the father, asking him to come to the maintenance office on a certain date.
- On the date, you and the father must go to the office. You must try to agree on how much the father must pay for his children.
- The maintenance officer will work out with you all the things you must pay for every month, how much money you earn and how much money the father earns. Then you can see how much you need from the father.
- It is important to get the court to make an order to do a paternity test if the father denies that he is the father.
- If you **agree** on how much the father must pay for his children, the maintenance officer will get both of you to sign a paper called an **order of court**. This states how much, when and where it must be paid.
- If you **do not agree**, then the officer will say your case must go to the **Maintenance Court** on a certain date. The court will warn both parties verbally of the date that they must appear in court.
- If the father does not come to court on the date that he was supposed to, and he has been properly informed, you can ask that a default order be made in his absence. Often, the court issues a warrant for his arrest instead of giving a default order, but it is better for you to get a default order. Otherwise, there is more delay in getting the maintenance.

If the father seems to have disappeared, then the court can order any person who knows where he is to come to the court and tell them where he is. It is the responsibility of the state to trace the father. However, this is very difficult, and it is a better idea to claim maintenance from the grandparents (this sometimes brings the father out of hiding!).

- At the maintenance enquiry in the court, the magistrate listens to both parties and finds out how much their income and expenses are every month. (*See: Monthly expenses*)
- The magistrate then decides how much the father must pay for his children. The magistrate makes this amount pg 578t an order of court in writing. It is called a **maintenance order**. Then, the father must pay that amount every week or month to the maintenance office or into the mother's bank account.
- The court can also order a stop (debit) order to be put on the person's account without their consent or make an order that the employer deducts the money from an employee's salary.

- If the father is out of work, he will not have to pay maintenance straight away. The magistrate will tell him that he has a certain time, say three months, to look for work. He will be given a form to be signed by employers he has approached if they do not give him a job. The enquiry will then be postponed to a future date. Once he has got work, an enquiry will be held, and the magistrate will make an order. But if the father stays out of work a long time, and doesn't look hard to find work, the magistrate might send him to jail for not paying support. If the father stays out of work a long time, you can try claiming maintenance from the grandparents as they have a duty of support towards their grandchildren if the parents can't support the children.

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## 5. Maintenance is not paid

*"I got a maintenance order against the father of my children. But he still doesn't pay support."*

### WHAT DOES THE LAW SAY?

- Go to the maintenance office and complain. It is important to make a formal complaint every time when the father doesn't pay.
- If the father is employed and fails to pay his maintenance, the mother must ask the court to make an order to get the maintenance deducted from the father's wage by the employer. This is called a garnishee order. The consent of the father is not required for a garnishee order, and the employer has a duty to obey the court order.
- If the father does not pay, he will be in **contempt of court**, which is a criminal offence. The police will give him a paper telling him he must come to court where he must explain why he did not pay the money. If he doesn't have a good reason, the court usually tells him that he must pay all the maintenance he owes, or he will go to jail.
- If maintenance is not paid, you can ask the court to issue a warrant of execution. This means the court orders the property of the father to be attached and sold to cover the cost of the maintenance. Complainants sometimes have to pay a fee towards the costs of the sheriff. This cost varies, but it can be recovered from the maintenance debtor in the end.

### SOME MORE POINTS ABOUT MAINTENANCE

You can ask the maintenance court to make the maintenance amount **higher** even if the father is behind in his payments. You must show good reasons for needing more money. You can ask the court to make an order that the maintenance goes up automatically every year either by a set percentage, for example, 10% or by the official inflation rate. This means you won't have to go

back to court regularly just to keep up with the rising cost of living. There may still be other reasons to apply for an increase, for example, you lost your job, the father got a much better job or a child had unexpectedly high medical expenses.

The father can also ask the maintenance court to make the maintenance money **lower**. He must show the court that since the court order was made, he earns less money. Or he can show that the mother or children can now support themselves.

You **do not need an attorney** to get maintenance through the maintenance courts. So it does not cost you anything. But some people **want an attorney to help** them when they go to court. You can do this, but then **you have to pay the attorney**.

Legal aid will not help you get maintenance because you do not need an attorney.

Other points about maintenance are:

- If a man pays maintenance directly to the mother of his children, he should get a receipt from her to prove this
- A mother is also entitled to get back payments of maintenance and medical expenses during her pregnancy and during or after the birth of her child
- You are entitled to charge interest on any back payments of maintenance
- To prevent wasting time and travelling, you can telephone the maintenance office and ask whether your maintenance was paid or not

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## 6. Making a will

*"I want to make a will, leaving small sums of money to my friend and to Child Welfare, and the rest of my estate to my wife. Should I consult an attorney? What should I say in my will?"*

### WHAT DOES THE LAW SAY?

Remember the will **must be in writing**, and it must be signed on each page by you, the testator (the person making the will), and by **two witnesses** who are not named in the will, all present at the same time. (See pg 563: *Dying with a will*)

## WHAT CAN YOU DO?

Making a will is very important. Unclear language in a will can cause problems. And if the legal requirements are not met, the Master of the High Court can ignore your will.

So it is best to consult an attorney or a bank if you want to make a will, or you can buy a will form from a stationery shop. A good attorney can draft a will that includes ways of saving tax when dividing up your estate. A bank may draw up your will without charging, if you are a client of the bank.

Your will can be simple, like the example below, or it can have detailed instructions. For example, it can say what must happen to everything you own and what must happen at the funeral. It can name someone to be the guardian of your young children.

If you want to leave something special to someone, for example, a sum of money to a charity or a book or watch to a friend, you can write this in your will. This is called a **legacy**. The rest of your estate, after legacies and debts are all paid out, goes to your **heir** or **heirs**.

You can write your will in handwriting as long as it is clear and neat. You can change it at any time. You and your witnesses must sign any changes you make. If there are big changes, it is best to make a new will. (*See pg 575: Example of a simple will*)



## EXAMPLE OF A SIMPLE WILL

### LAST WILL AND TESTAMENT OF ROWAN DANIELS

of 42 Blouboom Drive, Blikkiesfontein, Gqeberha

I hereby cancel all previous wills made by me.

I appoint as Executor of my estate, my brother PETER DANIELS, of 12 Marais Street, Aurora, Gqeberha.

I bequeath the following legacies: to my friend, JOSEPH WITBOOI, R2,000 (two thousand Rand) and my books on motor mechanics. to Animal Welfare (W.o. 2345) the sum of R2,000 (two thousand Rand)

The rest of my estate I leave to my wife, SORAYA DANIELS (nee FREDERICKS), to whom I am married out of community of property by ante-nuptial contract. If she does not survive me, I leave the rest of my estate to our daughter, ELSIE DANIELS.

Should my wife die before me, or at the same time, and should our daughter at that time still be a minor, I appoint my brother, the said PETER DANIELS, to be her guardian.

SIGNED by Rowan Daniels, the testator of this will, in the presence of the undersigned witnesses who signed in presence of the testator and each other, all being present at the same time at Gqeberha this 5th day of August 20.....

.....

**ROWAN DANIELS**

Testator

As witnesses:

1. ....

2. ....

## Model letter

### Model letter: Request for social worker's report to assist with application for legal aid

#### REQUEST FOR SOCIAL WORKER'S REPORT TO ASSIST WITH APPLICATION FOR LEGAL AID

Benoni Advice Centre  
[Address and Telephone]  
[Date]

The Social Worker  
Child Welfare  
[Address]

Dear Madam / Sir

#### **SOCIAL WORKERS REPORT: MELANEY ROBERTS**

We have been approached by the above person, who wishes to make an application for a divorce.

Ms Roberts intends to apply to the Legal Aid Board for financial assistance in obtaining this divorce and, therefore, requires a social worker's report.

We accordingly request that you interview Ms Roberts and draw up a social worker's report for her to submit with her application.

Yours faithfully,

.....  
**C QEGU**  
**Advisor**

## Checklists

### Marriage

- Were you married in a church or magistrate's office?
  - Or were you married according to customary law?
  - Did you sign an ante-nuptial contract with your partner before you got married?
  - What was the date of your marriage?
- 

### Divorce

- Do you want to separate from your partner, or do you want to divorce your partner?
  - What are your reasons for wanting a divorce?
  - Do you have any children with your partner?
  - Does your partner agree to the divorce?
  - Can you afford to pay for an attorney to deal with your divorce?
  - Do you want to apply for legal aid to pay for an attorney? (*See pg 257: Applying for legal aid*)
  - Has your husband treated you or your children cruelly or violently while you were married?
  - If the children are being maltreated, have you reported the case to Child Welfare or the police?
  - Does the father pay any maintenance for the children?
  - What are the respective contributions of the parties, and do you want to apply for forfeiture of benefits or redistribution of assets?
- 

### Maintenance

- When were you married?
- Are you living together or apart?
- How many children do you have?
- Where does the father of the children live, and where does he work?
- Have you applied for maintenance to the maintenance court?
- Have you worked out what your living expenses are (*See Monthly Expenses*)

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## Child abuse and neglect

- Has the problem of abuse been referred to the nearest Child Welfare Society, a social worker or the police?
- Have you applied for a Protection Order under the Domestic Violence Act?

## Monthly expenses

### How to draw up a list of expenses when you apply for maintenance

When you are getting ready to go for maintenance from the father of your child or children, you should make a list of what you spend every month. On the next page is an example of a monthly expenses list as it should be set out for the court enquiry. (The explanation parts in italics are there to help you see what goes onto the list and why.)

This is a maintenance claim by Ruby Brown to get money from Jack Mhlope, the father of her daughter Thandi, who is 11 years old. Ruby has 3 other children who are not Jack's children, and her mother lives with them. Go through the example on the next page on how to draft an application for maintenance.

### EXAMPLE: APPLICATION FOR MAINTENANCE: CASE NUMBER 276/2025

Ruby must show how much she spends on Thandi every month. The Maintenance Court will only make Jack, Thandi's father, pay half of Thandi's expenses. So Ruby must exclude the expenses of her other children and her mother in her claim.

	<b>GENERAL</b> What it costs Ruby for everyone	<b>THANDI</b>
<b>RENT</b> (R3 600 divided by 6 = R600 per person) 6 people live in the house (Ruby, mother, Thandi and 3 other brothers and sisters). A share for each of them is R700	R3 600	R600
<b>ELECTRICITY/WATER</b> Electricity account is usually R480 (R480 divided by 6 = R80 per person for 6 people)	R 480	R 80
<b>FOOD</b> Meat: R1 548 per month Bread and milk: R900 per month Vegetables, Groceries etc: R2000 per month  <i>6 people live in the house. A share for each of them is R741.</i>	R 4448	R 741
<b>SCHOOL</b> Fees: R20 per term x 4 terms x 4 children = R320 per year Stationery and text books: R100 per term x 4 terms = R400 per year School dresses: R98 x 6 = R588 per year Shirts: 8 x R66 = R528 per year Trousers: 5 pairs x R84 = R420 per year Shoes: R118 a pair x 8 pairs = R944 per year Jerseys: R90 x 6 = R540 per year Socks etc: R130 per year Total: R3 870 per year  <i>Ruby adds up how much she spends on all the children at school for the year. Remember there are 4 children but only Thandi is Jack's daughter. Then she divides by 12 to make that into a monthly amount.</i>  <i>Then she divides that amount by 4 to get the total for each child per month and allocates a portion to Thandi in the expenses.</i>	R 322.50	R 80.62
<b>CLOTHES</b> Ruby: Truworthe's account R100 Children: Jet account R240 Children: Edgars account R180 All: Layby General Clothing Store R70  <i>Remember with this one that when Ruby works out what she spends on Thandi's clothes, she doesn't put in her own Truworthe's account.</i>  <i>And where she spends only on the children, she must divide the total by the number of children she has (4) and for the lay-bys she divides it by all of them in the house (6).</i>	R 590.00	R 116.68
<b>INTERESTS / HOBBIES</b> Karate: Thandi, Robert, Kholeka R40 per month each	R 120.00	R 40.00

<b>FURNITURE</b> Elle Furniture Store: fridge R130 per month  <i>6 people live in the house. A share for each of them is R21.66.</i>	R 130.00	R 21.66
<b>MEDICAL</b> All: R100 (generally 1 hospital visit per month each) Thandi: doctor once a month at R50 a visit Chemist account for all: R160 per month  <i>Thandi has asthma and so she costs more in doctors and medicine every month. So R120 of the R160 chemist account every month is for Thandi.</i>  <i>If Ruby was on medical aid and she paid, say, R200 per month for it, and it helped Ruby and her 4 children, then Jack should be made to pay for Thandi's share of the medical aid (R200 divided by 5 = R40).</i>	R 310.00	R 170.00
<b>TRANSPORT</b> Bus fares for school for 2 children: R500 per month  <i>Train fares for Thandi + Ruby + one other child monthly tickets R600 per month</i>	R1 100	R 600
<b>TOTAL EXPENDITURE PER MONTH</b>	<b>R 11 100.50</b>	<b>R 2 449.96</b>
<b>TOTAL EXPENSES FOR THANDI</b>		<b>R 2 449.96</b>
<b>TOTAL CLAIMED FROM JACK FOR MAINTENANCE OF THANDI</b>		<b>R1224.98</b>
<i>This will depend on what Jack earns and what his monthly expenses are. But Ruby should ask for at least half of what Thandi costs.</i>  <i>And if she knows that Jack earns a lot more than she does, Ruby should ask for more from Jack.</i>  <i>Don't forget to put on your list any OTHER ACCOUNTS, EXPENSES or LOANS you might have.</i>  Model prepared by Pat Anderson.		