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The Easy Guide to Marriage, Divorce and the Legal System

Happily ever after is the dream that does not always turn into reality. This easy-to-read guide takes you through the basics of what needs to be considered before you get married and, if it happens, when you get divorced.

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DISCLAIMER

The information contained herein is of a general nature and should only be used as a guideline. You are encouraged to seek out legal advice specific to your situation.

While we have taken a great deal of care to ensure the accuracy of this document, the law is always changing and evolving, and so we are unable to guarantee that the information provided is without errors or omissions.

Marriage, divorce and the google joke

If you Google “divorce jokes”, the sheer volume is somewhat frightening. And while South Africa has a rather low divorce rate when compared to world standards, it is still extremely difficult to find someone, specifically from Generation X onwards, who has not been married and then divorced. In many cases, married and divorced two or three times. Generation X does seem to have a rather blasé attitude about marriage. Perhaps it’s a result of being the first generation for which having divorced parents was now normal.

And while Generation X may be blasé, Millennials seem to be growing weary of the institution of marriage. I do tend to agree with that notion. Not only an unnecessary financial burden, does a legal marriage mean you love someone more than if you were not married? Does a piece of paper ensure “happily ever after”. Clearly, based on divorce stats, the diamond ring, cake, dress and legal contract don’t ensure a state of together forever.

Because of this, we see more and more couples are now choosing to cohabit instead of marrying. There is also a definite leaning towards the view that, not only is marriage outdated, but monogamy as well.

Regardless of what you lean towards, whether it’s marriage, divorce, cohabitation or something in-between, each has a legal “right way / wrong way”. With a focus on marriage and divorce, the below will guide you so that you can ensure you are legally protected and make informed decisions.

GETTING MARRIED - WHAT TO CONSIDER

Status

Firstly, you obviously need to be of “legal age”. This means, over 18, or, if younger, then you need consent from parent or guardian. There are some cultures, however, who allow their girls at age 12 and boys at age 14, to get married. Shocking for some, normal for others, and a whole other article. Then, if previously married, you do actually need to be officially divorced before you dance down the aisle again.

Marital Regime

A marital regime is the legal choice you and your partner make at the time that you get married about how you want to share or divide any assets (valuable possessions, property or businesses) as well as debts (money owed). The options are explained as follows:

Married in Community of Property

This is when you and your partner will share in everything, assets and debts alike. The only exception is when one receives an inheritance - this belongs to the one who receives it and to that one only.

Pooling all assets, debts and everything in-between together is referred to as an estate. Should you get divorced, then the estate is divided between you equally. Being married IN community of property happens automatically if there was no marriage contract, which most know as an antenuptial contract or prenuptial contract.

Once the excitement of the engagement has subsided, it's important to think about the legal implications of marriage. There are those that don't want to ask their partner to get an antenuptial contract because “they will think I don't trust them”, or “they'll think I don't love them enough”.

All I can say is this: not having a marriage contract agreed and signed before the big day means joint assets and joint debt. Let me highlight:

joint debt, regardless of whose debt it is, it is now yours as soon as you are married. Even the debt racked up BEFORE the marriage.

Should your marriage, and we hope not, ever lead to divorce, then you will be responsible for half the debt. You can also be held responsible if your partner does not pay their debt. So, something to think about.

Married out of Community of Property

This is when you and your partner did sign a marriage (or antenuptial) contract prior to the actual wedding. This puts in writing how you will divide assets, as well as debts. This means, should you divorce, that you simply leave the marriage with what you originally agreed that you each own. In other words: what's yours is yours and what's mine is mine.

Out of community of property is easy when you look at all assets and debt before the marriage. During the marriage, additional assets and debts will be **accrued** by each. You decide to divorce. What you came in with, you leave with, but now you each added to the estate during the marriage, so now things get messy.

What this means is that when you draw up your marriage contract, you need to decide whether it will be out of community of property WITH accrual, or if it's out of community of property WITHOUT accrual.

With Accrual:

Each one walks away with their pre-marriage assets and debt, that much is known and it's all neatly laid out in a contract signed when you both still liked each other. Now, in most cases, the fighting begins over who deserves what in terms of all value added to the estate during the marriage.

Accrual is not automatic and needs to be drafted into the ante nuptial contract prior to marriage. Upon divorce, the accrual system will use a

calculation to determine how everything accrued will be split. How it essentially works is as follows:

- At the beginning of the marriage the value of each party's estate is determined and noted.
- On the day of divorce or death the growth value of both estates is calculated separately.
- The total differences in value between the bigger and smaller estate is noted.
- The bigger estate has to pay out half the difference in value to the smaller estate.

Without Accrual:

In this instance, each one brings their own estate into the marriage and then keeps this estate separately throughout the marriage. Meaning, what's mine is mine, what's your is yours, both before and during the marriage.

This means you retain total independence when it comes to contractual capacity and you are protected against any claims by the others creditors.

When you divorce, each one walks away with all their own assets and debt and no one can claim against the other. This is a nice, clean break and, when you end up hating each other and the divorce is horrific, then it's going to be a relief that you had the without community and the without accrual.

While all this talk of legal contracts and potential splits may take away some of your engagement sparkle, they are, unfortunately, real things that need consideration.

We all dream of happily ever after, and that is all we wish for you, but the statistics show us the reality, which means that there are some of you reading this who will have a marriage end in divorce, and when that happens, you will be relieved that you saw further than the champagne and balloons and had the foresight to ensure you were protected.

DIVORCE: THE WHAT, THE HOW AND THE WHY

One of the most traumatic things a person can go through, divorce and having to move forward is never easy. It can be stressful, takes time, is expensive and emotionally draining.

In order to try and help make it at least a little easier, below is a guideline in terms of when you can get divorced, the types of divorce and how it all works. Just a note: all marriages in South Africa must be dissolved in court. It needs to be proven that you and your partner are no longer capable of staying together, that the issues will not be resolved.

Acceptable Reasons

From a legal standpoint, there has to be an acceptable reason for ending the marriage. There are only two grounds that the court looks at when granting a divorce, the first being an irretrievable breakdown of the marriage, and the second being either mental illness or continuous unconsciousness.

The Divorce Act 70 of 1979, indicates that the court, when looking at irretrievable breakdown, may accept evidence of the following:

- You've not lived together for a continuous time period of a year or more;
- One of you is shown to be a habitual criminal who has been in prison as a result;
- One of you cheats and the other finds it's just not possible to continue with the marriage as a result of the adultery;

For mental illness, one or the other would have to have been institutionalised. This could mean being admitted as a patient or being held as a state patient or detainee, at an institution for the mentally ill.

Continuous unconsciousness, as the result of a physical disorder, which has lasted six months or longer, and for which the outcome is not positive,

is another acceptable reason that the court would consider. It will require expert opinion to be presented, in order to prove the claim.

Types of Divorce

If you are considering divorce, then it is important to understand the different types of divorce. How long divorce proceedings will take and how much it will cost depends on the type of divorce.

The Friendly Divorce, The Uncontested

This is the easiest, quickest and cheapest of the divorce types. In this instance, you've worked together to come to an agreement around maintenance, how you are going to split the assets, the kids and custody, and all other important decisions have been made.

Then, generally with the same attorney being used by both, you and your partner, together with the attorney, put the agreement in writing for the court. Even if everything is agreed, the divorce can only be granted by the court, and they need to view and accept the proposed agreement. If all is in order, then the court will grant the divorce. By working together in a mature and responsible manner, you and your partner can have the divorce process done and dusted within a matter of weeks.

To ensure the success of this process and to keep it amicable, here are a few tips to guide you:

- Don't drown in the past, instead focus on the future. You've made the decision to divorce, you want to keep it friendly, so don't bring up all the negative things from the past that led you to this point.
- No one is going to get every little thing they want, so be willing to compromise here and there. If keeping it amicable means losing the dinner set you were given as an engagement gift, then let it go. It's just stuff.
- This is an overwhelming and stressful process, even when friendly. So keep that in mind and remain patient with each other. One may need more time than the other to think about something, and since

you don't know if that might be you later on down the line, rather just be compassionate and considerate.

- Super important, yet probably the most difficult to do - keep the emotions out of the process. Try and keep it thought out and logical, and don't let anger and spitefulness creep in.

The “I’m Going To Be A Child” Divorce, The Contested

It's all in the title above - ok, might seem a bit harsh, but let's face it, this is usually when you and your partner can't agree and end up dragging each other to court, repeatedly. An uncontested divorce usually stems from jealousy, selfishness, anger, etc.

Don't get me wrong, there are isolated cases where there is no other option, so, that 5%, I feel for you and hope it works out. The other 95%, the jealous, the angry, the selfish, the one's with the “I'm going to show you” attitude, with all the respect in the world, grow up. And remember - children are not a weapon to be wielded against each other. To do so is nothing short of disgusting, not to mention emotional abuse of the child.

So, breathe in, breathe out. It hurts, it's sad, you feel betrayed - but, after it is all said and done, you will be ok.

Not all relationships will work out. Instead of acting out, keep your head held high, your integrity intact, keep the emotion out, base decisions on real facts, and you will feel the better for it.

If you require further deterrent, keep in mind that the contested divorce can drag on for years and will cost a small fortune. To come out at the end, there are various stages you will go through. These are as follows:

- Pleadings, which is when the facts surrounding the summons of the divorce are established.
- Then, the one applying for the divorce has to apply for a trial date.
- From there, all the evidence (discovery documents) is provided to each party.
- This discovery can be further drawn out if the one believes the other is hiding stuff.

- Then there is a pre-trial conference (if requested by the court), then the trial, which can also take time, then you wait for judgement.

So, think about the years you will spend, the money you will spend, the emotional toll, the effect it will have on children and others close to you, and then decide if it's really the way you wish to proceed.

The Mediated Divorce

The mediated divorce is the middle ground - more costly than uncontested, but less so than contested. This is an option if you can't reach an agreement, and are in need of some assistance. The mediator will help you both negotiate and come to a settlement.

Mediators are skilled in the art of helping couples set aside the emotion and focus on reaching an amicable agreement. Once the mediator helps you reach an agreement, your attorneys can draft the official settlement agreement. You both sign it and it goes to court for review and finalisation, the outcome of which is the court then granting the divorce.

Moving Forward

Don't kid yourself, whether uncontested, contested or mediated, divorce is going to have a big impact. It's a distressing experience and can leave you sad or depressed. There will be grief, there will be anger, there will be a sense of loss. These are all natural responses, but, guess what? These feelings will lessen as time goes by. You will pick up the pieces, you will move on, and you will be ok.

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