

PRE-READING MATERIAL



Webinar: **HOW DOES SPOUSAL MAINTENANCE WORK?**
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1. Introduction

The Divorce Act 70 of 1979 regulates maintenance between (ex) spouses post-divorce. Section 7(1) of the Act provides that a court may, on granting a decree of divorce, make an order regarding spousal maintenance based on a written settlement agreement between the parties. Section 7(2) provides that, in the absence of such settlement agreement, the court may make an order it deems just as to spousal maintenance. These legislative provisions allow a party to claim maintenance from their divorced spouse if the requirements for maintenance are met, namely a need on the side of the party seeking maintenance and means on the party sought to pay for such maintenance.

2. Historical context of spousal maintenance and fault-based divorce

Since the enactment of the 1979 Act, South Africa has moved away from fault-based divorce. Previously, this meant that spouses could get divorced on certain common law grounds. These two common law grounds for divorce, namely adultery and malicious desertion, were rooted in fault on the side of one party. These grounds were extended by the 1953 Divorce Laws Amendment Act to include two further grounds, namely incurable insanity for not less than 7 years, and imprisonment for at least 5 years after declaration as a habitual criminal.

It is clear that these grounds are all based on misconduct by a spouse, which warranted the other party to divorce the spouse at fault. These guilt-based grounds basically allowed the granting of a divorce where one spouse was 'guilty' for the breakdown of the marriage, whereas the other spouse was held to be 'innocent'. We have since these times, and as a result of the constitutional dispensation, moved away from fault-based divorce proceedings.

3. The law now: no-fault divorce

Since the enactment of the Divorce Act, we no longer believe that the above-mentioned 'marital offences' warrant parties' divorce. The Act now purports to provide a realistic framework for the dissolution of marriages and the consequences thereof. There are now only 3 grounds for divorce, namely irretrievable breakdown of the marriage, mental illness for at least 2 years or unconsciousness for at least 6 months.

This paradigm shift has also translated into how spousal maintenance, or 'alimony', is seen. While still respecting the institution of marriage, divorced spouses are now seen as economically separate entities whose financial dependence should be limited as far as possible. This is illustrated in the clean-break principle, as will be discussed in the webinar handout material.

4. Conclusion leading to webinar material

Spousal maintenance is a crucial aspect that must be dealt with before divorce proceedings have finalised. This is due to the contractual nature of such maintenance and the fact that spousal maintenance is no longer an option if it is not granted alongside a divorce order. These hardships are however overcome by awarding token maintenance, for example, of which will be elaborated in the webinar to follow. The focus of this webinar is ultimately on spousal maintenance upon divorce, not the maintenance of surviving spouses.