

WEBINAR HANDOUT



SESSION 2: CONSEQUENCES OF DIVORCE AND THE DIVORCE PROCESS EXPLAINED



Divorce awareness week 24-28 July 2023

DIVORCE AWARENESS

Consequences of divorce, divorce process & common mistakes, opposed vs unopposed divorces



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Divorce Awareness Week is proudly presented and sponsored by Oppermans Inc Attorneys, a legal firm specializing in family law. We have teamed up with the good guys from Lunch and Learn to create awareness about the difficulties and uncertainties when it comes to the sensitive topic of divorce. Oppermans Inc prides itself to take a holistic approach to divorce where you would be guided through the whole process with dignity and could assist with the following matters:

- Contested and uncontested divorces
- Divorce mediation
- Drafting of parenting plans
- Divorce coaching through the process
- Drafting settlement agreements
- Settlement mediation
- Assistance with child- and spousal maintenance
- Legal advice prior to divorce

Should you have any enquiries, drop us an email to eugene@oppermansinc.co.za or info@lunchandlearn.org.za

Regards

EUGENE OPPERMAN (Family Law Practitioner • Mediator • Trainer • Public Speaker)

(LPC, FAMAC, ADR and L.E.A.D. accredited mediator)

This session will deal with topics which include the following:

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1. Is cheating a ground for divorce in South Africa?

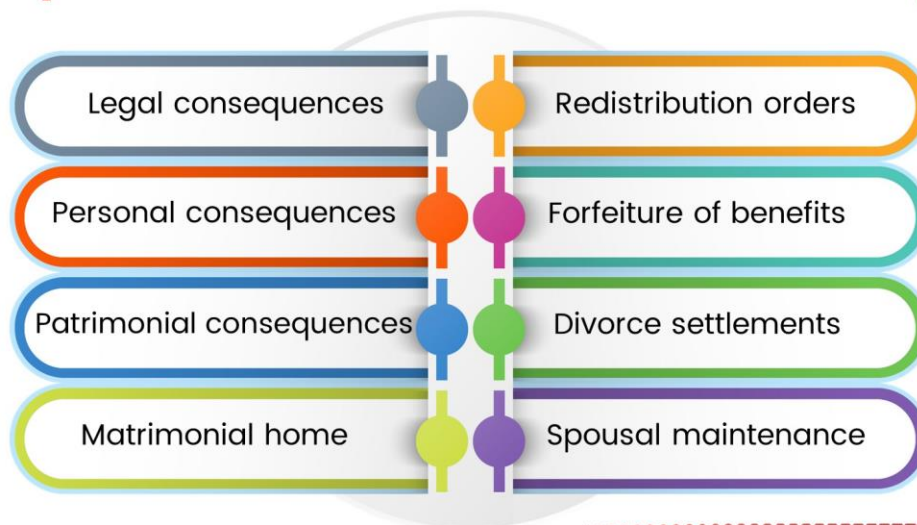
Infidelity causes a breakdown in trust, which in effect causes the marriage to irretrievably break down. There is no more trust between the spouses. It becomes important that the spouse legally gather as much information as possible regarding the extra-marital affair to prove that there has been an irretrievable breakdown of their marriage. Moreover, the spouse should gather as much information regarding the financial affairs of your spouse.

Therefore, cheating in itself is not a valid ground for divorce in South African law, but cheating is a factor that can be used to prove that there has been an irretrievable breakdown of the marriage relationship between the spouses. The latter is a valid ground for divorce in South African law.

2. Consequences of divorce

Consequences of divorce, opposed- and unopposed divorce

Consequences of Divorce



2.1 Legal consequences

Divorce is the dissolution or coming to an end of a marriage relationship. This is also known as the termination of a marital union. Once the marriage comes to an end the legal duties and responsibilities in terms of that marriage also come to an end. In South Africa, the consequences of a divorce are primarily legal and financial. Therefore, the legal consequences of a divorce

means that the spouses are for all purposes no longer married. These consequences ensue once the spouses have proved that there has been an irretrievable breakdown of the marriage relationship, and the court grants the decree of divorce.

2.2 Personal consequences

Personal consequences include emotional challenges. Spouses often find it difficult to accept that the marriage is over. For this reason, many couples may try to seek reconciliation or counselling before pursuing a divorce. The decision to proceed with your divorce will be one of the most challenging decisions you will make in your life.

2.3 Patrimonial consequences

The patrimonial consequences of the divorce depend on the matrimonial property regime entered into between the spouses. Additionally, plans will need to be made for spousal and child support. The three forms of matrimonial property regimes are married in community of property, married out of community of property, and married out of community of property subject to accrual, as can be seen from the discussion in session 1.

If you are married in community of property there is a joint estate. All assets and liabilities of both spouses form part of the joint estate, and this includes the pension of both spouses. If you are married out of community of property this means that both spouses retain their assets and liabilities during the marriage as well as after dissolution of the marriage. If the spouses were married out of community of property subject to the accrual system the spouses will share in the growth of their estates.

2.4 Redistribution orders

When spouses are married out of community of property with the inclusion of accrual, the spouses will, at divorce, share equally in the growth of the spouses' estates during the marriage. There is, however, no sharing of the assets which each party already owned at the time of the marriage (those assets will remain separate). This is set out in Section 3(1) of the Matrimonial Property Act No. 88 of 1984 which provides that, at the dissolution of a marriage subject to the accrual system, the spouse whose estate shows a smaller accrual than the estate of the other spouse acquires a claim against the other spouse for an amount equal to half of the difference between the accrual of their respective estates. If you are, however, married out of community of property without

accrual there is no sharing of any assets at divorce, whether accumulated before or during the marriage.

However, even if you got married out of community of property without accrual **before the enactment of the Matrimonial Property Act** (before 1 November 1984) there is a way you can still claim from your spouse's estate at divorce. This is called a redistribution order and is dealt with in section 7(3) of the Divorce Act No. 70 of 1979. Section 7(3) of the Divorce Act states that a court granting a decree of divorce in respect of a marriage out of community of property without accrual, entered into before the commencement of the Matrimonial Property Act may on application by one of the spouses (in the absence of any agreement between them regarding the division of their assets) order that such assets (or part thereof) of the other party as the Court may deem just be transferred to the first-mentioned spouse.

Section 7(4) goes on to state that such an order will only be granted if the Court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted **contributed directly or indirectly to the maintenance or increase of the estate** of the other party during the subsistence of the marriage. Section 7(5) then goes on to list other factors the court will take into account when determining the assets to be transferred.

2.5 Forfeiture of benefits

Forfeiture of patrimonial benefits is legislated by Section 9(1) of the Divorce Act 70 of 1979. Section 9(1) of the Act reads as follow: "(1) When a decree of divorce is granted on the ground of the irretrievable break-down of marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited."

In other words, this provision makes it clear that a court has the power to grant a forfeiture order in circumstances where one of the spouses would be unduly benefited in relation to the other spouse and the factors considered by the court are (a) the duration of the marriage; (b) the circumstances which gave rise to the breakdown of the marriage; and (c) any substantial misconduct on the part of either one of the spouses.

2.6 Divorce settlements

Reaching a settlement is a quick and efficient way to handle the divorce. Reaching settlement means that the divorce is uncontested. An uncontested divorce is less expensive and quicker than a contested divorce where the spouses have to attend trial and file pleadings. Settlement agreements are issues which were discussed and compromised upon between the spouses and their respective legal teams.

2.7 Matrimonial home

Is it possible for a married person to force their spouse to leave the marital home? The short answer is no. Irrespective of whether you are married in community of property or out of community of property, the general rule is that the spouse who rents or owns the property is not entitled to evict the other spouse from the matrimonial home, nor may the other spouse evict the spouse who rents or owns the property. South African courts are very reluctant to evict a spouse from the matrimonial home, especially if there are minor children involved. The court would have to take into account whether it would be in the best interests of the children to grant the eviction.

In order for a court to evict a spouse from the marital home the other spouse must provide a just reason and must prove to the court that they have provided the other spouse with suitable alternative accommodation. The provision of alternative accommodation and the use of household assets form part of the duty of support between spouses and a spouse who is subject to ejection from the matrimonial home or who is barred from using the household assets can approach the court for an interdict to prevent the other spouse from doing so.

2.8 Procedure and ancillary matters

The procedure for divorce is initiated by instituting a divorce summons and particulars of claim. If the divorce is uncontested the defendant will merely note their intention not to defend the action. If the defendant serves a notice of intention to defend the matter then it becomes a contested divorce. The trial process is then followed and the issues are aired out in court. The court will make the final decision and the decree of divorce will be granted.

Ancillary matters include matters relating to how the joint estate should be divided, and how spousal/ child maintenance will occur. Moreover, if there are children born from the marriage issues relating to guardianship, care, contact and maintenance has to be addressed either in a settlement agreement or by means of a parenting plan.

2.9 Dissolution of marriage on presumption of death

The Dissolution of Marriages on Presumption of Death Act 23 of 1979 intends to provide for the dissolution of marriages of persons presumed to be dead. Section 1 of that Act reads as follow: “Any provincial or local division of the Supreme Court of South Africa making an order that the death of any married person shall be presumed, may, when making that order or at any time thereafter, on the application of such person's spouse, make an order that the marriage in question shall be deemed to have been dissolved by death as from a date determined by the court, whereupon that marriage shall for all purposes be deemed to have been dissolved by death as from the date so determined.”

3. The five steps in the divorce procedure

3.1 Step one: Preparation and consultation

By questioning you extensively, your divorce lawyer will get a thorough understanding of the situation. Additionally, you will need to provide your lawyer with particular paperwork. As many details as you can and be as honest as possible in your responses to all of the questions. The lawyers will begin working on the preliminary draft of the legal documents once you leave the consultation. You'll be given a copy of this draft, which you must read and review. The attorney will only sign the paperwork and have it served after you have confirmed that you understand its contents.

3.2 Step two: Filing of pleadings

The next step is the filing of pleadings. Once the divorce summons has been signed, they are then delivered to the applicable court in order to obtain a case number and then delivered to the sheriff to effect service. The divorce summons is a combined summons and a particulars of claim. The aforementioned documents are normally personally served on the spouse, who then has 10 to 20 working days to respond by filing either a notice of intention to defend or not to defend.

Settlement can take place at any stage of the divorce procedure. This means that it could happen during the preparation phase or even just before during the trial. However, the standard and most proper place for settlement discussions would be after the filing of the pleadings and after the discovery process. However, settlement agreements can be reached by means of a roundtable discussion. This is done to allow both sets of divorce lawyers and both spouses to be present around the same table to discuss the details of different settlement options. When this is

successful it means that a settlement has been reached to which both spouses agree and consider fair and just. The divorce settlement agreement will set out in writing all the details that have been discussed and agreed upon by those spouses. Settlement is less expensive and easier than going to trial.

If settlement failed, the trial process will continue. In other words, the process of discovery will continue. You must give your attorney specific documents a lot of documents to amass as much information as possible. You as the client will be asked for bank and credit card statements as well as property documents. The lawyers will then share their collected information. This is done to allow the lawyers to have possession of all the information relating to their client, and the other spouse. This helps the divorce lawyers understand the focus of their legal opponents and ensures that neither spouse hides anything to get an unfair advantage.

3.3 Step three: Trial

Last step in the process is the actual trial. Most matters do not get to this stage as settlement usually takes place at some point before trial.

4. The divorce process explained

Make sure there is no chance of saving your marriage and that you truly want to pursue a divorce. Once you are certain, you can schedule a meeting with your desired attorney. It is absolutely up to you whether you want to let your spouse know in advance that you intend to get a divorce, but past experience has shown us that if both spouses are on the same page prior to the start of any legal processes, a settlement can be achieved more easily. The divorce summons must be served personally on the Defendant by the Sheriff. The Sheriff will then issue what we call a Return of Service. The purpose of the Return of Service is to indicate whether your spouse was successfully served or not.

The initial consultation will discuss the marital regime of your marriage. If settlement is possible, it should be considered. This is done by means of attending a roundtable meeting. All of the aspects of the marriage and dissolving the joint estate or the accrual system will be discussed in an attempt to reach a settlement. With a settlement agreement in place parties may proceed with an uncontested divorce. In the unfortunate event of a contested divorce, the matter will go on a full-on trial which is both costly and lengthy.

Jurisdiction of the court is established if one spouse is domiciled in the area of jurisdiction of the court or if said spouse is ordinarily resident within the area of the court for a period of at least a year.

5. The divorce process in South Africa

Point of departure:

Your spouse does not have to agree to a divorce. No court will force you to stay married if you do not want to continue with your marriage due to the no-fault system we have in South Africa.

What are the different types of courts that you can approach?

You can either approach your local High Court or Regional Magistrate Court. The Regional Court will be much faster and more cost effective, so there is no reason to approach the High Court, except if your divorce is an extremely complicated matter or if your estate is worth a substantial amount of money.

Both the Regional court and the High court involve the issuing of summons. Once the summons is issued, the other party then has an opportunity to respond to your summons. A settlement agreement is an out of court settlement that deals with all of the assets, liabilities, care and contact of minor children and any other applicable matter. Getting a divorce in South Africa can actually be a straightforward and uncomplicated process if both spouses work towards the same goal.

6. Common mistakes to avoid in the divorce process

6.1 Not getting proper legal advice

It becomes important to consult with an attorney who specializes in family law and divorces. An attorney who deals with divorces and separations has insight into people and families and understands how the law works. The attorney will be able to effectively advise you on your rights and obligations during the divorce process. Attempting to divorce on your own without an attorney can be daunting and could lead to making financial mistakes which will impact the future of both yourself and your children. A family law attorney's advice and guidance can be invaluable and help you make informed decisions.

6.2 Making decisions based on emotions

Decision making becomes difficult during a time of divorce due to overflowing of emotions. However, one must always remember to make practical decisions based on ethical and legal considerations. The aim of the divorce process is to remain focused and focus on the best interests of your family. This brings us back to the first point, hiring a specialized attorney will make the divorce process a bit more easeful due to their experience. The attorney will be able to assist you with guidance.

Allowing anger, resentment, or revenge to guide your decisions can lead to impulsive choices that may have long-term repercussions. It's crucial to approach negotiations and discussions with a level head and consider the practical implications of your choices. Engaging in mediation or seeking therapy or coaching sessions with a family law attorney or divorce coach can be helpful in managing emotions and maintaining a cooperative mindset.

6.3 Hiding assets

It is very unethical and illegal to hide assets during a divorce process. Both spouses must be upfront about their financial circumstances, including honesty about debts and assets. Your marital regime is a serious contract. That contract must be upheld and deviated from only in instances where the law allows it.

6.4 Not considering the tax implications

Particularly if there are large assets involved, divorce can have a big tax impact. It's crucial to consult a financial counselor to fully grasp the tax repercussions of different settlement possibilities. This is frequently best handled during a mediation process when parties can freely and openly engage in good faith to reach a settlement with the aid of financial professionals.

6.5 Failing to communicate effectively

In a divorce, communication is essential, especially if there are children. Failure to communicate effectively (openly and respectfully) with your spouse can result in misunderstandings, needless conflict, drawn-out legal battles, stress for you both, higher costs, and long-term effects on your ability to co-parent with the other parent of your children.

6.6 Rushing the process

Even though the divorce process can be drawn out, it's crucial to take your time and make wise choices. Rushing the process can result in errors and regrets later on.

6.7 Ignoring the needs of the children

The best interests of the children are of paramount consideration in all matters. Aim for a child-centered approach, focusing on creating a stable and supportive environment for your children. Arrive at mutually agreed-upon care and contact arrangements that prioritize their needs and promote healthy parent-child relationships. Where there are difficult and extra-ordinary circumstances that (unfortunately) impact these arrangements and the relationship of a child with one parent, be guided by appropriate experts and a good family law attorney.

7. Contested versus uncontested divorces

There are two types of divorces in South Africa. You get a contested divorce and an uncontested divorce. The process is slightly different for both types of divorces. What you need to do first is to determine the type of marital regime that you have. The best way to determine that is via an anti-nuptial contract. Our next important tip is to always encourage clients to settle their divorce cases out of court.

How to get a faster divorce is to accept that the relationship is over. Number two have an honest conversation with your partner check all the assets and the liabilities and write them down on a piece of paper. The next one is if they are any children then have a discussion about the children and make the suitable arrangements. This is called getting an uncontested divorce. Ask your lawyer about this. A contested divorce is where you fight over everything.

What is an opposed divorce?

An opposed divorce is one in which you and your spouse cannot come to an agreement on the conditions of the divorce. The division of assets and debt, maintenance duties, and child custody are just a few examples of the issues that may be at stake.

If your divorce is challenged, a formal trial will begin when the other spouse files a notice to defend the divorce. Based on the arguments presented during the court trial, the court will decide the

matter in the end. The court will make decisions and include them in the divorce decree about the children and assets.

What is an unopposed divorce?

Uncontested divorce is straightforward. The parties have reached a consensus. On the scheduled court date, just one side needs to show up. The parties reach an agreement on a settlement that will be included in the divorce decree regarding the division of assets, maintenance payments, and care and custody of minor children. If either party is the parent or guardian of a young child, the parties may even agree on a parenting plan that will be included in the divorce decree.

8. The costs of a divorce in South Africa

The cost of your divorce will depend on the type of divorce. Contested divorce are more time-consuming and expensive compared to uncontested divorces. In terms of a contested divorce there are more issues which need to be cleared out in court, i.e., pleadings will be exchanged and attorneys fees will add up. In terms of an uncontested divorce the parties can reach a settlement agreement and/or parenting plan and only one party needs to appear in court.

Therefore, if one spouse wishes to fight it out in court, the divorce is viewed as contested and the fees are significantly higher compared to an uncontested divorce. If it is clear that the divorce will be contested, it is advisable to negotiate a fee structure with the attorney in order to eliminate excessive statements of accounts. Thus, the cost of a divorce primarily depends on whether the spouses are willing to work together or not.

9. Fast and cost-effective divorce: unopposed divorces

With an uncontested divorce you and your spouse may use the same attorney as there will be no conflict of interest and the additional cost of appointing a second attorney is not needed. Only the Plaintiff needs to appear in court on the date of divorce. The most cost effective and least time-consuming way of divorcing your spouse is to enter a settlement agreement and/or parenting plan agreement with your spouse. The said agreements will then be incorporated in your divorce order your divorce will be finalized as an uncontested divorce.

Consequences of divorce, opposed- and unopposed divorce

The costs of a divorce in South Africa



Unopposed divorce

- cheaper
- faster / amicable
- settlement reached
 - less paperwork
- less court preparation
- no need for witnesses etc,

Opposed divorce

- more expensive
- prolonged litigation
- attorneys involved
- pleadings filed
- more court preparation
- need for witnesses etc,



10. Divorce summons and particulars of claim

10.1 How to start the divorce process

Spouses have registered their marriage in terms of South African law (i.e., married in or out of community of property). Therefore, spouses can only legally obtain a divorce if it is granted by a court (decree of divorce). The process of obtaining a divorce from the court is to institute the divorce summons and initiate the divorce process.

There are two aspects to initiating the divorce process. There is the face of the divorce, i.e., the divorce summons, and there is a particulars of claim document, i.e., setting out the reasons for wishing to obtain a divorce. The face of the divorce summons contains the information that the sheriff will use to serve the summons on your spouse or your ex-spouse.

10.2 How to prepare a divorce summons yourself

It is entirely possible to prepare your own divorce summons, however this is only advisable if your divorce will be uncontested and if there are no assets of substantial value that need to be divided between the spouses.

Your first step will be to prepare a combined summons (a summons that include a particulars of claim). You can obtain the said document from your local Regional Court or High Court. The purpose of this document is to inform your spouse that you intend to divorce him/her. The combined summons must be served on your spouse by the sheriff of the court; thus, you cannot hand the combined summons to your spouse yourself – as you will need the sheriff's return in order to proof to the court that a valid serve occurred.

The combined summons will notify your spouse that he/she has 10 days in order to notify you and the court of his intent to either defend or not defend divorce and thereafter a period of 20 days to provide you with his/her counterclaim/plea.

The particulars of claim set out what the particulars/terms of your divorce are and must contain certain basic information such as your and your spouse's full names, occupation, ID numbers and addresses. Furthermore, it must set out the reasons for the breakdown of the marriage and what relief you are seeking in terms of the summons. Finally, the particulars also needs to address the division of the joint or separate estates and what maintenance and custody arrangements is in place with regards to minor children. A mistake on your particulars of claim might result in grounds for your spouse to oppose the divorce or the withdrawal of the summons to reissue another summons, for this reason it is advisable to approach an attorney to assist you with your divorce.

What should the particulars of claim document contain?

- The first paragraph of the particulars of claim will be your details; your name, your ID number, your address and what is your occupation.
- The second paragraph of your particulars of claim, will be your soon to be ex-spouse's details; their name, their ID number, their address and their occupation.
- The third paragraph of the particulars of claim address jurisdiction, which basically means that at least one of the parties live in the area where the court is located.

- The fourth paragraph is details about the marriage what details such as where the marriage was concluded, the date of the marriage and the marital regime.
- The fifth paragraph deals with the minor children in address the number of minor children, their names, ages and sex.
- The sixth paragraph deals with the breakdown of the marriage. The most common grounds for a breakdown of a marriage were discussed above.
- After this, factors such as pension funds must be addressed, especially if parties are married in community of property where both spouses have a claim towards each other's pension funds.
- Finally, the care and guardianship of minor children must be addressed. Where will the children primarily reside? How often can the non-custodial parent see the children? Holiday arrangements? What maintenance will be paid towards the children? How long will the maintenance orders be in place? What happens during birthdays, etc. Keep in mind the Family Advocate must approve your arrangements with regards to the care of your minor children and if the Family Advocate is not in agreement that your proposed arrangements with regards to the minor children is in their best interests, then your divorce will not be granted.

Once you addressed all the above factors, you need to add an addendum with documents such as the necessary ID documents, proof of residence, birth certificates, marriage certificates, and any other documents that might affect your marriage.

Now you are ready to approach the sheriff in order to affect the service of your combined summons on your spouse. Keep in mind that you need to obtain the sheriff's return in order to proof to the court that a valid service occurred on your spouse. Failure to follow these steps will most likely result in the court refusing to grant your divorce.

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Divorce awareness week 24-28 July 2023

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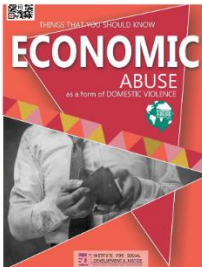
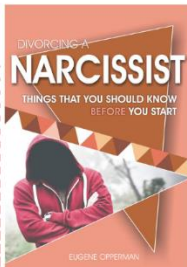
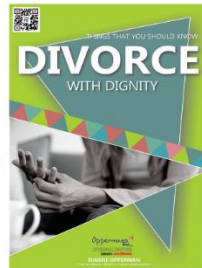
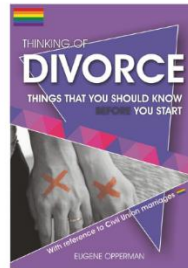
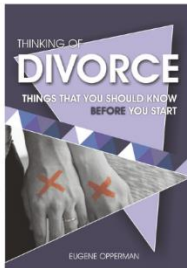
- 24 July @ 12:45** - dissolution of marriage, grounds for divorce, importance to know how you are married and the effects of your marital regime on divorce
- 24 July @ 14:00** - consequences of divorce and divorce process explained, is cheating grounds for a divorce, focus on uncontested divorces
- 25 July @ 12:45** - detailed explanation on how contested divorces work
- 25 July @ 14:00** - served with a summons, now what? Who gets the ring? Can I still date pending the divorce?
- 26 July @ 12:45** - divorce mediation, what it is and how does it work
- 26 July @ 14:00** - should you file for divorce first?, pro's and con's, working with lengthy divorces (Rule 43 / 58)
- 27 July @ 12:45** - protecting / hiding your assets during divorce, impacts of divorce on your pension, will and estate
- 27 July @ 14:00** - divorce settlements, what to look out for and what to negotiate
- 28 July @ 12:45** - married overseas or to a foreigner?, divorcing a missing spouse, dealing with a narcissistic and abusive ex
- 28 July @ 14:00** - unfair divorce tactics, child- and spousal maintenance



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