

WEBINAR HANDOUT



SESSION 1: GENERAL INTRODUCTION



Divorce awareness week 24-28 July 2023

DIVORCE AWARENESS

General introduction, matrimonial regimes, grounds for divorce, reasons for divorce and jurisdiction



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Divorce Awareness Week is proudly presented and sponsored by [Oppermans Inc Attorneys](http://www.oppermansinc.co.za), a legal firm specializing in family law. We have teamed up with the good guys from [Lunch and Lean](http://www.lunchandlearn.org.za) 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. Matrimonial property regime (How are you married?)

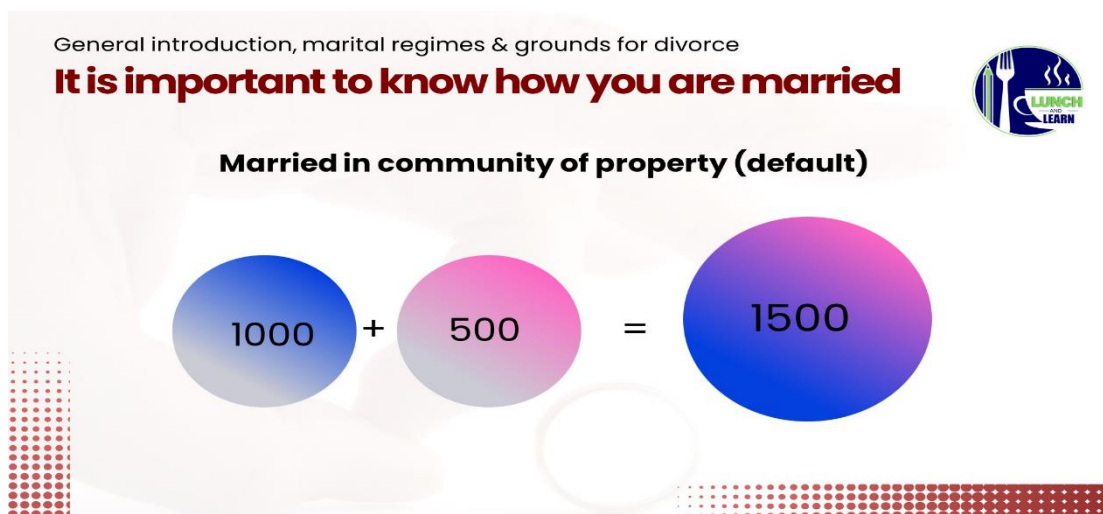
As a point of departure, it is important to know how you are married. Knowing your matrimonial property regime will make it easier for you to understand your rights and obligations within the marriage, especially on dissolution by death or divorce. The three common marital regimes in South Africa are:

- Marriage in community of property;
- Marriage out of community of property;
- Marriage out of community of property subject to the accrual system.

Marriage in community of property explained:

Marriage in community of property is the default marital property regime in South Africa. In terms of this property regime the parties estate's become a joint estate. This means that everything owned by the parties prior to the marriage and anything accrued to them during the marriage will go into the joint estate. This includes debts, inheritances, and gifts. However, if something accrued to one of the parties on the condition that it be excluded from the joint estate, that property will not fall into the joint estate. If no agreement is reached between the parties regarding the division of the joint estate at the time of divorce, the court will liquidate all the assets and split the proceeds 50/50 between the parties.

Being married in community of property has the benefit of promoting equality within the union and balancing the relationship's legal and financial responsibilities. The spouse with the worst financial situation will gain if one spouse is in a significantly better financial situation than the other spouse.

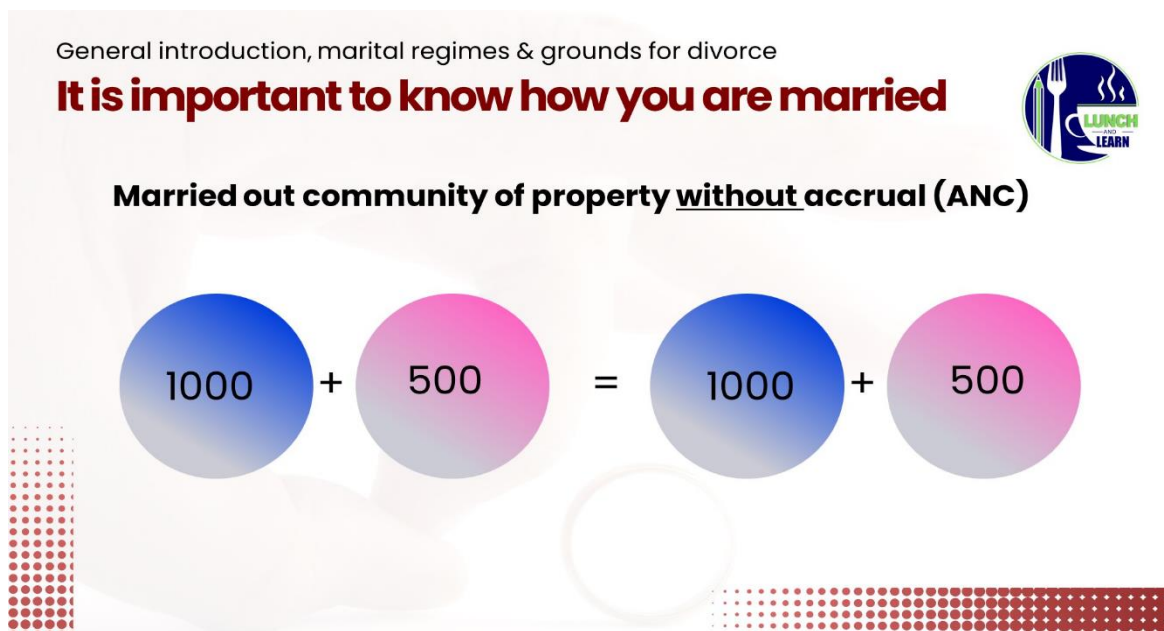


Marriage out of community of property explained:

In order to be married out of community of property the parties have to specifically elect this property regime. There is no joint estate between the parties. Each party retains all their assets and liabilities acquired before and during the marriage. When the parties divorce each one retains their property and no division is necessary. However, a redistribution order in terms of Rule 58 of the Regional Court or Rule 43 of the High Court can be executed.

What is a redistribution/forfeiture order? Spouses can approach the court and ask for a redistribution of assets (or debts) outside their marital property regime.¹ The party who wants to benefit from this order has to show that they have contributed either directly or indirectly. Contribution can be provision of a service, saving expenses, helping start a business, or even being a fulltime mother (raising children). In granting a redistribution order the court will consider the following factors:

- i. Existing means and obligations of the parties;
- ii. Donations between the spouses or owed in terms of the ante-nuptial contract;
- iii. Any other factor the court deems relevant (including substantial misconduct for example: abuse).



¹ *GKR v Minister of Home Affairs and Others* 2022 (5) SA 478 (GP).

The disadvantage of a marriage out of community of property without accrual is that one spouse might leave the marriage with significantly less than the spouse with the stronger financial position upon dissolution of the marriage. Spouses do not share assets and liabilities so one spouse might end up with all the debt and the other spouse might end up with all the assets.

The benefit of a marriage out of community of property is that each spouse's estate is kept entirely separate from the other, and in the event of a divorce, the division of assets and liabilities is quite easy to understand. Another benefit is that spouses can legally contract with one another to transfer money or assets between their several estates.

Marriage out of community of property subject to the accrual system:

The default marital property regime for out of community of property is subject to accrual. There is no joint estate between the parties. An ante-nuptial contract is concluded between the parties prior to the marriage. This contract is legally binding and regulates the marital property. The ante-nuptial contract can set out how the accrual should be calculated at the time of divorce, it can also set out which assets and liabilities are excluded from the accrual at the time of death or divorce.

Marriage out of community of property subject to accrual means that spouses maintain their separate estates as prior to their marriage and the spouse whose estate shows the smallest growth during the duration of the marriage is entitled to half of the growth of the estate of the spouse with the largest estate upon the dissolution of the marriage.

General introduction, marital regimes & grounds for divorce

It is important to know how you are married



Married out community of property with accrual (ANC)



Each party shares in half of the growth of the other party's estate

Advantages of a marriage out of community of property subject to accrual is that both spouses enjoy the benefits of separate estates, but that the spouse with the smallest estate can share in the growth of the estate of the spouse with the biggest estate, which will eliminate any inequality between spouses in terms of estate value.

Changing the marital property regime

Only the High Court is able to change the marital property regime between the spouses. The application must be brought by both spouses and both spouses have to explain to the court the reasons as to why they wish to change their marital property regime.

2. Different types of marriages in South African law

General introduction, marital regimes & grounds for divorce

Different types of marriages in South Africa



Civil marriages



Civil unions marriages



Customary marriages

There is **no common law marriage** in South Africa. Cohabitation does not create any automatic legal rights and duties between couples.

(a) Civil marriage

The Marriages Act of 1961 governs civil marriages and states that it is a legally binding contract. A civil marriage is between a man and a woman to the exclusion of all other persons. This means that same-sex partners cannot conclude a civil marriage, and polygamy is prohibited.

Requirements of a civil marriage:

- 1) Capacity
- 2) Consensus
- 3) Formalities

Both persons entering into the marriage must be over the age of 18 years. An authorised marriage officer appointed in terms of the Marriages Act must conduct the marriage. Two witnesses and the marriage officer must sign the marriage register. The parties then have a duty to lodge the signed marriage register at the Department of Home Affairs.

Law of persons and the family: A Barratt

(b) Civil Union

The Civil Union Act 17 of 2006 governs civil unions in South Africa and makes a civil union a legally binding contract. A civil union is between any two people of any gender. Therefore, civil unions can be entered into between opposite sex and same sex couples who wish to legally formalise their union. However, it is to the exclusion of all other persons, and therefore polygamy is prohibited.

Requirements of a civil union:

To enter into a civil union both parties must be unmarried and must be over the age of 18 years. The union must be conducted by an authorised marriage officer appointed in terms of the Marriages Act. A marriage register will be issued which must be signed by two witnesses and the marriage officer who conducted the ceremony. A marriage certificate is then issued to the parties. Both the signed register and the marriage certificate must be lodged at the Department of Home Affairs.

(c) African customary marriages

The Recognition of Customary Marriages Act of 1998 governs African customary marriages. An African customary marriage is between a man and a woman. These marriages can be either monogamous or polygamous. However, it cannot be between same-sex couples. The marriage becomes a legally binding contract once it has been registered with the Department of Home Affairs.

Requirements for an african customary marriage:

Cultural customs dictate the age, and current marital status requirements. The marriage is officiated by cultural rites, and as such conducted by a cultural figurehead. If there was a lobola

agreement that agreement must be lodged at the Department of Home Affairs for the marriage to be registered.

(d) Civil Marriages of Africans of 1988

The Marriage and Matrimonial Property Law Amendment Act of 1988 governs the civil marriages of Africans. This is a marriage between a male and a female, and has the potential to become polygamous. If it is registered at the Department of Home Affairs it becomes a legally binding contract. Cultural custom will dictate the age and current marital status requirements. The marriage is officiated by cultural rites, and therefore conducted by a cultural figurehead. If there is a lobola agreement that agreement must be lodged at the Department of Home Affairs for the marriage to be registered.

(e) Muslim and Hindu customary marriages/ religious marriages

There is currently no legislation in South African law which deals specifically with religious marriages. However, the Constitution of the Republic of South Africa, 1996 recognises religious marriages and placed them on the same footing as regulated marriages in theory. South Africa awaits case law and legislation which regulates these types of marriages and therefore there is no legally binding contract between persons who were married in terms of religion.

The court in *Women's Legal Centre Trust v President of the Republic of South and Others* declared section 6 of the Divorce Act inconsistent with section(s)9, 10 and 28(2) of the Constitution to the extent that it failed to, at the time of dissolution of a Muslim marriage, provide structures to safeguard the welfare of minor or dependent children born of Muslim marriages.

3. What are the legal grounds for divorce in South African law?

There are three grounds of divorce (*provided for in section 3 of the Divorce Act 70 of 1979*):

- 1) Irretrievable breakdown of the marriage (this is our focus)
- 2) Continuous unconsciousness of a spouse
- 3) Mental illness of a spouse

3.1 Mental illness

In South Africa, divorce can be granted on one of three legal reasons. Mental illness is the first acknowledged cause. To be successful with mental illness as a reason for divorce, you will need a professional prognosis from at least three medical professionals. When you rely on mental illness for grounds for a divorce you need to prove that your spouse was officially admitted to a mental institution and that he/she has been mentally ill for an extended period of time. Further, you need the evidence of two psychiatrists who can testify that they examined your spouse and declared your spouse to be officially insane, unwell and overall incapable of making coherent decisions. This is a lengthy and strenuous route to follow in order to divorce, but it does happen in practice.

3.2 Continuous unconsciousness of your spouse

The second ground is continuous unconsciousness of your spouse. It should be noted that if your spouse is unconscious as a result of a medical condition or an accident, this does not indicate that you have a free pass to divorce them. There must be a prolonged unconscious condition for at least six months with little hope of recovery. The spouse wanting to claim a divorce must obtain medical evidence from two medical professionals indicating that the unconscious spouse has little chance of gaining consciousness.

3.3 Irretrievable breakdown of the marriage

The Plaintiff simply needs to prove that there is no reasonable prospect to restore the marriage relationship between the spouses. If the court is of the opinion that the parties might reconcile their marriage through marriage counselling, reflection etc. the proceedings may be postponed to allow the parties an attempt to first reconcile. South African law follows a “no fault” based system of divorce. This means that a spouse can file for divorce without having to prove that the other spouse did something wrong.

Section 4(2) of the Divorce Act states the following as ways in which a marriage has irretrievably broken down:

- (a) Where the other spouse is in prison;
- (b) Where the other spouse suffers from a mental illness;
- (c) Where the other spouse is a habitual criminal;

- (d) There has been assault, cruelty or domestic violence;
- (e) The spouses have been living separately for more than a year;
- (f) There has been malicious desertion;
- (g) Or one of the spouses has an alcohol or drug addiction.

4. Irretrievable breakdown of the marriage explained in detail

4.1 What does it mean?

This means that a court in South Africa has the authority to grant parties a divorce as long as they can demonstrate that their marriage has irretrievably broken down to the point where there is no reasonable chance that it will ever be able to mend.

4.2 Factors of irretrievable breakdown

(a) Lack of meaningful communication

You and your spouse cannot find common ground anymore and every conversation turns into an argument. Miscommunication and misinterpretation seems to be the common factor in every conversation which results in unresolvable conflict.

(b) Attempt at reconciliation

You have tried to reconcile. This could mean going to counselling, or speaking to close family members and friends. However, even after attempting to reconcile it did not succeed.

(c) Domestic violence

If your partner abuses you mentally, physically or sexually that is considered irretrievable breakdown of your marriage as there will be no trust after the fact.

(d) Where the partner/spouse has left the communal home and has not yet returned

If the partner/spouse has left the home and has not returned this is considered irretrievable breakdown of the marriage.

(e) Infidelity

Where your spouse has committed infidelity by sleeping around or having illicit relationships. The damage of cyber relationships or online flirtations cannot be overlooked.

(f) Section 4 of the Divorce Act

The divorce act makes provision for the following grounds for divorce:

- Spouses who live apart for a continuous period of at least a year.
- When one spouse commits the act of adultery.
- If a spouse commits a criminal offence under South African law.

5. Most common reasons for a divorce

(a) Inconsolable differences

This is a legal term that people often cite as a catch-all for things like parenting styles, different goals, different attitudes and values.

(b) Use of money

Divorcing couples often cite money as one of the primary reasons for a divorce.

(c) Constant conflict

Couples are arguing about different things like power struggles, lack of equality, or lack of an identity of the partners.

(d) Infidelity

A wronged spouse needs to make a decision if he/she can ever trust the spouse guilty of infidelity again. If not, this is sufficient ground for a divorce.

(e) Lack of intimacy

This concerns emotional intimacy where parties don't feel connected anymore, there's no love and bonding anymore.

(f) Abuse

Abuse does not have to be physical. It can take many forms such as emotional abuse, financial abuse or psychological abuse.

(g) Addiction

Substance abuse where the spouse refuses to admit he/she has a problem can lead to major marital issues.

6. Things to think about before considering divorce

There will be times in any relationship or marriage when you feel uninterested, disgruntled, demotivated, or just unsatisfied. It's critical to distinguish between these fleeting emotions and the reasons mentioned above that actually cause your marriage to end irreparably.

Sometimes this occurs during mediation, other times it occurs during the actual litigation, but many couples come to the realization that they do not genuinely want to get divorced once they reach the divorce attorney's office. By doing some introspection to discern between your emotions and feelings, all of this can be prevented.

The settlement agreement is a component that the majority of married couples who are about to file for divorce overlook. It will have a much less severe effect on your financial situation and physical and emotional wellbeing if you and your spouse can come to an agreement regarding the settlement or division of your estate before the start of your divorce proceedings. This is because the divorce will be able to proceed on an uncontested basis. Due to negotiations and court battles, a disputed divorce can quickly get out of hand and become very expensive.

Frequently, the partners can reach an understanding and go on. In order to reach an out-of-court settlement, the divorce lawyer might advise mediation; nevertheless, if mediation is unsuccessful, the matter will go to trial. If your divorce goes to trial, you will have little control over how it will turn out, and both you and your spouse risk suffering unnecessarily severe consequences.

In some divorce proceedings, maintenance is requested. The entire divorce procedure results in financial disadvantage for one partner, who is typically but not always the woman. The financially disadvantaged spouse may submit a rule 43 application to get interim maintenance in order to resolve this issue. This enables the spouse who is in a less advantageous financial situation to obtain financial support in order to bounce back financially and achieve financial independence. As part of the implementation of rule 43, the spouse may even demand a contribution to his or her legal expenses.

7. Which court does a person go to get a divorce in South Africa?

In South Africa, the High Court and the Regional Magistrate Court have the authority to hear divorce cases. Despite this, one cannot just walk into any High Court or Regional Court and get a divorce. It must be a court where one of the parties has resided for at least a full year prior to the divorce, or where they are domiciled.

How to go about approaching the regional court?

You will find your Regional Court at the premises of your town's local Magistrate Court. If you are going to do your own divorce, without the assistance of an attorney, it will be helpful if you approach the court with the following documentation:

- Certified ID copies of yourself and of your spouse
- Ante-nuptial contract (if applicable)
- Certified copies of children's birth certificates (if applicable)
- Marriage certificate
- Proof of address (not older than 3 months)
- Date of your marriage
- A list of assets in your joint and/or separate estates.

Once you have all of this information then you are able to approach the court and get started with the divorce process. Keep in mind that it might be in your best interest to approach an attorney if you have substantial assets or if your divorce will not be uncontested.

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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

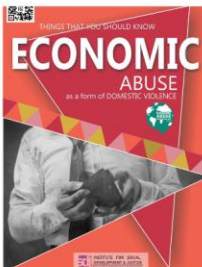
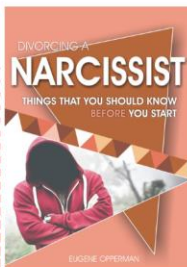
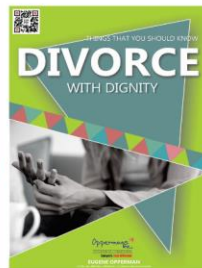
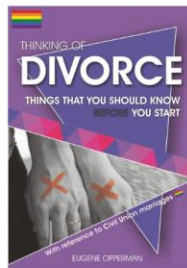
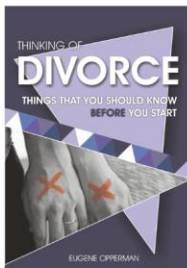


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