



What do you think the first thing I ask a client is when they are consulting our firm in a divorce case? “How much money do you have?”; “Why do you want to divorce your spouse?”; “Were you unfaithful?”

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South Africa experienced its first gay divorce as early as March 2007

Many possible questions come to mind. But the first thing I usually ask is: “Is there any way that this marriage – or civil union – can be saved?” If the answer is “No”, I will proceed, otherwise I will decline the instruction. A “maybe” won’t do – attorneys are not marriage counselors. Their job is to assist in the dissolution of the union with as few problems as possible and as soon as possible; to save their clients even more hardship, and of course - money. Not all attorneys are ethical, and not all attorneys do it this way, but it is the correct procedure in my opinion.

South Africa experienced its first gay divorce as early as March 2007 (as reported in the *Mail & Guardian*) after a marriage that lasted only a couple of weeks. According to the newspaper, one Richard Thornton (52), filed for divorce from 20-year old Andries Jacobs. Having married on January 5, 2007, young Jacobs

“packed his bags in the dead of night a matter of weeks into the marriage and, according to Thornton, moved in with another man in the same neighbourhood in the town of Krugersdorp.” And with that alleged act, Mr. Jacobs dragged gay South Africans into the divorce arena as equals to their heterosexual counterparts for the first time.

Since then, many gay couples have divorced, or dissolved or deregistered their civil union. The difference is actually semantic, as the dissolution of a gay marriage or a civil union is treated the same way as any divorce between heterosexuals was handled before.

Regarding the division of assets, the most important fact to ascertain, is if the couple entered into an antenuptial contract or not, commonly referred to as the “ANC” in legal terms (or “HVK” for “huweliksvoorwaardekontrak” in Afrikaans). There are currently three

ways to get married and arrange the estates of the parties in South Africa;

- with ANC, out of community of property, with the exclusion of the accrual system (commonly referred to as “totally out of community” or “what is mine is mine” and so on) – this means there are two estates, one for each spouse
- with ANC, out of community of property, but with the accrual system applied (referred to as “postponed community of property” or “share after marriage”), which has the effect of creating three estates – one for each spouse that existed before marriage and the common estate which starts



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accumulating from the date of the marriage, which is then divided as agreed in the ANC (typically 50/50).

- without ANC, which means that you are automatically married in community of property – there is only one estate, which will have to be divided equally after dissolution.

A common misconception is that the behaviour of the parties, or other factors, are taken into account when the court makes an order of division of assets. In practice, nothing more than a simple calculation is made – using the guidelines outlined above. When making an order of maintenance, the incomes and expenses of the parties are considered and a proportionate amount awarded. However, problems arise when parties hide

assets or income, or when they can't agree on the value of certain assets. This is when legal practitioners make a lot of money because it takes a lot of time and effort to settle the matter. A very small percentage of divorces are actually resolved in court – we leave that to the Heather McCartneys of this world who ends up paying attorneys ridiculously large sums in fees, only to be awarded what she was initially offered! In reality, most cases are settled out of court within a few months after summons was served. A settlement is a process of give and take – you must be prepared to accede to some demands, either totally or in part (otherwise, be prepared to pay for my next trip to Ibiza!).

So what are the legal grounds for a divorce under South African law, you may ask? Only two grounds exist: irretrievable breakdown of the marriage, or if one of the spouses

was committed to a mental institution for more than six months. This means simply that if one of the parties does not want to continue with the marriage, it has irretrievably broken down and a divorce is inevitable. The law however requires that the reasons be given for the actual breakdown, to demonstrate that the parties are not conspiring to defraud creditors or other third parties, and to convince the court that the marriage has in fact irretrievably broken down. These reasons are the actual problems in the marriage and constitute the juicy bits that the tabloid papers thrive on. I still have a record of a divorce that I facilitated where no less than 32 reasons for irretrievable breakdown were listed! These included allegations ranging from the husband being a compulsive gambler to having bisexual tendencies (!), being a drug and alcohol abuser, through to

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insisting on threesomes and being unfaithful outside the marriage with both sexes. However, your normal run-of-the-mill divorce mentions about five or six reasons, and often lists the following two:

- there exists no meaningful communication between the parties and if they do communicate, it mostly results in conflict;
- the plaintiff has lost all his/her love and respect for the defendant.

After listing these two, it is mostly followed by one or both of the following – money problems or infidelity (a wonderful guide as to what pitfalls to beware of in a marriage, although this is said with a very cynical smile, a result of being involved in just about 1000 divorces to date!).

“So what may be claimed?” I hear you ask. There is the division of the assets as explained above, the question of maintenance (both for the minor children, if any, and for the lesser-earning of the two spouses),

as well as custody of any children.

Maintenance will almost always be ordered to be paid by the spouse not having custody (if the spouse is an adopted or biological parent) and almost never to the lesser-earning spouse, simply because that person has the ability to earn his or her own income.

If there is a dispute as to custody of minor children, the court will look towards the family advocate to investigate the matter to provide guidance as to who to award custody to, always considering the best interest of such minor children. I must mention here that as early as the 1920's, it was remarked by a judge that even a prostitute may be a good parent! If the children are well looked after, the conduct of a party plays a small role, if any at all, in deciding the awarding of custody. The best interest of the children is always the yardstick.

Finally, to summarise what to do if a marriage or civil union has irretrievably fallen apart? First, the best is to ascertain that there is no chance of reconciliation. A cooling-off period or temporary separation at

this stage is a good idea, although this situation does not have any legal effect other than to demonstrate that the marriage was in trouble. At this point, the best thing to do is to try and look at the situation objectively, as an outsider would, and make up your mind if the union is beyond repair. Only then proceed to the next step – which is to calmly discuss the matter, acknowledge that divorce is imminent, and what a fair way of dealing with assets, maintenance and custody is. A “friendly” divorce is always the best option – fighting means more money to the legal eagles. However difficult it is, try to settle, even before the advice of an attorney is sought.

The last question we usually get asked is: “So, do I actually need an attorney? Well, if you perfectly understand all that was discussed in this article as well as any implied detail and potential complications, which I could not discuss for a lack of space, be my guest. Just don't expect me to sort it out if it results in a right royal mess ...