



ABRAHAMS & GROSS INC.



FAMILY LAW

F a m i l y L a w

2 0 1 1



ABRAHAMS & GROSS INC

When experience matters

OUR SERVICE

Abrahams and Gross Inc is a firm of forward thinking attorneys established in 1935. We are passionate about Family Law and our attorneys are caring, understanding and sensitive in our approach. We pride ourselves in our commitment to clients in delivering efficient, high quality legal services.

"When Experience Matters"



ABRAHAMS & GROSS INC

F a m i l y L a w



ABRAHAMS & GROSS INC

When experience matters

CONSIDERING DIVORCE

No couple goes into marriage thinking they will be the ones who won't make it. Certainly, at your wedding, you thought you were promising a love that would last a lifetime. Now, for reasons you may not fully understand, that dream seems shattered. Divorce is not an easy decision, it requires thorough consideration of your personal and financial needs, also the needs of your family and therefore you will need to know what your rights are.

This is a brief guide to divorce and matrimonial law in South Africa and our aim is to give you a better understanding of the divorce process and the laws governing the breakdown of your marriage and the laws affecting your children.

It is however highly recommended that you do consult with one of our Family Law Attorneys who has vast experience in matters of this sort and the intricacies involved in the divorce process. The cornerstone of our success rest on our ability to understand the dynamics of the divorce process and to negotiate the best possible solution for you and your family.



ABRAHAMS & GROSS INC

When experience matters

G R O U N D S F O R D I V O R C E (S p o u s e c o n s e n t n e e d e d ?)

In South Africa there are three grounds for divorce, the most common ground is the fact that there is an irretrievable breakdown of the marriage. There are numerous reasons why this happen, for example:

- either party has committed adultery;
- you have not lived together as husband and wife for a substantial period of time;
- there is a complete lack of communication between you and your spouse;
- there are physical, verbal or emotional abuse or an alcohol or drug related problem.



ABRAHAMS & GROSS INC.

When experience matters

G R O U N D S F O R D I V O R C E

A marriage has broken down if one spouse no longer wishes to continue with the marriage. The formation of an intention to sue for divorce is the subjective element in the method of determining marriage breakdown. However, in order to assess the probability of a successful reconciliation being effected, the court also has to consider the reasons that prompted the plaintiff to sue for divorce, and the parties' conduct. Only when the court has determined that there is no reasonable prospect of reconciliation, will it find that the marriage has broken down irretrievably and grant a decree of divorce. The court looks at the objective scantiness and surmountability of the reasons why a divorce was applied for to ascertain whether the marriage in question can still be saved. It is therefore irrelevant whether or not a spouse agrees to the divorce.

The second and third grounds for an order of divorce is the mental illness or continuous unconsciousness of a spouse. In such an instance you will have to prove that for a certain prescribed time period, your spouse was admitted to, or still is, in a mental institution; or that your spouse is in a state of continuous unconsciousness.



ABRAHAMS & GROSS INC.

When experience matters

THE PROCESS OF DIVORCE

After a proper consultation and obtaining all the relevant information and documentation, your attorney will issue a divorce summons and particulars of claim through either the High Court or the Regional Division of the Magistrate's Court on your behalf. The summons is then dispatched to the office of the Sheriff to have it served on your spouse.

If you so wish, your attorney can arrange that the summons be served on your spouse at the Sheriff's office or at his or her home, to avoid the possible embarrassment. In the particulars of claim the following issues, amongst others, are usually stated:

- the names and addresses of the Plaintiff and Defendant;
- the details of your marriage, whether you were married in community, out of community, with or without the accrual;
- whether any children were born from the marriage, their ages and names and when they were born. This information is needed by the Family Advocate's office, to determine whether the care and contact arrangements as well as the issues surrounding guardianship in respect of the children will be in their best interests;
- which parent will be the parent of primary residence and which parent will be the parent of alternate residence;
- issues of maintenance, medical, school and tertiary education;
- how assets will be split and pension funds be dealt with.



ABRAHAMS & GROSS INC

When experience matters

THE PROCESS OF DIVORCE

We strive to bring the divorce process to finality as soon as possible and believe that a speedy resolution will always be in the interest of all parties concerned. Our track record is self evident and was able to conclude many divorces in as quickly as 3 weeks from the date of serving the summons.

After issuing the summons or even before issuing thereof we embark upon settlement negotiations with your spouse or with his attorney if he/she is represented. It is critical that an attorney knows exactly how to negotiate a settlement agreement especially because the decisions taken will have a lasting impact on you and your children. This is why we say that the decision to divorce is a business decision.

Once a settlement is reached and the time period or *dies* as we call it in law have lapsed the attorney will apply to enrol the divorce on the court roll. On the day of the hearing the party who initiated the process (the Plaintiff) will appear in court to confirm the allegations that was made in the Summons. Once the judge is satisfied that the marriage has broken down irretrievably an order of divorce will be granted incorporating the settlement agreement.

Where you and your spouse are unable to agree on the terms of the settlement, the divorce will be contested and various types of pleadings will be exchanged between the parties' legal representatives where after the divorce will go to trial. A trial at court can last for days. After hearing evidence, the judge will then make a finding.



ABRAHAMS & GROSS INC

When experience matters

CAN I CLAIM MAINTENANCE PENDING FINALISATION OF THE DIVORCE?

Rule 43 of the High Court Rules apply to whenever a spouse seeks relief from the court in respect of:

- maintenance pending the divorce,;
- a contribution towards the costs of a 'pending matrimonial action';
- and interim care or contact to any child.

Rule 43 was designed to provide a streamlined and inexpensive procedure for procuring the same interim relief in matrimonial actions in regard to maintenance and costs.

The purpose of such relief is to regulate the position between the parties until the court finally determined all the issues between them. The entitlement to maintenance pending the divorce arises from a general duty of a husband to support his wife and children.

A spouse who is subject to ejectment from the matrimonial home or who is barred from using the household assets or left with no money can also approach the magistrate's court for an interdict under the Domestic Violence Act, 116 of 1998 to stop the other spouse from doing so and apply for immediate emergency monetary relief pending institution of the Rule 43 application.



ABRAHAMS & GROSS INC

When experience matters

WHAT ARE YOUR RIGHTS?

Matrimonial assets

The assets in a divorce are divided according to the marital regime applicable to the parties' marriage. There are three marital regimes in South Africa:

- In community of property
- Out of community of property (without the accrual)
- Out of community of property (with the accrual)

What a spouse will be entitled to in a divorce will largely depend on the marital regime at the date of divorce.

Where one of the spouses is a foreigner, the domicile of the husband at the time of the marriage determines the marital regime a court will apply in a divorce matter. For example, if the parties' were married in South Africa but the husband was domiciled in England at the time, the laws of England and Wales will apply once they divorce.



ABRAHAMS & GROSS INC

When experience matters

MATRIMONIAL ASSETS

Marriages in community of property

The property, assets and liabilities belonging to both parties at the time of marriage or acquired any time thereafter become part of the joint estate. The parties own the assets and liabilities in equal undivided shares and they are joint administrators of the joint estate.

The parties in certain circumstances may however own separate property which will not form part of the joint estate for example donations and inheritances where the testator or donator expressly excluded from the joint estate. This exclusion of ownership is only valid between the parties and not against creditors of the joint estate and is thus attachable.

A forfeiture order however cannot be granted mero motu by the court by implication then it has to be specifically prayed for. The criteria which the Court will use to make such an order is: - the duration of the marriage, the circumstances leading to the break-down, or the substantial misconduct of one of the parties. The duration of a marriage is considered the most important factor.

The basic test is whether if the order is not granted the one party will in relation to the other be unduly benefited. If the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down of the marriage and any substantial misconduct on the part of either of the parties. It must be satisfied that, if the forfeiture order is not made, the one party will be unduly benefited in relation to the other party. The forfeiture order can be up to 100% of the benefits.



ABRAHAMS & GROSS INC.

When experience matters

MATRIMONIAL ASSETS

Marriages out of community of property (without the accrual)

Each spouse retains his or her own assets and liabilities whether acquired before or during marriage. There is no sharing of profits and losses. Both spouses have full and independent contractual capacity. Upon death or divorce, each spouse keeps control over their own assets.

This clearly gives parties absolute independence of contractual capacity and protects the estates of each party against claims by the other party's creditors. There is no provision for any sharing whatsoever. A party who contributed to the other party's estate whether in cash or otherwise would have a heavy onus to prove that he or she was entitled to anything from that party's estate on dissolution of the marriage.

Where one party stays at home to raise children and does not contribute financially towards the marriage and the other spouse works and accumulates assets, the former may find herself with nothing and no claim to the assets of the latter.

The marriage is governed by a contract known as an ante nuptial contract which is concluded by the parties before the marriage. If the marriage occurred after 1 November 1984, the contract had to specifically exclude the system of accrual. In the absence of this exclusion the rules of accrual will automatically apply.



ABRAHAMS & GROSS INC

When experience matters

MATRIMONIAL ASSETS

Marriages out of community of property (with the accrual)

The Matrimonial Property Act 88 of 1984 brought with it the “accrual” system which permits a form of sharing, consistent with a primary objective of marriage, but permitting retention of each party’s independence of contract and ability to retain their own unique separate estates. “Accrual” means increase.

The accrual system is a form of sharing of the assets that are built up during the marriage. The underlying philosophy in respect of the accrual system is that each party is entitled to take out the asset value that he or she brought into the marriage, and then they share what they have built up together. One spouse’s property cannot be sold to pay the other’s creditors if the other becomes insolvent – in contrast to the case where the parties are married in community of property. It is of utmost importance that a party wishing to enter into an Ante Nuptial Contract must fully understand what it is they are signing. It is for this reason that a standard form contract cannot be used, that consultations cannot be held over the phone or by means of email and that, unfortunately.

The important features of an accrual marriage are in essence the following:

- Each party retains his or her own estate. Each party may accumulate assets and incur liabilities without interference from or assistance of the other spouse.
- The estate of each party is determinable separately.
- The monetary value of the smaller estate is subtracted from the monetary value of the larger estate, the difference is split, and the party having the larger estate pays half of the difference between the two estates to the party with the smaller estate.



ABRAHAMS & GROSS INC

When experience matters

- At dissolution of the marriage, the estate of each party is calculated by listing all assets, listing all liabilities, subtracting liabilities from assets and arriving at a net asset value.

In practical terms this amounts to a similar division to a marriage in community of property. However there are certain crucial factors of an accrual marriage which add complexity and much more freedom of choice. When drafting the Ante Nuptial Contract, the parties can each decide to exclude certain assets. The effect of excluding an asset will be that it does not feature on the asset statement at dissolution of the marriage and is completely excluded from the calculation.

Assets which are not properly described can cause huge problems when the executor or the divorce attorney tries to decide what to do with it in calculating the net accrual value. To exclude either a specific asset, or a commencement value, or both (which must be separate and not derived from the same asset), can effectively ensure that couples share only what they choose to share and keep separate any item or items, or values, which they do not believe it fair to share (for example something acquired before the relationship commenced).

Parties not wishing to exclude specific assets may exclude a certain sum of money which is the agreed equivalent of assets which they do not wish to share, and which is termed a “commencement value”.

Certain property belonging to either the husband or the wife may not be taken into account when the accruals are worked out: Any damages awarded to either spouse for defamation or for pain and suffering; Any inheritances, legacies or gifts that either spouse has received during the marriage, unless the parties have agreed in their antenuptial contract to include these or the donor has stipulated their inclusion; A donation made by one spouse to the other.



ABRAHAMS & GROSS INC

When experience matters

PENSION BENEFITS

A pension fund or pension benefit, as defined by the Pension Fund Act, 24 of 1956, includes not only a Pension Fund but also an Annuity Fund and a Provident Fund. Section 7(7) of the Divorce Act 7 of 1989 (as amended) provides that, in the determination of the patrimonial benefits to which the parties in any divorce action may be entitled, the pension benefits of a party shall be deemed to be part of his/her assets. Thus in any divorce action, a party's pension benefits shall also form part of his/her estate in the determining the patrimonial benefits to which a party in a divorce action will be entitled.

The position regarding the pension benefits in the different marital regimes is therefore as follows:

Marriages in community of property

Where the parties have entered into a marriage in community of property, one joint estate is formed. When the marriage dissolves through divorce, each spouse will be entitled to 50% of the joint estate, which joint estate includes the parties' pension benefits as well. The only exception would be if the Court made an Order in terms of Section 9 of the Divorce Act to the effect that one party forfeits in favour of the other, either wholly or in part his/her patrimonial benefits due to substantial misconduct during the divorce.

Marriages out of community of property without the accrual system

When a marriage out of community of property without the accrual system ends through divorce, each spouse will retain his/her own estate. The basic rule is that neither spouse will have a claim against each other spouse, but Section 7 of the Divorce Act provides that a Court may, on application by one of the parties; order that a part of one-spouse's assets be transferred to the other spouse.



ABRAHAMS & GROSS INC

When experience matters

PENSION BENEFITS

The spouse's assets, which are to be transferred to the other, shall then also include his/her pension benefits.

Marriages out of community of property with the accrual system

At the dissolution of a marriage out of community of property with the accrual system through a divorce, a redistribution of assets will be done according to a prescribed formula, which means that the spouse whose accrual during the marriage was smaller is entitled to half of the difference of the accruals between the spouse's estates. The accrual is calculated by deducting the beginning value of the estate from the end value of the estate. A spouse's pension benefits will therefore in this be taken into account when the accrual is calculated.

In terms of Section 1 of the Divorce Act, a spouse is only entitled to the other spouse pension benefit as at date of divorce, a spouse is not automatically entitled to any interest accrued to the other spouse pension benefits. This means by implication that any benefits of whatever nature including the interest accrued upon a pension benefit, does not form part of a person's estate for the purposes of divorce.

The parties are however entitled to enter into an agreement between themselves regarding the interest accrued to a spouse's pension benefit.

Who pays the tax?

In terms of Section 37A of the Pension Fund Act 24 of 1956, a person's pension benefits are taxable. The parties are entitled to enter into an agreement, which provides that the tax payable on that part of the pension benefits, to which the non-members spouse is entitled, shall be recovered from such spouse.



ABRAHAMS & GROSS INC.

When experience matters

PENSION BENEFITS

In the case of divorces granted before 13 September 2007, the member is responsible for any tax in respect of the spouse's benefit, irrespective of whether it is paid to the spouse or transferred to another retirement fund.

In the case of divorce orders granted on or after 1 March 2009, any tax is payable by the spouse on the benefit that he or she receives.

In respect of divorce orders granted from 13 September 2007 to 28 February 2009, the person liable for the tax on the pension interest depends on the date the spouse made his/her election as to whether he/she wants the benefits to be paid in cash or be transferred to another retirement fund of the spouse's choice:

- for an election before 1 March 2009 the member has to pay the tax.
- for an election from 1 March 2009 the spouse has to pay the tax

The Income Tax Act provides the member with a right to recover tax that the member had to pay in respect of the spouse's benefit, from the spouse.

It is of utmost importance that the clause dealing with the Pension benefit in the Settlement Agreement is drafted in the correct fashion and as such it is important to consult with an attorney who has experience in this regard.



ABRAHAMS & GROSS INC.

When experience matters

CONTACT WITH AND CARE OF THE CHILDREN

Contact (formerly known as "access") is what is awarded in a divorce matter to the non-resident parent and entitles such a parent to visit the child. Theoretically this right is vested in the child; however, non-resident parents cannot be forced to have contact with their child.

What is meant by the term "care"?

Care (formerly known as "custody") of a child entails more than a parent physically having the child with her/him and controlling the child's everyday life. Care now places a duty on parents to maintain a good solid relationship with the child and also promotes the child's well-being.

If we get divorced, what determines when my ex-spouse and I will see the child?

The new Children's Act 38 of 2005 states that both parents, upon divorce, will usually have parental responsibilities and rights in respect of a child born of the marriage. These rights and responsibilities include care, contact, guardianship and maintenance of the child.

When parents divorce, the court will make an order regarding their children. The order will include which parent the child will live with ("the primary resident parent") as well as the parental rights and responsibilities. The order will either be based on a parental agreement reached by the parents or, if no parental agreement was reached, the court will determine what is in the best interests of the child and what is reasonable in the circumstances.



ABRAHAMS & GROSS INC

When experience matters

CONTACT WITH AND CARE OF THE CHILDREN

When can a child make his own decisions about the contact he has with the other parent?

A child can only make a decision when he reaches the "age of majority", i.e 18 years old. However, a child that does not want to have contact with the non-resident parent cannot be forced to do so once he is of an age, development and maturity where his wishes can be taken into account. The Children's Act also states that before any person holding parental rights and responsibilities makes a major decision regarding the child, that person must consider the views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

"Major decisions" are decisions affecting the contact of the child with his parents as well as any of the decisions which require the consent of both guardians, such as consent for a child to get married, be adopted, apply for a passport, be removed from the Republic of South Africa, enter into a contract or for that child's immovable property to be sold. Consideration must also be given to the wishes and views expressed by any person having parental rights and responsibilities, which is usually the other parent.

What if one parent wishes to take the child on an overseas holiday and the other parent refuses to let the child go?

A parent's consent (if he is also a guardian of the child) is required to apply for a passport for a child and to remove the child from the Republic. If one parent unreasonably withholds his consent then the court can be approached. The court can be approached on an urgent basis and once the matter is heard, the court will make a ruling.



ABRAHAMS & GROSS INC

When experience matters

MAINTENANCE IN RESPECT OF CHILDREN

Legally, a duty of support exists between people who have a familial bond or certain relationship between each other. A person who owes another person a duty of support may have to pay maintenance for that person, if the person has the means to provide maintenance and if the receiving person is in need of maintenance.

The following categories of maintenance exist:

1. Child
2. Partners/surviving spouses

There is also a third type of maintenance that is not discussed in this document and that is the right of parents, in certain circumstances to claim maintenance from their children.

What rights to support do children have?

In terms of the Constitution of South Africa (which is the highest law of our country), every child has the right “to family care or parental care, or to appropriate alternative care when removed from the family environment”. Every child has the right to basic necessities such as food; shelter; clothing; medical and dental care; education; and social services.

Children should get these basic needs from their parents or relatives. This support given by parents or relatives is called maintenance.



ABRAHAMS & GROSS INC.

When experience matters

MAINTENANCE IN RESPECT OF CHILDREN

Parents or relatives maintain children directly when the child lives with them. Parents or relatives maintain children indirectly, when the child lives with someone else, by paying maintenance, or money to support the child and provide his or her basic needs.

Who has a duty to support (maintain) children?

The law requires a child to be supported or maintained by:

- both his/her parents, whether married, living together, separated or divorced;
- through the estate of the deceased parent(s) of the child, whether or not the parents were married; and
- both his or her grandparents, in certain cases. This legal duty is called 'the duty to maintain' or 'the duty to support'.

Both parents must contribute to 'lying-in' expenses – these are the mother's expenses immediately before, during and immediately after the birth. It is also important to remember that an adoptive parent owes a duty of support towards his/her adopted child and that, when adoption takes place, the child's natural parents are no longer required to support the child.



ABRAHAMS & GROSS INC

When experience matters

MAINTENANCE IN RESPECT OF THE SPOUSE

At common law this duty comes to an end on divorce. However, in terms of the Divorce Act 70 of 1979, the court granting the decree of divorce may make an order directing one spouse to pay maintenance to the other spouse after divorce, either by agreement between the parties or, in the absence of such an agreement, after taking into account various factors set out in s 7(2) of the Divorce Act.

If no such order was granted at the time of the divorce, the divorcé cannot at a later stage approach the maintenance court for an order directing his ex-spouse to pay him maintenance. However, if such an order was granted by the divorce court, the divorcé may approach the maintenance court at a later stage to apply for a substitution (increase or decrease) or the discharge of the existing order, provided that good cause exists for such a substitution or discharge.

In the event that the parties cannot reach a settlement about spousal maintenance, then the Court will have to make a decision about spousal maintenance. The Court will look at factors such as the duration of the marriage, reasons for the break-up of the marriage, the respective earning capacity of the parties, whether or not both parties worked during the marriage etc. In the event that both parties are self-supporting they will not be entitled to spousal maintenance. Our Courts much prefer the so-called 'clean-break' principle, which means that the parties each go their separate ways post divorce.



ABRAHAMS & GROSS INC

When experience matters

CONTACT US:

Bertus Preller

B.Proc; AD Dip L Law

Family Law Attorney

Abrahams and Gross Inc.

A: 1st Floor, 56 Shortmarket Street, Cape Town, 8000

O: +27 (0) 21 422 1323

F: 086 572 8373

C: +27 (0) 83 443 9838

E: bertus@divorceattorney.co.za





ABRAHAMS & GROSS INC

When experience matters

OTHER SERVICES:

- Conveyancing and Property Transactions
- Corporate and Commercial Services
- Estate Planning, Administration of Estates and Wills, Trusts and Curatorships
- Immigration and Emigration, Sports Law and Endorsements
- Litigation, Criminal Law, Debt Collection, Labour Law
- Maritime and Marine Law