

Dissolution of a civil marriage by divorce

3 no-fault grounds for divorce were introduced by the Divorce Act:

1. irretrievable breakdown of the marriage (section 4);
2. mental illness of a party to the marriage (section 5);
3. continuous unconsciousness of a party to the marriage (section 3).

Irretrievable breakdown of the marriage

Section 4(1) – court may only grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them. There are thus 2 requirements:

- (a) marriage relationship must no longer be normal;
- (b) there must be no prospect of the restoration of a normal marriage relationship between the spouses.

The legal definition of “normal marital relationship” should be sought in the concept of *consortium omnis vitae*. When either spouse or both of them behave in such a way that the *consortium omnis vitae* is terminated or seriously disrupted, it can be said that a normal marriage relationship no longer exists between the spouses.

Schwartz v Schwartz: in determining whether a marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties it is important to have regard to what has happened in the past, that is, history of the relationship up to the date of trial, and also to the present attitude of the parties to the marriage relationship as revealed by the evidence at the trial.

Swart v Swart: 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.

Coetzee v Coetzee: in order to succeed in a divorce action based on irretrievable breakdown, the plaintiff must prove that there has been a change in the pattern of the marriage from which breakdown can be deduced. The inherent problem in this conception is that a divorce cannot be obtained in a marriage which was unhappy from the start and remained unhappy throughout.

Guidelines for irretrievable breakdown of marriage (section 4(2))

The guidelines are merely examples of instances where the probability is high that a normal marriage relationship no longer exists and that there is no reasonable prospect for the restoration of a normal marriage relationship. However, these guidelines are neither exhaustive nor conclusive.

(1) parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action

Since the legislator requires an unbroken period of at least one year, it is clear that if the period was interrupted by periods of resumed cohabitation, the plaintiff would have to present more evidence to the court than the mere fact that they have lived apart for a year.

The *consortium* between the spouses must have been terminated. Even if the spouses have continued living together under the same roof there is no reason why the plaintiff cannot show that the *consortium* between them has been terminated.

If the plaintiff wishes to rely only on the spouses having lived apart for a year without adducing any further evidence in support of the divorce action, he or she would have to produce proof that the full period of a year has elapsed. If the spouses still share the same dwelling, the plaintiff would have to prove the particular point in time at which the consortium came to an end.

(2) The defendant has committed adultery and the plaintiff finds it irreconcilable with a continued marriage relationship

The test to determine whether the plaintiff considers the defendant's adultery irreconcilable with the continuation of the marriage is clearly subjective. If the plaintiff alleges that he or she cannot continue with the marriage, there is no way in which this allegation can be refuted. There is support for the contention that it is not necessary to convince the court on a balance of probabilities that adultery was committed. The plaintiff should however place some evidence of the adultery before the court. A mere allegation that the defendant committed adultery would not be sufficient to ensure the success of the divorce action.

(3) A court has declared the defendant a habitual criminal and the defendant is undergoing imprisonment as a result of that sentence

If the defendant has not been declared an habitual criminal, the plaintiff would have to adduce evidence other than the mere fact of the defendant's imprisonment to prove that the marriage has broken down irretrievably. In any event, in terms of section 4(2), a plaintiff may sue for divorce after a year's separation, regardless of whether or not the separation resulted from imprisonment.

Incurable mental illness or continuous unconsciousness

The criteria

Section 5(1) – mental illness

1. The defendant has been admitted to an institution as a patient in terms of a reception order under the Mental health Act, or is being detained as a state patient or mentally ill convicted prisoner at an institution;
2. The defendant has not been unconditionally discharged from the institution or place of detention for a continuous period of at least two years immediately prior to the institution of the divorce action;

3. There is no reasonable prospect that the defendant will be cured of his or her mental illness. This fact must be proved by the evidence of at least two psychiatrists, one of whom must be appointed by the court.

Section 5(2) – continuous unconsciousness

1. The defendant must be in a state of continuous unconsciousness caused by a physical disorder;
2. The defendant's unconscious state must have lasted for a period of at least six months immediately prior to the institution of the divorce action;
3. There must be no reasonable prospect that the defendant will regain consciousness. This fact must be proved by the evidence of at least two doctors, one of whom must be a neurologist or neurosurgeon appointed by the court.

The requirements of section 5 need not be complied with in order to obtain a divorce order against a mentally ill or unconscious spouse. A decree of divorce can be granted under section 4 if the plaintiff can prove that the marriage has broken down irretrievably. Only in the most exceptional circumstances will a court make a forfeiture order against a defendant whose mental illness or unconsciousness is the reason for a divorce which is granted in terms of section 4.

Special rules which apply in terms of the Divorce Act:

(a) Section 5(3)

The court is empowered to appoint a legal practitioner to represent the defendant at the court proceedings, and to order the plaintiff to bear the costs of the defendant's legal representation.

(b) Section 5(4)

The court may make any order it deems fit in respect of requiring the plaintiff to furnish security for any patrimonial benefits to which the defendant may be entitled as a result of the divorce.

(c) Section 9(2)

Forfeiture of patrimonial benefits may not be ordered against a defendant if the marriage is dissolved on the ground of the defendant's incurable mental illness or continuous unconsciousness.

(d) Maintenance

The plaintiff may indeed claim maintenance from the mentally ill or unconscious defendant if he or she qualifies for maintenance in terms of section 7(2) of the Act.