

South Africa

## Divorce Act, 1979

Act 70 of 1979

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## Divorce Act, 1979

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# South Africa

## Divorce Act, 1979

### Act 70 of 1979

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**Assented to on 8 June 1979**

**Commenced on 1 July 1979**

*Note: See section 19*

*[This is the version of this document as it was from 3 October 1986 to 1 December 1988.]*

*[Amended by [Matrimonial Property Act, 1984 \(Act 88 of 1984\)](#) on 1 November 1984]*

*[Amended by [Transfer of Powers and Duties of the State President Act, 1986 \(Act 97 of 1986\)](#) on 3 October 1986]*

(Afrikaans text signed by the Acting State President)

## ACT

**To amend the law relating to divorce and to provide for incidental matters.**

BE IT ENACTED by the State President, the Senate and the House of Assembly of the Republic of South Africa, as follows:—

### 1. Definitions

- (1) In this Act, unless inconsistent with the context—

"**court**" means the provincial or local division of the Supreme Court of South Africa, or a divorce court established under section 10 of the Black Administration Act, 1927, Amendment Act, 1929 ([Act No. 9 of 1929](#)), which has jurisdiction with respect to a divorce action;

"**divorce action**" means an action by which a decree of divorce or other relief in connection therewith is applied for, and includes—

- (a) an application pendente lite for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
  - (b) an application for a contribution towards the costs of such action or to institute such action, or make such application, in forma pauperis, or for the substituted service of process in, or the edictal citation of a party to, such action or such application.
- (2) For the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of court, as the case may be.

### 2. Jurisdiction

- (1) A court shall have jurisdiction in a divorce action if—

- (a) the parties to the action are domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or

- (b) the wife is the plaintiff or applicant and she is ordinarily resident in the area of jurisdiction of that court on the date on which the action is instituted and has been ordinarily resident in the Republic for a period of one year immediately prior to the said date and—
  - (i) is domiciled in the Republic; or
  - (ii) was domiciled in the Republic immediately before cohabitation between her and her husband ceased;
  - (iii) was a South African citizen or was domiciled in the Republic immediately prior to her marriage.
- (2) A court which has jurisdiction in terms of subsection (1)(b) shall also have jurisdiction in respect of a claim in reconvention or a counter-application in the divorce action concerned.
- (3) A court which has jurisdiction in terms of this section in a case where the parties are not domiciled in the Republic shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in the area of jurisdiction of the court concerned on the date on which the divorce action was instituted.
- (4) The provisions of this Act shall not derogate from the jurisdiction which a court has in terms of any other law or the common law.

### 3. Dissolution of marriage and grounds of divorce

A marriage may be dissolved by a court by a decree of divorce and the only grounds on which such a decree may be granted are—

- (a) the irretrievable break-down of the marriage as contemplated in [section 4](#);
- (b) the mental illness or the continuous unconsciousness, as contemplated in [section 5](#), of a party to the marriage.

### 4. Irretrievable break-down of marriage as ground of divorce

- (1) A court may grant a decree of divorce on the ground of the irretrievable break-down 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.
- (2) Subject to the provisions of subsection (1), and without excluding any facts or circumstances which may be indicative of the irretrievable break-down of a marriage, the court may accept evidence—
  - (a) that the 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;
  - (b) that the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship; or
  - (c) that the defendant has in terms of a sentence of a court been declared an habitual criminal and is undergoing imprisonment as a result of such sentence,as proof of the irretrievable break-down of a marriage,
- (3) If it appears to the court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings in order that the parties may attempt a reconciliation.
- (4) Where a divorce action which is not defended is postponed in terms of subsection (3), the court may direct that the action be tried *de novo*, on the date of resumption thereof, by any other judge of the court concerned.

## 5. Mental illness or continuous unconsciousness as grounds of divorce

- (1) A court may grant a decree of divorce on the ground of the mental illness of the defendant if it is satisfied—
  - (a) that the defendant in terms of the Mental Health Act, 1973 ([Act No. 18 of 1973](#))—
    - (i) has been admitted as a patient to an institution in terms of a reception order;
    - (ii) is being detained as a President's patient at an institution or other place specified by the Minister of Prisons; or
    - (iii) is being detained as a mentally ill convicted prisoner at an institution of hospital prison for psychopaths,and that he has, for a continuous period of at least two years immediately prior to the institution of the divorce action, not been discharged unconditionally as such a patient, President's patient or mentally ill prisoner; and
  - (b) after having heard the evidence of at least two psychiatrists, of whom one shall have been appointed by the court, that the defendant is mentally ill and that there is no reasonable prospect that he will be cured of his mental illness.
- (2) A court may grant a decree of divorce on the ground that the defendant is by reason of a physical disorder in a state of continuous unconsciousness, if it is satisfied—
  - (a) that the defendant's unconsciousness has lasted for a continuous period of at least six months immediately prior to the institution of the divorce action; and
  - (b) after having heard the evidence of at least two medical practitioners, of whom one shall be a neurologist or a neurosurgeon appointed by the court, that there is no reasonable prospect that the defendant will regain consciousness.
- (3) The court may appoint a legal practitioner to represent the defendant at proceedings under this section and order the plaintiff to pay the costs of such representation.
- (4) The court may make any order it may deem fit with regard to the furnishing of security by the plaintiff in respect of any patrimonial benefits to which the defendant may be entitled by reason of the dissolution of the marriage.
- (5) For the purposes of this section the expressions "institution", "mental illness", "patient", "President's patient" and "reception order" shall bear the meaning assigned to them in the Mental Health Act, 1973.

## 6. Safeguarding of interests of dependent and minor children

- (1) A decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances.
- (2) For the purposes of subsection (1) the court may cause any investigation which it may deem necessary, to be carried out and may order any person to appear before it and may order the parties or any one of them to pay the costs of the investigation and appearance.
- (3) A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted,

a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.

- (4) For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.

## 7. Division of assets and maintenance of parties

- (1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.
- (2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

*[subsection (2) substituted by section 36(a) of [Act 88 of 1984](#)]*

- (3) A court granting a decree of divorce in respect of a marriage out of community of property entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded, may, subject to the provisions of subsection (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.

*[subsection (3) added by section 36(b) of [Act 88 of 1984](#)]*

- (4) An order under subsection (3) shall not be granted unless 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, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.

*[subsection (4) added by section 36(b) of [Act 88 of 1984](#)]*

- (5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3) the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account-
- (a) the existing means and obligations of the parties;
  - (b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;
  - (c) any order which the court grants under [section 9](#) of this Act or under any other law which affects the patrimonial position of the parties; and
  - (d) any other factor which should in the opinion of the court be taken into account.

*[subsection (5) added by section 36(b) of [Act 88 of 1984](#)]*

- (6) A court granting an order under subsection (3) may, on application by the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including

conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just.

[subsection (6) added by section 36(b) of [Act 88 of 1984](#)]

## **8. Rescission, suspension or variation of orders**

- (1) A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor.
- (2) A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.
- (3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply with reference to any order referred to in subsection (1) given by a court in a divorce action before the commencement of this Act.

## **9. Forfeiture of patrimonial benefits of marriage**

- (1) When a decree of divorce is granted on the ground of the irretrievable break-down of a 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.
- (2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.

## **10. Costs**

In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.

## **11. Procedure**

The procedure applicable with reference to a divorce action shall be the procedure prescribed from time to time by rules of court.

## **12. Limitation of publication of particulars of divorce action**

- (1) Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgement or order of the court, no person shall make known in public or publish for the information of the public or any section of the public any particulars of a divorce action or any information which comes to light in the course of such an action.
- (2) The provisions of subsection (1) shall not apply with reference to the publication of particulars or information—
  - (a) for the purposes of the administration of justice;

- (b) in a *bona fide* law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or
  - (c) for the advancement of or use in a particular profession or science.
- (3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act.
- (4) Any person who in contravention of this section publishes any particulars or information shall be guilty of an offence and liable on conviction to a fine, not exceeding one thousand rand or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

### 13. Recognition of certain foreign orders

- (1) The validity of a decree of divorce granted in a country or territory in which the husband was not domiciled at the time of the granting of the decree shall be recognized by a court in the Republic if that country or territory has been designated by the Minister of Justice by notice in the *Gazette* for the purposes of the recognition of such decrees.
- (2) The Minister of Justice may designate a country or territory for the purposes of subsection (1) if he is satisfied that the law of that country or territory provides for the exercise of jurisdiction which substantially corresponds to the jurisdiction referred to in [section 2\(1\)\(b\)\(ii\)](#) and (iii).
- (3) No notice shall be issued in terms of this section unless the Minister of Justice is satisfied that the law of the country or territory concerned makes sufficient provision for the recognition by the courts of that country or territory of a decree of divorce granted in the Republic in terms of a jurisdiction under [section 2\(1\)\(b\)\(ii\)](#) or (iii).
- (4) A notice issued in terms of this section may be withdrawn at any time.

[section 13 amended by sections 46 and 47 of [Act 97 of 1986](#)]

### 14. Abolition of orders for restitution of conjugal rights and judicial separation

It shall not be competent for a court to issue an order for the restitution of conjugal rights or for judicial separation.

### 15. Application of Act

This Act shall not apply with reference to a divorce action or proceedings for the restitution of conjugal rights or for judicial separation instituted before the commencement of this Act.

### 16. Amendment of section 5 of [Act 37 of 1953](#), as amended by section 2 of [Act 13 of 1966](#)

Section 5 of the Matrimonial Affairs Act, 1953, is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
- "(1) Any provincial or local division of the Supreme Court or any judge thereof may, on the application of either parent of a minor whose parents are divorced or are living apart, in regard to the custody or guardianship of, or access to, the minor, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.";
- (b) by the substitution for subsection (2) of the following subsection:



"(2) An order under subsection (1) in regard to a minor whose parents are living apart shall, if the parents become reconciled and live together again as husband and wife, lapse with effect from the date on which the parents commence to live together again.";

- (c) by the substitution for subsection (3) of the following subsection:

"(3) Subject to any order of court—

- (a) a parent to whom the sole guardianship or custody of a minor has been granted under subsection (1) or the Divorce Act, 1979, or a father or a mother upon whom a children's court has under section 60 (1) of the Children's Act, 1960 ([Act No. 33 of 1960](#)), conferred the exclusive right to exercise any parental powers in regard to a minor, may by testamentary disposition appoint any person to be the sole guardian or to be vested with the sole custody of the minor, as the case may be; and
- (b) the father of a minor to whom the sole guardianship of the minor has not been granted under subsection (1) or the Divorce Act, 1979, or upon whom a children's court has not conferred the exclusive right to exercise any parental powers in regard to the minor, shall not be entitled by testamentary disposition to appoint any person as the guardian of the minor in any other manner than to act jointly with the mother."; and

- (d) by the substitution for subsection (6) of the following subsection:

"(6) If an order under section 60 of the Children's Act, 1960, is rescinded, or if an order under subsection (1) of this section or under the Divorce Act, 1979, granting the sole guardianship or custody of a minor to a parent, lapses or is rescinded or is varied in such a manner that the parent is no longer the sole guardian or vested with the sole custody of the minor, any disposition under subsection (3)(a) shall lapse."

## 17. Amendment of section 72 of [Act 66 of 1965](#), as amended by section 7 of [Act 54 of 1970](#)

Section 72 of the Administration of Estates Act, 1965, is hereby amended by the substitution for that part of subsection (1) which precedes paragraph (b) thereof, of the following:

"(1) The Master shall, subject to the provisions of subsection (3) and to any applicable provision of section 5 of the Matrimonial Affairs Act, 1953 ([Act No. 37 of 1953](#)), and section 4 of the Matrimonial Affairs Ordinance, 1955 ([Ordinance No. 25 of 1955](#)), of the territory, or any order of court made under any such provision or any provision of the Divorce Act, 1979, on the written application of any person—

- (a) who has been nominated by will or written instrument—
  - (i) by the father of a legitimate minor, who has not been deprived, as a result of an order under subsection (1) of the said [section 5](#) or subsection (1) of the said [section 4](#) or the Divorce Act, 1979, of the guardianship of such minor, or under section 60 of the Children's Act, 1960 ([Act No. 33 of 1960](#)), or section 58 of the Children's Ordinance, 1961 ([Ordinance No. 31 of 1961](#)), of the territory, of his parental powers over him; or
  - (ii) by the mother of an illegitimate minor or of a legitimate minor whose father is dead, who has not been so deprived of the guardianship of such minor or of her, parental powers over him; or
  - (iii) by the parent to whom the sole guardianship of a minor has been granted under subsection (1) of the said [section 5](#) or under subsection (1) of the said [section 4](#) or under the Divorce Act, 1979, or on whom the exclusive right to exercise parental powers in regard to a minor has been conferred under the said section 60 or the said section 58,

to administer the property of such minor and to take care of his person as tutor, or to take care of or administer his property as curator; or".

**18. Repeal of laws**

The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

**19. Short title and commencement**

This Act shall be called the Divorce Act, 1979, and shall come into operation on 1 July 1979.

**Schedule**

No. and year of law	Short title	Extent of repeal
<a href="#">Act No. 32 of 1935</a>	Divorce Laws Amendment Act, 1935	The whole
<a href="#">Act No. 22 of 1939</a>	Matrimonial Causes Jurisdiction Act, 1939	The whole
<a href="#">Act No. 17 of 1943</a>	Matrimonial Causes Jurisdiction Amendment Act, 1943	The whole
<a href="#">Act No. 35 of 1945</a>	Matrimonial Causes Jurisdiction Act, 1945	The whole
<a href="#">Act No. 37 of 1953</a>	Matrimonial Affairs Act, 1953	Sections 6, 7, 8, 9 and 10
<a href="#">Act No. 70 of 1968</a>	General Law Amendment Act, 1968	Sections 21, 22 and 23
<a href="#">Act No. 42 of 1974</a>	Publications Act, 1974	Section 47 (2) (f) (iii) and (3)