



# OPEN MIND MEDIATION

Consider the Alternative



# A GUIDE TO UNCONTESTED DIVORCE

## MEDIATED DIVORCE EXPLAINED

My partner and I are considering a divorce

though divorce should never be your first option when marital problems arise, in some instances divorce is inevitable. Should this be the case, one cannot under South African law prohibit a partner from approaching the Court for a divorce. Not participating in the divorce proceedings could negatively affect the outcome, as that Party would be denied the opportunity to give their inputs and state what they need out of the divorce. It is, however, highly advisable to seek the assistance of a mediator.

The legal grounds for divorce



Either of the Parties need to prove to the Court that the marriage has broken down irretrievably. The conditions for this include, *inter alia*:

- A spouse has moved out of the house
- Abuse of any kind by either of the spouses
- Adultery
- Habitual criminality
- Neglecting to support financially
- Constant arguing
- Loss of love between the spouses

## WHAT WILL HAPPEN TO OUR CHILDREN?

Will we have to go through a custody battle?

Both Parties need to decide who the primary caregiver will be. In recent years our Courts have shown greater flexibility with regards to shared care (shared custody), where the children spend a period of time with one parent, and an equal amount of time with the other. This is subject to age considerations and a social worker may be appointed to compile a report in this regard. It is important to note that deciding on appointing one Party as the primary caregiver, does not mean that the other party loses or has less rights and responsibilities toward their children.

Should the Parties fail to agree, the Court, as upper guardian of all minors, will decide. This is usually done on recommendation of the Office of the Family Advocate. The Court may hold the Parties liable for the cost of a social worker's report. Understandably, the whole divorce process and transition can be highly stressful for the children. Mediation enables the Parties to work out their differences and minimize the impact on their children. The mediation process further allows the parties to come up with an agreement for care (and maintenance) that they are able to design themselves, as opposed to a Court ordering what should be done.



# HOW WILL OUR PROPERTY BE DIVIDED?

Who gets what?

Mediation allows the parties the opportunity to decide how they want their property to be divided. If the Parties are unable to arrive at a settlement, the Court may decide to liquidate the assets and divide the net returns based on the applicable marital property regime. Typically there is a loss in the value of the returns as the assets are liquidated. Mediation is, however, not limited by these processes.

During mediation, the parties are free to negotiate and to be creative about how they want to go about the split. The goal is to find out-of-the-box solutions to lose as little as possible in terms of the value of the shared estate (if any). Where the services of an expert is required (financial/ property/ business) one can be so appointed.

Ultimately the Parties, if able to reach an agreement, are free to determine their own fate and to avoid what could be an order of Court, setting out the division of property in such a way that neither Party is satisfied.



# CONTESTED vs UNCONTESTED DIVORCE

What's the difference?

A decree of Divorce can be granted by a Court only. A contested divorce is typically where the Parties disagree on:

- With whom the children should live
- Contact with the children
- Maintenance for the children or spouses
- Division of the estate/s

Contested divorces, due to the lack of settlement, usually entail multiple Court appearances, which dramatically increase the cost to each of the Parties and ends (usually after a number of years) in an order of Court stipulating terms that the Parties had no hand in determining.

Uncontested divorces are where the Parties agree on all aspects and sign a Divorce settlement Agreement, which the Court then incorporates into its Decree of Divorce. Costs are substantially lower, the matter is concluded much more timeously, and the Parties do not require legal representation. At the end of the mediation process the mediator guides the Parties through the process of filing for divorce at Court without legal representation. Or, if the Parties prefer, assists in appointing a legal representative to file on their behalf.

Ultimately, where the Parties approach the Court with a signed Divorce Settlement Agreement (i.e. an uncontested divorce), concluded via the mediation process, they do not need attorneys/ advocates and will they in all likelihood also be allocated an earlier court date. The Parties appear before Court as a formality, but there is no trial. The Settlement Agreement is made an order of Court, which the Parties must adhere to.

# CHILD MAINTENANCE

Who pays what?

Every parent is legally required to pay child maintenance until their child is 18 years old. Should the child not be self-supporting at 18, the parent is required to continue to pay maintenance until the child is self-supporting.



Child Maintenance is payable in proportion to the Parents' incomes and include all costs for raising the child. The first step is to calculate the actual costs, which include housing, food, educational & medical expenses, *inter alia*.

Below is a (very) simplified example:

Cost of raising child	R5 000.00
Parent 1 Income	R20 000.00
Parent 2 Income	R12 000.00
Parent 1's share	62.5%
Parent 2's share	37.5%
Parent 1 contribution	R3 125.00
Parent 2 Contribution	R1 875.00

Any and all actual expenses of the child at both parents' homes are then calculated and factored into the required child maintenance payments.

# SPOUSAL MAINTENANCE

## How does it work?

The mutual duty between spouses to maintain and support each other usually ends when the marriage is dissolved – unless certain factors apply which demand otherwise.

If one of the spouses was the sole breadwinner, the Court may award spousal maintenance in favour of the other spouse. The Court will take into consideration certain factors, like:

- Assets obtained from the Divorce
- Ability to re-enter the job market or generate an income
- Age and Health
- Reasons for unemployment if the person was not working for an extended period during the marriage
- Duration of the marriage

The Court may decide to award spousal maintenance for a limited period of time in order to enable a spouse to re-enter the job market. This is called rehabilitative maintenance. The Court may also award permanent maintenance in favour of a spouse that, for example, is too old and unlikely to be able to rejoin the workforce.

The quantum does not depend on the desire of the party obliged, and divorcees cannot expect the same standard of living after divorce. The amount must be determined in accordance with:

- Requirements of the one to be supported; and
- The ability of the one who must pay, to pay

# PARENTAL RIGHTS & RESPONSIBILITIES

## Do both parents have the same rights?



In terms of the Children's Act 38 of 2005, parents have the following rights and responsibilities in respect of their children:

- To care for their child
- To have regular contact with their child and to maintain a meaningful relationship
- To act as guardian of the child
- To contribute in respect of child maintenance

The Children Act envisages that both parents should retain full parental rights and responsibilities in respect of their children after divorce. However, the court may deviate from this if the best interest of the child so dictates. It is advisable for parents to consider drawing up a detailed parenting plan with the help of a mediator, in order for both parents to be prepared and comfortable with the arrangements in respect of the children that are part of the transition that is divorce.

# MEDIATION

## What is it?

Mediation is a voluntary process of structured negotiation between two or more parties that enables the parties to resolve any differences and arrive at a mutually acceptable solution to a legal problem. Because the solution is designed by both parties, the chances that one of the parties will default or go back on the agreement are substantially lower.

The mediation process engages a neutral third party who does not judge the case, but helps facilitate a discussion, limit the issues and put them in perspective to resolve a dispute. Mediation is the fraction of the cost of a traditional court case and more confidential and timeous than lengthy court battles. The process is highly effective in resolving conflicts peacefully.

## What to do next?

For more information, or to book a mediation or information session with Open Mind Mediation, kindly visit our website: [www.openmindmediation.co.za](http://www.openmindmediation.co.za)

Or

- contact us via email at: [marique@openmindmediation.co.za](mailto:marique@openmindmediation.co.za)
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