

Family law in South Africa: overview

Jurisdiction and conflict of law

Regulatory framework

1. What are the primary sources of law in relation to marriage, marital breakdown and the welfare of children and give a brief overview of which courts will have jurisdiction to hear the dispute?

Sources of law

The sources of South African law relating to marriage, the dissolution of marriage and the welfare of children are:

- The Constitution (of primary reference).
- Common law.
- Customary law.
- Precedent.
- Legislation.
- The writings of jurists.

Regard is always had to the Constitution of the Republic of South Africa as the supreme law when interpreting sources of law. The High Court and the Constitutional Court have held that the Bill of Rights must be interpreted in such a way as to afford protection to the core elements of the institution of marriage and family life.

The common law is Roman-Dutch-based with a significant English law influence. The common law has been developed through the decisions of the courts and it has been influenced by a number of cultures that make up the South African society.

The primary statutes relating to family law are the:

- **Marriage Act 1961 (25 of 1961)**. This deals with the formalities of marriages.
- **Matrimonial Property Act 1984 (88 of 1984)**. This regulates the distinct matrimonial property systems.
- **Divorce Act 1979 (70 of 1979)**. This determines the grounds for divorce, based on the irretrievable breakdown of a marriage and the determination of the personal and proprietary consequences of the divorce for the spouses.
- **Maintenance Act 1998 (99 of 1998)**. This regulates the determination and enforcement of maintenance claims.
- **Recognition of Customary Marriages Act (120 of 1998)**. This makes provision for the recognition and regulation of customary marriages.
- **Domicile Act 1992 (3 of 1992)**. This amends the common law relating to domicile and regulates the acquisition and determination of domicile.
- **Children's Act 2005 (38 of 2005)**. This consolidates the law relating to children and determines the exercise of parental responsibilities and rights.
- **Civil Union Act (17 of 2006)**. This provides for the solemnisation of civil unions, by way of either a marriage or civil partnership and the legal consequences of those.

Court system

The South African courts are divided into two categories:

- The superior courts, that is:
 - the Constitutional Court;
 - the Supreme Court of Appeal; and
 - the High Courts.

- The lower or inferior courts, that is, the divisions of the Magistrates' Courts.

There is no designated specialist family division of the superior courts. The High Courts have general jurisdiction over civil and criminal matters, including divorce and family-related matters. The lower courts have designated Divorce Courts, Maintenance Courts and Children's Courts. Proceedings in courts are generally open to the public, unless specifically determined otherwise, as, for example, applies to proceedings in the Maintenance Courts and Children's Courts.

Jurisdiction

2. What are the main requirements for local courts to have jurisdiction in relation to divorce, property and children proceedings?

Divorce

In terms of the Divorce Act (see Question 1) a court has jurisdiction in a divorce action if one or both of the parties are either:

- Domiciled in the area of jurisdiction of the court on the date on which the divorce action is instituted.
- Ordinarily resident in the jurisdiction of the court on the date of institution of the proceedings and has or have been ordinarily resident in South Africa for a period of not less than one year immediately prior to that date.

The South African courts have not definitively defined the term "residence". There is no fixed minimum period of physical presence to constitute residence. The term "ordinarily resident" denotes a residence that is not casual or occasional.

Property

A court that has jurisdiction in respect of a divorce action has jurisdiction in relation to all relevant claims between the parties, including claims relating to:

- Payment of maintenance.
- The exercise of parental responsibilities.
- Rights relating to children.
- Property claims.

These issues are generally determined simultaneously with the granting of the divorce.

The court which made the original order of divorce, or another court where the parties are both domiciled (or where the applicant is domiciled if the respondent consents) can rescind, vary or suspend the order in respect of the children or the payment of maintenance.

Children

The High Court is the upper guardian of all minor children that fall within the jurisdiction of South Africa and has jurisdiction over all matters pertaining to minor children in South Africa.

Domicile and habitual residence

3. How do the concepts of domicile and habitual residence apply in relation to divorce, financial arrangements, and children?

Domicile

Under South African law, no person can be without a domicile or have more than one domicile at any time. The Domicile Act adapted, and must be read in conjunction with, the common law (see Question 1). The Domicile Act distinguishes between domicile of choice and assigned domicile.

Any person over the age of 18 years is competent to acquire a domicile of choice.

A domicile of choice is acquired by a person having the requisite legal capacity, who establishes their lawful presence in the chosen area with the intention of settling for an indefinite period.

A person must be habitually and physically present at the place of intended domicile. No minimum period of physical presence is required, but more than a visit is necessary. The person's presence in the relevant jurisdiction must be lawful to acquire a domicile of choice.

The private legal status of a person under South African law is determined by the law of the country in which he is domiciled. A minor or a person lacking in mental capacity is not capable of acquiring a domicile of choice.

No person loses his domicile until he has acquired another domicile.

Domicile is determined by operation of law at the place with which they are factually most closely connected (section 2(1), Domicile Act).

Habitual residence

The term "habitual residence" is known in South African law in the context of applications in terms of HCCH Convention on the Civil Aspects of International Child Abduction 1980 (Hague Child Abduction Convention), which was ratified in 1996 and incorporated into South African law in October 1997.

"Habitual residence" has been considered in local courts with reference to international precedent. The term has no technical definition. Habitual residence is decided on the facts of each case, by applying an ordinary meaning to the words. The courts have held that the word "habitual" implies a stable, territorial link, achieved through length of stay or through evidence of a particularly close tie between person and place, that is not temporary (Central Authority of the Republic of South Africa v L G (2011 (2) SA)).

Conflict of law

4. What procedure applies for a party applying to stay proceedings in favour of a foreign jurisdiction? What factors do local courts take into account when determining forum issues?

Procedure

It often occurs that matrimonial proceedings are instituted simultaneously in competing jurisdictions. In determining whether proceedings should be stayed, the court takes into account a number of factors.

The court considers whether it has jurisdiction to hear the action. The doctrine of effectiveness is fundamental to the consideration of a court's jurisdiction in a matter. The court must have the power to make its order effective. Whether the court has jurisdiction in a divorce is determined in terms of the jurisdictional requirements stipulated in the Divorce Act at the time that the proceedings are instituted (see Question 1).

Once it is determined that the court has jurisdiction, the court has regard to whether the issue is already pending adjudication in another court (the doctrine of *lis alibi pendens*, that is, dispute pending elsewhere). It is within the court's discretion to consider whether an action brought before it should be stayed pending the decision of another previously brought action between the same parties, for the same cause and in respect of the same subject-matter, or whether it is more just and equitable or convenient that it should be allowed to proceed.

Factors

In considering a plea of *lis alibi pendens*, the court considers which court will more conveniently consider the issue. The plea is not an absolute bar to the matter proceeding. The court has discretion whether or not to uphold it and may refuse the stay application.

In *Kerbel v Kerbel* (1987(1)SA 562 W), it was held that once the plea of *lis alibi pendens* has been made, the court should be inclined to uphold it, unless there is good reason to determine why the court where the action first commenced should not be allowed to carry on with the proceedings.

A court may also decline to exercise jurisdiction if it is more convenient or more fitting for another forum to do so (the doctrine of *forum non conveniens*).

Pre- and post-nuptial agreements

Validity of pre- and post-nuptial agreements

5. To what extent are pre- and post-nuptial agreements binding?

South African law recognises a validly concluded pre-nuptial or post-nuptial contract, save to the extent that the contract violates public policy considerations. Where there is no pre-nuptial contract, the proprietary regime that applies to the marriage is determined by the husband's domiciliary law at the time of the marriage. The principle of immutability operates so that there is certainty regarding the law that applies to the proprietary consequences of the marriage.

Once the legal system governing the proprietary regime of the marriage is determined, that legal system cannot be changed.

A South African court must authorise the execution of a post-nuptial contract for it to be valid in South Africa, whether against spouses or third parties. However, if the husband's domiciliary law at the time that a post-nuptial contract is executed recognises such a contract, then South African law will recognise the contract.

When a South African court grants a decree of divorce in respect of a marriage, the proprietary consequences of which are, according to South African private international law, governed by the law of a foreign state, the court has the same power that a competent court of the foreign state concerned would have had at that time to order that assets be transferred from one spouse to the other (section 7(9), Divorce Act). This includes applying a validly concluded foreign pre- or post-nuptial contract.

Although subject to some debate, the essential validity of a pre-nuptial contract is determined by the law of the:

- Husband's domicile in respect of movable assets.
- Place where the property is situated (*lex situs*), in respect of immovable property.

Where parties insert a choice of law clause in a pre-nuptial contract, the validity of the clause is determined in accordance with the law of the matrimonial domicile.

The law of the place where the contract was concluded (*lex loci contractus*) determines the formal validity of a pre- or post-nuptial contract.

Where a pre-nuptial contract is executed outside of South Africa by a husband who is domiciled in South Africa, the contract must be registered in South Africa to be effective against third parties. Registration is not required where the husband is not a South African domiciliary in order to be recognised by South African law.

South African law does not require a pre-nuptial contract to be concluded in writing, formally executed or registered for it to be valid between the parties, but such a contract is not valid as against third parties.

Divorce, nullity and judicial separation

Recognition of foreign marriages/divorces

6. Are foreign marriages/divorces/civil partnerships recognised?

Marriages

The validity of a foreign marriage is tested according to the law of the place where the marriage was celebrated (*lex loci celebrationis*).

The doctrine of evasion (*fraus legis*) determines that where a man or woman, one or both of whom were domiciled in the court's jurisdiction, have their marriage deliberately solemnised elsewhere to escape a formal requirement of the *lex domicilii* (law of a particular domicile), they act in *fraudem legis* (in circumvention of the rules of law), and the validity of their marriage is then tested in accordance with local law as *lex domicilii*.

Where the application of the law where the marriage is celebrated is repugnant to the moral principles of the local court, it will refuse legal recognition of the marriage. For example, where the marriage is tainted by incest.

Divorces/annulment

The validity of a divorce order, order for annulment or judicial separation granted in a court of a foreign country or territory is recognised by a South African court if, on the date on which the order was granted, either party to the marriage was, in respect of the country or territory concerned (section 13, Divorce Act):

- Domiciled (either in terms of South African law or in terms of the law of that country or territory).
- Ordinarily resident.
- A national.

It is implicit that the divorce granted must be effective under the law of the country in which it was granted.

Civil partnerships

The validity of a foreign civil partnership (or civil union), including a same sex civil partnership is, like a foreign marriage, tested according to the law of the place where the marriage was celebrated (lex loci celebrationis). If the civil partnership is valid in terms of the law of the place where it was solemnised, it will be valid in South Africa, save where the application of the lex loci celebrationis is repugnant to the moral principles of the court, for example, where the civil partnership is tainted by incest.

Divorce

7. What are the grounds for divorce?

Divorce

The two grounds for divorce are (section 3, Divorce Act):

- Irretrievable breakdown of the marriage or civil union.
- Mental illness or continuous unconsciousness.

The grounds for divorce are not based on fault.

A court can grant a decree of divorce on the ground of irretrievable breakdown of the marriage if it is satisfied that the marriage has reached such a state of disintegration that there is no reasonable prospect of reconciliation or the restoration of a normal marriage relationship between the parties (section 4, Divorce Act).

The only alternative ground for divorce is mental illness or continuous unconsciousness.

The court will not grant a decree of divorce where appropriate safeguards are not in place to secure the interests of dependent (s) and/or minor children.

The court determining whether the marriage has broken down irretrievably may consider, as proof of the irretrievable breakdown of the marriage, evidence that the:

- Parties have not lived together as husband and wife for a continuous period of one year prior to the proceedings.
- Defendant committed adultery and the claimant finds it irreconcilable to continue the marital relationship.
- Defendant has been declared a habitual criminal and is serving a prison sentence.

In addition to the above factors, the court can consider any other circumstances that indicate the marriage has irretrievably broken down. The test is not burdensome.

The court can refuse to grant a decree of divorce unless it is satisfied that the spouse in whose power it is to have a religious impediment to divorce removed has done all that is necessary to dissolve the religious marriage and to remove the religious barriers to remarriage.

Nullity

In the absence of compliance with various legal requirements for a valid marriage, the marriage can be determined to be either:

- **Void.** In a void marriage, there is no marriage and no consequences of marriage result. The parties usually seek a declaratory order. A void marriage cannot be validated, except in certain specific circumstances, usually where the offending issue is a formal requirement.
- **Voidable.** A voidable marriage is distinct from a void marriage. A valid marriage is concluded unless it is invalidated and annulled by a court. Until it is set aside, the consequences of a valid marriage apply. The annulment usually applies retrospectively to the date of the marriage. Examples of a voidable marriage include a marriage:
 - by a minor without the consent of his or her guardian;
 - concluded under duress or by fraud or error;
 - by someone impotent at the time of the marriage.

A putative marriage may result as a consequence of a void or voidable marriage. A putative marriage is not a marriage and arises where either both or one party is, in good faith, ignorant that their marriage is invalid. The law attaches some consequences to a union declared to be a putative marriage by a court. Certain proprietary claims can assist the innocent party. Children born of the union are regarded as legitimate.

Judicial separation

There is no longer any formal regulation of judicial separation in South Africa.

Finances/capital and property

8. What powers do the courts have to allocate financial resources and property on the breakdown of marriage?

The court granting a decree of divorce also determines the proprietary and financial claims of the parties.

A court granting a decree of divorce can make an order with regard to the division of assets or the payment of maintenance by one party to the other, in accordance with a written settlement agreement entered into between the parties (section 7(1), Divorce Act).

The parties may, at any time before or following the institution of divorce proceedings, settle their disputes under such an agreement and request that the court incorporate the terms of the agreement into the final decree of divorce.

Where the parties do not conclude an agreement with regard to the payment of maintenance, the court can make an order regarding the maintenance payable by one spouse to the other following the divorce (section 7(2), Divorce Act).

The court can also make orders regarding the division of assets (including pension interests) in accordance with the regime that dictates the patrimonial consequences of the marriage. The division of assets takes into account the matrimonial property regime under which the parties were married. Distinct consequences arise if the spouses are married:

- In community of property.
- Having executed a pre-nuptial contract excluding accrual sharing before 1 November 1984.
- Having executed a pre-nuptial contract concluded after 1 November 1984 which either includes or excludes accrual sharing.
- According to the laws of a foreign country.

In certain circumstances, the court can also consider ordering one spouse to forfeit the patrimonial benefits of the marriage on the basis detailed below.

All marriages entered into in South Africa without a valid pre-nuptial contract are presumed to be in community of property and of profit and loss. The presumption can be rebutted.

On dissolution of a marriage in community of property:

- The joint estate, which includes the sum total of the assets and liabilities of the parties, is divided equally between the parties.
- Assets that do not fall within the joint estate, being the separate assets as determined under the Matrimonial Property Act (for example, inherited assets, donations specifically excluded and certain damages awards) are retained by the relevant spouse.

Division of the assets of the joint estate is based on the principle that the parties are owners of undivided equal shares of the joint estate.

Marriages entered into after 1 November 1984 under a pre-nuptial contract, which excludes community of property and of profit and loss, are automatically subject to the accrual system, unless accrual sharing is specifically excluded. In a marriage governed by the accrual system, the parties retain separate estates during the marriage and are not responsible for each other's debts. On dissolution of the marriage, the parties share in the accrual of (or growth in) the estate of the other party. The accrual is the difference between the net asset value of each spouse's estate at the commencement of the marriage and the value on dissolution.

In calculating the accrual, the value of assets specifically excluded from accrual sharing at the commencement of the marriage in terms of the pre-nuptial contract are similarly excluded on dissolution of the marriage.

Certain assets acquired by gift, inheritance or donation are also excluded from the accrual calculation. On dissolution of the marriage, inflation is taken into account from the date of commencement until the date of dissolution of the marriage and the commencement values of the parties estates are adjusted accordingly.

The court can order that one party to a marriage in community of property, or to which the accrual system applies, should forfeit the proprietary benefits of the marriage in favour of the other party, either wholly or in part. The court will do so if it considers that, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown and any substantial misconduct on the part of one of the parties, the other party would unduly benefit if the forfeiture order was not granted. This discretion is exercised cautiously. In respect of marriages in community of property, this would mean that all assets are not necessarily divided equally. In respect of marriages subject to the accrual system, this could mean that the right to share in the accrual to the other party's estate can be forfeited.

Where spouses enter into a pre-nuptial contract after 1 November 1984, if accrual sharing is explicitly excluded, the court does not have discretion to direct a redistribution of assets between the parties. If the contract provides for any property claims, these are given effect to. If the parties have jointly owned assets, their rights are determined in accordance with their respective rights to the assets.

Where spouses entered into a pre-nuptial contract before 1 November 1984 that excludes accrual sharing, the court granting a decree of divorce can direct that the assets of one spouse be transferred to the other spouse on such basis as the court considers to be just and equitable, having regard to the direct and indirect contributions made by the one spouse to the growth or maintenance of the estate of the other spouse during the marriage (sections 7(3) to 7(6), Divorce Act).

In circumstances where it is alleged, and found, that a trust is a sham and not valid, or that beneficial ownership of the assets ostensibly held in a trust in fact vests in one of the spouses, the assets of the trust may be taken into account when determining the proprietary consequences of the marriage.

When a South African court grants a decree of divorce in respect of a marriage where the proprietary consequences are, according to South African private international law, governed by the law of a foreign state, the court has the same power that a competent court of the foreign state concerned would have had at that time to order that assets be transferred from one spouse to the other (section 7(9), Divorce Act).

9. What factors are relevant to the exercise of the court's powers?

In terms of sections 7(3) to 7(6) of the Divorce Act, a court directing a redistribution of assets in marriages concluded before 1 November 1984 under an ante-nuptial contract where accrual sharing is excluded will take into account:

- The contributions made by the spouses to the growth or maintenance of the estate of the other spouse, whether directly or indirectly, including by the rendering of services and the saving of expenses.
- The means and obligations of the parties.
- Any donations made between the parties.
- An order for the transfer of assets in terms of a foreign proprietary regime.
- Any other factor which the court deems relevant.

The court must exercise its discretion in making a value judgement in respect of the value of the contribution made. There are several considerations that are taken into account in exercising this very wide discretion. Each case is determined on its own merits. Although South Africa has adopted a no fault system of divorce, in exercising its discretion, the court can take into account the misconduct of one or both of the parties, but only where it would be unjust to disregard the misconduct.

Inheritances are taken into account as a financial contribution when consideration is given to the redistribution of assets (*Kirkland v Kirkland* (2006 6 SA 144 C)).

10. What is the court's current position on the division of assets?

More recently, greater consideration has been taken of the assets of discretionary trusts created during the marriage in redistributing assets and in dividing joint and accrued estates. Frequently the trustees of the trusts are joined to divorce actions and relief is sought in respect of the assets of the trusts where it can be shown that the trust is either a sham and/or that a spouse is the de facto or beneficial owner of the assets of the trust (*BC v CC and others* (2012 5 SA 562 (ECP)); *Badenhorst v Badenhorst* (2006 2 SA 255 (SCA)) and compare *Van Zyl N.O. and Another v Kaye N.O. and Others* (2014 4 SA 452 (WCC), and more recently, *M v M* 2017 (3) SA 371 (SCA)).

Where the proprietary consequences of a marriage are determined in accordance with the law of a foreign state, the court granting the decree of divorce has the power to make orders in respect of the transfer of assets between spouses on the same basis as a competent court in the foreign jurisdiction.

Finances/maintenance

11. How does ongoing spousal maintenance operate following marital breakdown?

The duty of support between spouses in a marriage arises as a consequence of the contract of marriage and is an invariable consequence of the marriage that cannot be regulated by a pre-nuptial contract. The reciprocal duty of support between spouses comes to an end when the marriage terminates, whether by death or divorce.

The court granting a divorce order can make an order in respect of the payment of maintenance by one party to another following their divorce on the basis that a court finds just (section 7(2), Divorce Act).

Only the court granting a decree of divorce can extend the maintenance obligation beyond the date of divorce. Another court cannot make an order for the payment of maintenance to a divorced spouse. The court has the discretion to direct that the maintenance obligation should be extended:

- Until the death or remarriage of a party.
 - For any other period (rehabilitative maintenance).
- Neither spouse has a right to maintenance upon divorce. The claim arises as a consequence of section 7(2) of the Divorce Act.

When the court considers the making of an order in respect of the payment of maintenance post-divorce, it considers certain factors, namely the (section 7(2), Divorce Act):

- Existing or prospective means of each of the parties.
- Respective earning capacities of the parties.
- Financial needs and obligations of the parties.
- Age of the parties.
- Duration of the marriage.
- Standard of living of the parties before the divorce.
- Conduct of the parties insofar as relevant to the breakdown of the marriage.
- An order for the division of assets.
- Any other factor which, in the court's opinion, should be taken into account.

None of these factors should be regarded as dominant.

Certain factors introduce moral considerations. As divorce is not fault-based, the predominant considerations in determining maintenance are:

- Financial need.
- Ability of the parties to meet the maintenance claim.

The court's discretion in respect of the award of maintenance is unfettered.

A maintenance order made in terms of the Divorce Act can be rescinded or varied at any time by:

- The court which made the order, ordinarily the High Court.
- A divorce court.

- A maintenance court.

A maintenance order can be revisited and varied or set aside if there is sufficient reason for the variation or setting aside of the order.

12. Is it common for maintenance to be awarded on marital breakdown?

It is relatively common for an order for the maintenance of a spouse post-divorce to be granted where the marriage has been a long one, where the earning abilities and financial resources of the parties are significantly distinct, and where a clean break cannot be effected (see Question 13).

13. What is the court's current position on maintenance on marital breakdown?

The court prefers to achieve a clean break on divorce so that the parties become economically independent. To the extent that the court has a discretion regarding the transfer of assets, it applies its discretion to terminate the financial dependence of one party on the other. This is most likely achieved in circumstances where the court has a discretion to make a redistribution order (section 7(3), Divorce Act). The court cannot otherwise direct the payment of a lump sum to effect a clean break as maintenance must be a periodic payment of sums of money.

In certain circumstances, for example, the provision of household necessities, the court has awarded a lump sum payment to enable an ex-spouse to purchase household necessities and establish a home rather than making monthly payments.

It has also been ordered that the accommodation requirements of an ex-spouse be met by an appropriate order for maintenance to provide directly for the accommodation of that spouse.

Child support

14. What financial claims are available to parents on behalf of children within or outside of the marriage?

A parent of a minor child has locus standi to claim financial support on behalf of that child from any person who has a legal obligation to maintain the child. The parent of a minor child, in their capacity as guardian, is responsible for the prosecution of financial claims on behalf of that child. The child's parents have an obligation to meet the reasonable financial needs of the child, pro rata, in accordance with their respective means. This is a joint obligation. If one parent does not pay their share of the expenses of a minor child, the other parent enjoys a right of recourse against that parent to recover the amounts reasonably expended and to which the other parent ought to have contributed.

When a child attains the age of majority, but remains financially dependent, it falls to the child to enforce their claim for financial support. For example, if the child shares a residence with one parent, that parent can include a provision made for the child's household costs, as a financially dependent major child. The alternative is to simply recover from the defaulting parent the amount of the child's costs that ought to have been paid by that parent, if that parent has failed to meet their proportionate share of the dependent child's costs.

15. On what basis is child maintenance calculated?

The obligation to maintain a child arises by operation of law and not as a consequence of a contractual obligation.

Both parents must support a child in accordance with their means. The obligation to maintain a child cannot be contracted out of on divorce, for example, by the payment of a lump sum, as this is contrary to public policy. The duty of support between a parent and a child is mutual and exists between descendants and ascendants without limitation.

To contribute to the maintenance of the child is one of the four recognised parental responsibilities and rights that a parent has in respect of a child (Children's Act).

The Divorce Act provides for the payment of maintenance of dependant and minor children of divorcing couples. A court granting a decree of divorce must not grant a decree of divorce unless it is satisfied that the provisions made with regard to the welfare of any minor or dependent child are satisfactory.

In calculating the maintenance that is payable in respect of a child, a determination is made in respect of the:

- Reasonable needs of the child according to their standard of living.
- Respective parent's ability to meet the needs of the child.

Parents may have to use both income and capital to meet the reasonable maintenance requirements of a child. Each case is determined on its own merits and there is no specific table or formula in determining the quantum of maintenance payable.

On divorce, maintenance awards generally provide for the payment of:

- An allowance for general living expenses.
- Medical and related costs.
- Educational and related costs.

Due regard is had to the time spent with each party and to the costs that are incurred when the child is with them, in addition to medical and educational costs.

16. What is the duration of a child maintenance order (up to the age of 18 years or otherwise)?

The obligation to contribute to the maintenance of a child arises *sui generis*. The obligation is a reciprocal one that extends along the lines of ascendancy and descendency. The obligation does not cease at a particular age, but endures for so long as there is a reasonable need to be maintained by one person and an ability of the other party to contribute to those reasonable needs.

This duty to maintain a child can extend to the payment of the child's tertiary education costs and living expenses whilst the child continues in tertiary education, provided that the child reasonably requires assistance and the parents' have the ability to pay the costs. A court granting a decree of divorce must be satisfied regarding the arrangements for minor or dependent children (section 6, Divorce Act).

17. Can children make direct claims against their parents?

A child can make a claim directly against their parents. The Children's Act provides that a minor child has the right to bring, and to be assisted in bringing, a matter to court and that a child who is affected by or involved a matter may approach a court (see Question 1). A minor child is generally assisted by a

guardian or by a curator ad litem (legal representative). A major has locus standi to make a claim directly against their parents.

Reciprocal enforcement of financial orders

18. What is the legal position on the reciprocal enforcement of financial orders?

A maintenance order of a country designated under the Reciprocal Enforcement of Maintenance Orders Act (80 of 1963), can be enforced in South Africa. A South African maintenance order can be transmitted to a similarly designated foreign country for enforcement against the debtor residing there.

The maintenance order of a designated foreign country must be registered in a South African court before it can be enforced in South Africa.

If a person residing in South Africa is entitled to be maintained by a person living in a designated foreign country, an enquiry under the Maintenance Act must be held. A provisional order is granted, which only becomes final when confirmed by the appropriate authority in the foreign country. The order is then enforced in accordance with the terms of the laws of that country.

Civil judgments given in designated countries can be enforced in South Africa in the magistrate's court of the district where the person against whom the judgment in question was given (Enforcement of Foreign Civil Judgments Act (32 of 1988)):

- Resides.
- Carries on business.
- Is employed.
- Owns movable or immovable property.

Only a final judgment or order for the payment of money by any court in civil proceedings in a designated country, which is enforceable by execution in the country in which it was given or made, can be enforced. This does not include orders for the payment of maintenance.

The relevant judgment must then be registered in the manner prescribed in the Act. When such a judgment has been registered, the judgment has the same effect as a civil judgment of the relevant South African court and can be enforced in accordance with South African law. The designated countries are very limited.

The common law also provides for the recognition and enforcement of a foreign judgment if:

- The foreign court had international jurisdiction to decide the case.
- The judgment delivered was final and conclusive (and is not superannuated).
- The recognition and enforcement of the judgment is not contrary to public policy.
- The judgment does not fall foul of the Protection of Business Act (99 of 1978) (as amended).

Enforcement in terms of common law is cumbersome.

Financial relief after foreign divorce proceedings

19. What powers are available to the court to make orders following a foreign divorce?

To the extent that a foreign court has made an order in respect of the proprietary consequences of a marriage, and the order is final and valid under the law of the foreign country, the order will not be revisited by a South African court.

The High Court is the upper guardian of minor children within its jurisdiction. It has inherent jurisdiction to consider any order in respect of a child within its jurisdiction to ensure the protection and best interests of that child. Foreign orders in respect of the exercise of parental responsibilities and rights relevant to a child in South Africa can be varied by the South African High Court.

Once a foreign maintenance order has been granted and registered in South Africa, the order can be varied by the relevant maintenance court having jurisdiction in the matter if sufficient reason exists for the variation of the foreign order.

If no order in respect of post-divorce maintenance of a spouse has been made by a foreign court, such an order cannot be made by a South African court as the maintenance obligation cannot be revived.

Children

Custody/parental responsibility

20. What is the legal position in relation to custody/parental responsibility following the breakdown of a relationship or marriage?

The Children's Act determines the regulation of parental responsibilities and rights, including following the breakdown of a relationship or marriage.

Parents of children born in wedlock or of children born out of wedlock, where the parents lived together at the birth or where the father showed his commitment to the child by consenting to being identified as the father and by contributing to the child's upbringing and expenses, or attempting in good faith to do so, enjoy shared parental responsibilities and rights in respect of their child.

Parental responsibilities and rights include the responsibility and right to:

- Act as guardian of the child.
- Care for the child.
- Have contact with the child.
- Contribute to the maintenance of the child.

All of these responsibilities and rights are exercised and regulated against the standard of the best interests of the child. Parental responsibilities and rights can be suspended, terminated or extended by a court.

Parties who share parental responsibilities and rights in respect of a child can reach agreement regarding how they wish to regulate their shared responsibilities and rights in terms of a parenting plan. It is common to incorporate provision for mediation into parenting plans. Although arbitration is precluded in matrimonial matters, parties to a parenting plan frequently agree to defer decision-making in respect of disputed issues to a third party mediator, called a facilitator. This delegation of decision-making is always subject to a court determining the issue if it remains in dispute and does not divest the co-holders of their parental responsibilities and rights.

The Act places significant emphasis on children having a voice in decisions affecting them and due consideration must be given to their views.

The term "custody" has essentially been replaced by the term "care". The term care is an all-encompassing term relating to the protection of and regulation of the well-being and development of a child.

A decree of divorce will not be granted until the court is satisfied that the provisions made or contemplated regarding the welfare of any minor or dependent child are satisfactory or are the best that can be effected in the circumstances (section 6(1), Divorce Act).

21. What is the legal position in relation to access/contact/visitation following the breakdown of a relationship or marriage?

The term "access" has been replaced by the term "contact". Contact is "maintaining a personal relationship with a child" and where a child resides with someone else, includes visiting and being visited by the child and communication, including by post, telephone and other electronic media (Children's Act).

Contact can be regulated by agreement between the parties, frequently in terms of a parenting plan (see Question 17), or it can be regulated by the court. The views of the child are considered, taking into account their age and stage of development, and are considered on the basis of what is in the best interests of the child.

Contact arrangements are subject to variation as the best interests of the child dictate. A child may be separately represented in care and contact proceedings. A child must be informed of any action or decision regarding the child and due consideration must be given to the child's views when making any decision (sections 6(5), 10 and 31(1), Children's Act).

International abduction

22. What is the legal position on international abduction?

South Africa is a party state to the Hague Child Abduction Convention. South Africa ratified the Hague Child Abduction Convention in 1996. It was transposed into domestic law when the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 came into operation on 1 October 1997.

South Africa abides by the principles espoused in the Convention, which the courts enforce with reference to international precedent. Emphasis is placed on securing the prompt return of children wrongfully removed to or retained in a contracting state.

In practice, applications are generally heard on an urgent or semi-urgent basis by way of motion proceedings. The overriding principle emphasised in the Constitution and the Children's Act with regard to applying the Convention is that the best interests of the child are a priority.

A person who has parental responsibilities and rights in respect of a child has the right to act as guardian of the child (section 18(2)(c), Children's Act (38 of 2005)). A guardian must consent to the child's departure or removal from South Africa (section 18(3)(c)(iii), Children's Act). Where more than one person has guardianship of a child they must all consent to the departure or removal of a child from South Africa.

Parental responsibilities and rights include the duty to (Children's Act):

- Care for the child.
- Maintain contact with the child.
- Contribute to the maintenance of the child.

To the extent that these rights and responsibilities are held and exercised by any person in respect of a child, they have rights of custody for the purposes of the Hague Child Abduction Convention.

Where a child is removed to or from a country that is not a party state to the Hague Child Abduction Convention, the South African High Court as the upper guardian of minor children applies the principle of the best interests of the minor child and in effect, applies the Hague Child Abduction Convention principles in determining whether a child should be returned to or retained in (as the case may be) their habitual residence.

Leave to remove/applications to take a child out of the jurisdiction

23. What is the legal position on leave to remove/applications to take a child out of the jurisdiction? Under what circumstances can a parent apply to remove their child from the jurisdiction against the wishes of the other parent?

It frequently occurs that one spouse wishes to relocate from South Africa to a distinct jurisdiction with the parties' minor children. A guardian must consent to the child's departure or removal from South Africa (see Question 19). Where more than one person has guardianship of the child, both must consent to the departure or removal of the child.

In circumstances where a co-holder of parental responsibilities and rights and/or the co-guardian of a minor child does not consent to the removal of the child, then the removal of the child from South Africa is unlawful.

The party who wishes to remove the child, in the absence of consent, must seek the authority of the High Court for the removal. The authority of the court will only be awarded if the removal is considered to be in the best interests of the child. South African law has developed in this regard with reference to contemporary international precedent in regard to the relocation of children.

Frequently, when orders are granted allowing the relocation of children, provision is made for the registration of orders in the country to which the children relocate, to regulate the continued exercise by both parents of their parental responsibilities and rights including orders in respect of contact.

Surrogacy and adoption

Surrogacy agreements

24. What is the legal position on surrogacy agreements?

A "surrogate motherhood agreement" is an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother (Children's Act):

- Is artificially fertilised for the purpose of bearing a child for the commissioning parent.

- Undertakes to hand over such child to the commissioning parent upon its birth, or within reasonable time, with the intention that the child concerned becomes the legitimate child of the commissioning parent.

A surrogacy agreement is not valid unless:

- It is in writing and signed by all the parties.
- Entered into in South Africa.
- At least one commissioning parent (or if single, that parent) is domiciled in South Africa.
- The surrogate mother and her husband or partner are domiciled in South Africa at the time.
- The agreement is confirmed by the High Court.

The written consent of a spouse or partner of both the commissioning parent and of the surrogate mother is required and they must be parties to the agreement. The court can dispense with the consent of the partner of the surrogate mother if she is not the genetic parent.

In addition, the agreement is not valid unless the following conditions exist:

- The gamete of both commissioning parents, or if not possible for valid reasons, one of the commissioning parents' gamete is used for the conception of the child.
- If there is a lone commissioning parent, clearly a gamete from them must be used. The commissioning parents must be unable to give birth to a child.
- The surrogate mother must have a living child of her own.
- She must assist for altruistic (not commercial) reasons.
- The agreement must stipulate the care and welfare arrangements for the child.
- The effect of a valid surrogate motherhood agreement is that the child born is the child of the commissioning parents from birth.

Adoption

25. What is the legal position in relation to adoption? Is adoption available to individuals and cohabiting couples (both heterosexual and same-sex)?

A child is adopted if he or she is placed in the permanent care of a person under the terms of a court order that, unless otherwise provided, has the effect of terminating the parental responsibilities that any person had in respect of the child before the order (Chapter 15, Children's Act). The order confers full parental responsibilities and rights on the adoptive parent.

A child can only be adopted in the following circumstances (section 231, Children's Act):

- Jointly by a husband and wife.
- Partners in a permanent domestic life partnership.
- Persons sharing a common household forming a permanent family unit.
- A widow, widower, divorcee or unmarried person.
- A person whose spouse or permanent life partner is the parent of the child.
- The biological father of a child born out of wedlock.
- The foster parent of the child.

The Act does not distinguish between same-sex and heterosexual couples. The adoption must be in the best interests of the child. South Africa is a party state to the HCCH Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 (Hague Adoption Convention).

Cohabitation

26. What legislation (if any) governs division of property for unmarried couples on the breakdown of the relationship?

There is no law in South Africa regulating the rights of parties to a cohabitative relationship. Cohabitation is not formally recognised as a legal relationship.

Cohabitation is regarded to be a stable, common, monogamous relationship where a couple who do not wish to, or are not allowed to get married, live together as spouses. In order to establish a cohabitative relationship, there must be a:

- Sexual relationship between the couple.
- Factual cohabitative relationship.
- Measure of durability and stability of the relationship.

Although cohabitation is not a formally recognised legal relationship, in certain circumstances the word "spouse" has been interpreted to include a partner in a cohabitation relationship in relation to the awarding of benefits. This has included:

- Damages claims.
- Domestic violence disputes.
- Provision for pension benefits.
- Medical aid entitlements.

A cohabitee in a heterosexual relationship whose partner dies without a valid will has no right to inherit under the Intestate Succession Act. The situation is distinct for same-sex couples where the permanence of their relationship and reciprocal support obligations are proved. This anomaly arose prior to the enactment of the law allowing same-sex unions. A partner to a cohabitative relationship cannot rely on the provisions of the Maintenance of Surviving Spouses Act to secure maintenance on the death of a partner. This situation which resulted from a 2005 decision is subject to much criticism and is unlikely to survive contemporary scrutiny by the courts.

There is no obligation between cohabitees to maintain one another and therefore no enforceable right to claim maintenance, unless an agreement, either express or tacit, to pay maintenance can be proved.

In certain circumstances partners have been assisted by the courts who have found that a universal partnership, whether express or implied, exists between the couple and have awarded a share of assets acquired during the course of the partnership so that there is a sharing of assets acquired during the cohabitation relationship.

To establish a universal partnership, the following requirements must be satisfied:

- The aim of the partnership is to make a profit.
- Both parties must contribute to the enterprise.
- The partnership must operate for the benefit of both parties.
- The contract between the parties is legitimate.

These parameters have recently been quite broadly interpreted (see for example *Butters v Mncora* 2012 (4) SA 1(SCA)).

It is becoming more prevalent that partners in a cohabitative relationship enter into a contract which regulates their relationship, including personal and proprietary consequences.

Family dispute resolution

Mediation, collaborative law and arbitration

27. What non-court-based processes exist to resolve disputes? What is the current status of agreements reached through mediation, collaborative law and arbitration?

Alternatives to litigation are frequently considered by parties to disputes. Mediation is favoured in matrimonial disputes where arbitration is prohibited (see Question 25). There is currently significant lobbying to vary the law to allow for arbitration in family law disputes.

A few statutes refer to the referral of family disputes to mediation prior to resorting to litigation, for example the:

- Children's Act.
- Mediation in Certain Divorce Matters Act (24 of 1987).

Collaborative law is in its infancy in South Africa. Among family law practitioners a collaborative approach to dispute resolution is gaining in popularity as they begin to understand the merits of collaborative law.

Parenting plans

In respect of disputes relating to children, parties who share parental responsibilities and rights in respect of a child can enter into a parenting plan to regulate by agreement their shared exercise of parental responsibilities and rights (sections 33 and 34, Children's Act).

The agreements can be made an order of court. Parenting plans generally provide for mediation by a mediator appointed in accordance with the plan, who is mandated with powers, including deciding a dispute and issuing a directive where agreement is not achieved. Such an agreement binds the parties until the matter is referred to a court. This form of alternative dispute resolution has enjoyed much support from practitioners and the courts.

Mediation

The courts promote mediation, particularly in family law disputes. In the decision of *MB v NB* (2010 (3) SA 220 (GSJ)) (Brownlee decision) the court chastised the parties' attorneys for not advising their clients to consider mediation and issued a punitive costs order against the attorneys.

28. What is the statutory basis (if any), for mediation, collaborative law and arbitration?

South Africa does not have a statutory basis for mediation, collaborative law or arbitration in matrimonial matters, other than in very limited respects. In fact, arbitration is not permitted in respect of any matrimonial cause, any matter incidental to any such cause or any matter relating to status (section 2, Arbitration Act 42 of 1965 (as amended)). There is currently extensive lobbying to vary the law in this regard.

A system of compulsory mediation has recently been introduced into the lower courts and will in all likelihood be introduced into the High Courts in the near future.

Some concerns have been raised regarding the practicality of compulsory mediation in all matters and a practical efficient way forward remains the subject of lobbying and debate.

Commercial disputes are frequently referred to arbitration.

Civil partnership/same-sex marriage

29. What is the status of civil partnership/same-sex marriage? What legislation governs civil partnership/same-sex marriage?

The concept of a civil union was introduced into South African law by the Civil Union Act 17 of 2006 and is defined as a voluntary union of two persons, who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in the Act to the exclusion, while it lasts, of all others.

The Act defines a civil union partner as a spouse in a marriage or a partner in a civil partnership. Spouses in a civil union can elect to call their union a marriage or a civil partnership. Both a marriage and a civil partnership can be entered into by partners of either the opposite or the same sex.

A civil union allows only a monogamous relationship. The law regarding the prohibition of marriages within limited degrees of affinity and consanguinity applies to civil unions.

The dissolution of a civil union, other than by death, is dealt with in accordance with the Divorce Act. The proprietary consequences of a civil union are determined on the same basis as a marriage in terms of the Matrimonial Property Act:

- Where no pre-nuptial contract is signed, a union is automatically in community of property.
- Where a pre-nuptial contract is signed which does not expressly exclude the accrual system, the accrual system applies.

A civil union has the legal consequences of a marriage, including in terms of the common law, and reference in any law to a husband, wife or spouse includes a partner in civil union. Similarly, the duty of support applies between spouses to a civil union and is extinguished on dissolution of the civil union by divorce, unless otherwise determined by the court hearing the divorce (section 7(2), Divorce Act).

Media access and transparency

30. What is the position regarding media access to and press reporting of family law cases?

Maintenance hearings, domestic violence hearings and hearings in the Children's Court are all held in camera. Where an issue pending in a court relates to a minor child, the identity of the child is required to be protected. The publication of the particulars of a divorce action is limited (section 12, Divorce Act). In 2008, this section was declared unconstitutional by the Constitutional Court, but it also ruled that publication of the identity of and any information that may reveal the identity of any party or child in any divorce case before any court is prohibited, save in exceptional circumstances.

Controversial areas and reform

31. What areas of the law (if any) are currently undergoing major change? Which areas of law are considered to be particularly controversial?

The most anticipated development in respect of family law is the recognition and regulation of:

- Domestic partnerships.
- Religious marriages.

There is an urgent need for the formal recognition and regulation of both these areas of law that impact on the rights of several family units in South Africa, particularly when measured against constitutional imperatives.

The law as it currently exists is uncertain and requires the intervention of the courts and the legislature to address the consequent difficulties for the families concerned.

The area of South African family law which is most out of step with recent developments and constitutional imperatives is the recognition of religious marriages. Marriages entered into in accordance with the tenets of a religion (for example, Muslim or Hindu marriages) are not recognised as valid.

Everyone has the right to freedom of conscience, religion, thought, belief and opinion (section 15(1), Constitution). The fact that religious marriages are not regulated is problematic within this context. Significant recognition has been given to the rights of spouses within religious marriages in terms of precedent. The rights of spouses in religious marriages have been extended by legislation. However, religious marriages are still not afforded equal recognition to civil marriages and civil unions.