

## APPLICABILITY OF DIVORCE MEDIATION IN TANZANIA



The Black's Law Dictionary 10th Edition defines Divorce as the legal ending of a marriage that is, the dissolution of a marriage by a Court.

### What Renders a Marriage Broken Down

For a marriage to be dissolved the Court must satisfy itself, with evidence that, the marriage has irreparably broken down. The Law of Marriage Act, 1971 Under Section 107 Subsection 1 and 2(a-i) provides for the evidence to be furnished before the Court as proof that the marriage has broken down as follows:

#### Section 107 Subsection 1 and 2(a-i)

1. In deciding whether or not a marriage has broken down, the court shall have regard to all relevant evidence regarding the conduct and circumstances of the parties and, in particular—
  - a. shall, unless the court for any special reason otherwise directs, refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing; and
  - b. shall have regard to the custom of the community to which the parties belong.
2. Without prejudice to the generality of subsection (1), the court may accept any one or more of the following matters as evidence that a marriage has broken down but proof of any such matter shall not entitle a party as of right to a decree—
  - a. adultery committed by the respondent, particularly when more than one act of adultery has been committed or when adulterous association is continued despite protest;
  - b. sexual perversion on the part of the respondent;
  - c. cruelty, whether mental or physical, inflicted by the respondent on the petitioner or on the children, if any, of the marriage;
  - d. wilful neglect on the part of the respondent;
  - e. desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is wilful;

- f. voluntary separation or separation by decree of the court, where it has continued for at least three years;
- g. imprisonment of the respondent for life or for a term of not less than five years, regard being had both to the length of the sentence and to the nature of the offence for which it was imposed;
- h. mental illness of the respondent, where at least two doctors, one of whom is qualified or experienced in psychiatry, have certified that they entertain no hope of cure or recovery; and
- i. change of religion by the respondent, where both parties followed the same faith at the time of the marriage and where according to the laws of that faith a change of religion dissolves or is a ground for the dissolution of marriage.

A Marriage may meet the requirements for divorce, however there are other pertinent issues that may need to be determined by the Court . These issues include the following;

1. Child maintenance
2. Child custody
3. Property division
4. Spouse Maintenance

The above issues may be settled by the parties out of court through divorce mediation, before the spouse petition for separation or divorce is lodged or during the divorce proceedings, before the judgement is delivered by the Court. Once the spouses have settled the aforementioned issues through mediation the Court will be left to decide on the issue of divorce only.

### **Divorce Mediation**

Divorce mediation involves the spouses where a third party (mediator) convenes a meeting to assist the parties work through a divorce settlement on pertinent issues. The mediator will gather information from both sides, analyze the information and help the parties reach a fair settlement. The mediation process may occur in one session or multiple sessions. The parties may have their lawyers during the mediation.

Divorce mediation is not specifically provided for under the Tanzania Law of Marriage Act,1971. However, the Law of Marriage Act, 1971 under Section 106 (1)(f, g) provides that:

- a. a petition for a decree of separation or divorce to contain the terms of any agreement regarding maintenance or the division of any assets acquired through the joint efforts of the parties or, where no such agreement has been reached, the petitioner's proposals; and
- b. particulars of relief sought.

Furthermore, the Law of Contract Act, Cap 345 gives room for parties to enter into contract/ agreement provided the contracts adhere to the requirements of the law. Therefore, when spouses reach a consensus in a divorce mediation, they enter into an agreement, provided that the agreement is in line with the provisions of the Law of Contract Act, Cap 345, the agreement will be valid and legitimate even though it is not specifically provided for under the Law of Marriage Act,1971.

Therefore, in Tanzania parties in a divorce proceeding may opt to settle the issues of child maintenance, child custody, property distribution and spouse maintenance, through mediation and thereafter attach the said agreement to the divorce petition while petitioning for divorce in Court. This will speed up the divorce proceedings since the parties will have settled the pertinent issues through mediation.

## Who May Conduct Divorce Mediation

- Mediators accredited under Regulation 5 of the Reconciliation, Negotiation, Mediation and Arbitration Practitioners Accreditation Regulations of 2021, can be involved in the divorce mediation process. Therefore, Parties intending to petition for divorce, may select a mediator accredited by the Accreditation panel from the register of accredited mediators.

## Benefits of Divorce Mediation

- Mediation allows parties to deliberate, agree and make decisions on pertinent issues including child maintenance and custody, spouse maintenance and division of assets on their own, instead of letting the court decide for them.
- Divorce Mediation agreements are not binding unless the spouses agree to it. Where the Parties do not agree in divorce mediation, they can seek the Court's determination of the issues in dispute through the divorce petition.
- Parties may negotiate on selected issues for example, if they agree on child maintenance and custody and disagree on division of assets, the court will accept the mediated agreement in those areas and incorporate the terms of the agreement as agreed, and for the disagreed issues, the Court will have to decide on them.
- Divorce mediation is flexible and confidential, unlike Court hearings, whereby proceedings are recorded, and the public may attend the divorce proceedings. Mediations are private and conducted behind closed doors; they are not recorded and involve the spouses, the mediator, and the spouses' lawyers if the spouses wish to be represented. It is only the outcome of the Mediation (the Settlement/Divorce Agreement) that is documented/recorded.
- Divorce mediation may take 4-10 sessions, unlike Court proceedings which might take years, especially when issues such as child maintenance and custody, spouse maintenance and distribution of properties need to be decided by the court. In divorce mediation spouses may not need their lawyers and even if they do, the process takes lesser time than the time consumed in Court, thus divorce mediation is less costly.
- During Mediation, spouses learn how to communicate well amongst each other. It helps to restore good relations between spouses since they get an opportunity to calmly deliberate on important issues concerning their welfare and that of their offspring. The settlement will be the spouses' product and hence, they will all be satisfied with the outcome laying ground for easier post-divorce relations.

However, it should be noted that, even though divorce mediation is advantageous to the spouses, it is not advisable for couples to go through the divorce mediation process, if one of them is violent or where the parties are not willing to take the mediation path. Furthermore, spouses should always seek legal advice from their divorce lawyers before making any legal decisions.

### FURTHER INFORMATION:

This editorial is intended to give you a general overview of the Law. If you would like further information and clarification on any issue raised in this editorial, please contact.

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