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LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

To: THE HONOURABLE MINISTER OF JUSTICE

I have the honour to submit to you, in terms of section 9(1) of the Law Reform and Development Commission Act, 1991 (Act 29 of 1991), the Commission's Report on Divorce.

Mr U D Nujoma
CHAIRPERSON:LRDC
2004-11-17

The Law Reform and Development Commission (LRDC) approved this Report before 1 July 2004. With effect from 15 July 2004 a new LRDC, with six new members, were appointed. The final changes indicated by the LRDC were however only effected by the Secretariat during the next few months.

LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

The LRDC was established by the Law Reform and Development Commission Act, 1991 (Act 29 of 1991) which came into operation on 15 July 1992.

The members of the LRDC on 14 July 2004 were (see # on page (iii)):

Mr U D Nujoma (Chairperson)
Mr J R Walters (appointed as Ombudsman with effect from 1 July 2004)
Adv. D Sauls (nominated by the Law Society of Namibia)
Mr G M Mutwa (Deputy Chief: Legislative Drafting in the Ministry of Justice; nominated by the Minister of Justice)
Mr A Vaatz (Legal Practitioner)
Mr G N Ndauendapo (Legal Practitioner)
There were two vacancies.

The members of the LRDC on 17 November 2004 were (see # on page (iii)):

Mr U D Nujoma
Mr J R Walters (Ombudsman)
Ms L Conradie (nominated by the Law Society of Namibia)
Ms N N Shivute (Deputy Chief : Lower Courts in the Ministry of Justice, nominated by the Minister of Justice)
Mr S K Amoo (Lecturer at Law Faculty of University of Namibia)
Mr A Vaatz (Legal Practitioner)
Mr T Kamuhanga-Hoveka (Legal Practitioner)
Ms M Samson (Legal Adviser in Office of the Attorney-General).

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1. Introduction and Background

The reform of the Namibian law on divorce remains a matter that is long overdue. Current divorce law is not in tune with everyday social realities. It is based on Roman Dutch common law together with the following statutes, namely the Divorce Laws Amendment Ordinance, 1935 (Ordinance No. 18 of 1935), the Matrimonial Causes Jurisdiction Act, 1939 (Act No. 22 of 1939), the Matrimonial Causes Jurisdiction Act, 1945 (Act No. 35 of 1945) and the Matrimonial Affairs Ordinance, 1955 (Ordinance No. 25 of 1955). This means the last major statutory reform of the law of divorce took place almost half a century ago.

2. Project Committee

2.1 The reform of the law relating to divorce was initially handled by the Women and the Law Committee (WLC) of the Law Reform and Development Commission (LRDC). At its meeting of 14 May 2001, the LRDC decided to make this a full separate project and appointed a Committee for this purpose, constituted by Adv D. Sauls (a member of the LRDC, as Chairperson), Ms P. Daringo (a legal practitioner of the Directorate Legal Aid of the Ministry of Justice), Ms Dianne Hubbard (a law researcher at the Legal Assistance Centre), Mr N. Tjombe (a legal practitioner at the Legal Assistance Centre and at that time a part-time lecturer at the Law Faculty of the University of Namibia) and Ms H. Duvenhage (a legal practitioner with A Vaatz and Co).

2.2 The Committee had its first meeting on 26 July 2001 and finished its work on 6 June 2002. The Committee adopted the Legal Assistance Centre's publication: *Divorce Law Reform in Namibia* as a basic framework for its further work. The Committee's first recommendations were discussed by the LRDC in October 2002.

2.3 The LRDC would like to put on record its thanks and appreciation for the very valuable work done by the Committee. Their dedication, in spite of having other full-time commitments, was exceptional.

3. Consultations

3.1 A Draft Bill, incorporating the LRDC's amendments, was then sent out to the following stakeholders for comments:

- 3.1.1 Faculty of Law of the University of Namibia
- 3.1.2 Namibia Financial Institutions Supervisory Authority (Namfisa)
- 3.1.3 High Court Judges
- 3.1.4 Law Society of Namibia
- 3.1.5 Legal Assistance Centre
- 3.1.6 Namibia Lawyers' Association
- 3.1.7 Ministry of Women Affairs and Child Welfare
- 3.1.8 Ministry of Home Affairs

- 3.2 Comments were received from most of these persons and institutions and some improvements to the Draft Bill were made as a result of such comments.

4. **Recommendations**

Format of Recommendations:

Annexure A contains the proposed **Draft Divorce Bill**. A general explanatory note and a summary of the key features of the proposed Bill are provided in a frame at the top of the Bill and more particular explanations and comments on the clauses of the Bill are given in such frames below those clauses.

Annexure B contains recommendations on **amendments** to be effected to the **High Court Rules**.

The LRDC recommends:

- 4.1 The enactment of the proposed Draft Divorce Bill (as in Annexure A);
- 4.2 That the necessary steps be taken to amend the Rules of the High Court as recommended in Annexure B – to come into operation at the same time as the proposed new Act.
- 4.3 That the necessary steps be taken to ensure that there will be more sittings of the High Court outside Windhoek for divorce matters. (See paragraph 2 of the Explanatory Note under clause 2 of the proposed Draft Bill (Annexure A)).
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ANNEXURE A: DRAFT DIVORCE BILL

General Explanatory Note/Summary of key features of the Proposed Bill:

1. The approach of the LRDC's Committee for this project was to adopt the Legal Assistance Centre's publication on Divorce Law Reform in Namibia as a basic framework for reform and then make modifications thereto.

2. Background: Namibia's current divorce law is based on the Roman Dutch common law which provides for divorce based on fault. What this means is that, to obtain a divorce, the one spouse must prove that the other spouse did something wrong – usually some form of malicious desertion or adultery.

3. This proposed Bill then seeks to redress this problem by adopting a divorce regime which is based on irretrievable breakdown rather than fault, in that the basis for divorce should no longer be that one party is at fault but rather that the marriage itself has broken down beyond any repair.

4. Another problem with the current divorce process is the fact that it is both formal and complicated with the result that a party seeking a divorce must invariably do so through a lawyer, mostly at a very exorbitant cost. The additional problem is that divorces are only heard by the High Court and this court is at this point in time still very much Windhoek based which means that this forum is just too inaccessible to people living in outlying areas.

5. The proposed Bill then seeks to achieve the following:

(a) eliminate fault-based grounds (e.g adultery) and introduce a new system based on irretrievable breakdown;

(b) simplify the divorce procedure in instances where parties have no real dispute about their divorce or the terms of the divorce;

(c) give courts sufficient discretionary powers to distribute marital property fairly and eliminate injustices that can occur from strict application of the existing property regime; and

(d) ensure that before the granting of the divorce order, matters pertaining to custody of minor children are sufficiently clarified and that additional protections are put in place to ensure that children's best interests are met.

6. Additional explanatory notes on Irretrievable Breakdown (See also Clause 4 and the Explanatory Notes to that clause):

6.1 It has become apparent from the comments received from various stakeholders that the fundamental philosophy of irretrievable breakdown has not been really well understood. It needs to be emphasised that under the new dispensation, once irretrievable breakdown is asserted, it will in most cases no longer be necessary to engage in a further factual analysis.

6.2 The framework of the bill takes the view that if both parties allege irretrievable breakdown, then the reasons for the breakdown become irrelevant on the question whether or not to grant a divorce. The same is true if one party alleges irretrievable breakdown and the other

party does not oppose the divorce. If only one party alleges irretrievable breakdown and the other party denies that the marriage has irretrievably broken down, then there are two options: (1) facts can be pleaded to support an immediate finding of irretrievable breakdown or (2) the court can postpone the proceedings for a period not exceeding six (6) weeks to allow for the possibility of reconciliation. If there is no reconciliation, then the divorce will be granted.

6.3 This situation can also be dealt with on a constitutional basis, as has been recently illustrated in a recent court decision, Snyman v Snyman (Case No. (P) 166/2003). Some of the points raised in the judgement were:

- A party is entitled to approach court and seek relief in terms of Article 25 of the Constitution, and he or she is entitled to relief.
- Persons have the right to associate freely, which association includes the right to enter into marriage and withdraw from a marriage.
- It is against public policy to force a party to remain married under the circumstances where he or she is not interested in the continuation of the marriage relationship.
- There are fundamental differences between the principles upon which Namibia as a secular state [Article 1(1) of the Namibian Constitution] is founded, and the common law grounds for divorce.
- The law as it stands includes the provisions of the Constitution.

6.4 The approach proposed in the Bill would respect the constitutional rights of parties to associate in marriage and to withdraw from that marriage.

BILL

To amend the law pertaining to divorce; and to provide for incidental matters.

(Introduced by the Minister of Justice)

BE IT ENACTED by the Parliament of the Republic of Namibia as follows:-

1. Definitions

(1) In this Act the following terms shall have the following meanings unless the context indicates otherwise:

“accrual system” means a contractual agreement between intending spouses who marry out of community of property and of profit and loss, by which they agree to share the accrual of their separate estates with each other, or any similar system established by any law;

“ancillary arrangements relating to divorce” means the division of assets and liabilities, arrangements for spousal or child maintenance, and all other arrangements relating to the welfare of a minor or dependant child of the marriage;

“assets” means any movable or immovable property, incorporeal property or other tangibles or intangibles of value, situate in Namibia or any other country;

“child of the marriage” means a child who is conceived by or born to the parties during the subsistence of the marriage; a child born to the parties outside marriage who has been subsequently legitimated by a marriage between the two parties; a child of one spouse who is adopted by the other spouse; or a child who is jointly adopted by the spouses;

“court” means any High Court established in terms of the High Court Act, 1990 (Act No. 16 of 1990);

“custody” means, for the purposes of this Act, the rights, duties and powers of custody in terms of the common law, and “custodian” and “custodial parents” shall have corresponding meanings;

“divorce application” means an application by which a decree of divorce is sought or any proceeding seeking other relief in connection with such decree, including-

- (a) any interim application made in terms of the Rules of the High Court;
- (b) an application for a contribution towards the costs of such application, or an application to institute or defend such application *in forma pauperis*;
- (c) an application for substituted service of process or the edictal citation of a party in such an application;

“family member” means a person who is related by consanguinity, affinity or adoption, or stand in the place of such a family member by virtue of foster arrangements: Provided that such a person also has some connection of a domestic nature, including, but not limited to –

- (aa) the sharing of a residence; or
- (bb) one of them being financially or otherwise dependant on the other.

“guardianship” means, for the purposes of this Act, all the rights, duties and powers normally exercised by a parent in terms of the common law but without the rights, duties and powers of custody in terms of the common law, and “guardian” shall have a corresponding meaning;

“life policy” means a life policy as defined in section 1 of the Long-term Insurance Act, 1998 (Act No. 5 of 1998);

“life policy benefit”, in relation to a party to a divorce application, means the surrender value of the life policy or the total value of the premiums paid in terms of the life policy to date, as calculated on the date of institution of the divorce application, whichever is the greater;

“marriage” means a marriage under the common law, including a marriage recognised in terms of section 2 of the Recognition of Certain Marriages Act,

1991 (Act No. 18 of 1991), and any other relationship recognised by Namibian law and defined as a marriage for purposes of this Act;

“medical aid benefit” means any benefit available under a medical aid fund as defined in section 1 of the Medical Aid Funds Act, 1995 (Act No. 23 of 1995)

“non-custodial parent” means a parent who does not have legal custody of a child;

“retirement annuity fund” means a retirement annuity fund as defined in the Income Tax Act, 1981 (Act No. 24 of 1981);

“retirement fund” means a pension fund organisation as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), and includes a retirement annuity fund;

"retirement fund benefit", in relation to a party to a divorce application, where such party is a member of a -

- (a) retirement fund (excluding retirement annuity fund), means his or her resignation benefit;
- (b) retirement annuity fund, means the total amount of that party's contribution to the fund including any lawful interest that may have accrued to such contributions; or
- (c) any gratuity that such party may receive in lieu of a resignation benefit by virtue of his or her employment in terms of a fixed term contract

as calculated on the date the divorce application is instituted;

“withdrawal benefit” means the actuarial value as would have been determined in terms of the Pension Funds Act, 1956 (Act No. 24 of 1956) if a transfer in terms of section 14 of that Act would have taken place;

(2) For the purposes of this Act a divorce application shall be deemed to be instituted on the date on which the application seeking a decree of divorce is filed or delivered in terms of the rules of court, as the case may be.

Explanatory Note:

1. Clause 1 (1) relates to the definitions of key terms in the draft bill.
2. The definitions of the terms "custody" and "guardianship" are necessary because guardianship can have two meanings at common law – a broad sense which includes the concept of custody, or a narrow sense which does not include the concept of custody. It is used in this Bill in the narrow sense.
3. The term retirement fund is preferred to pension fund as this is the term used in the draft Retirement Fund Bill (NAMFISA is working on such a Bill), so adopting this technically correct classification will prevent the amendment of the Divorce Act in future.
4. Clause 1 (2): The purpose of this subclause is to avoid confusion about the date of institution of the divorce application given the fact that the definition of "divorce application" includes several ancillary proceedings. It re-enacts section 1(5) of the Matrimonial Causes Jurisdiction, 1939 (Act No. 22 of 1939).

2. Jurisdiction

(1) A court shall have jurisdiction in a divorce application if the parties are, or either of the parties is-

(a) domiciled in the area of jurisdiction of the court on the date on which the divorce application is instituted;

(b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in Namibia for a period of not less than one year immediately prior to that date.

(2) A court which has jurisdiction in terms of this clause in a case where the parties are or either of the parties is not domiciled in Namibia shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in Namibia on the date on which the divorce application was instituted.

(3) 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.

Explanatory note:

1. Background: Under the current system, divorces of civil marriages can only be granted by the High Court sitting in Windhoek. Magistrates' courts do not have jurisdiction over divorce matters whatsoever. However, under very specific circumstances (for example where one of the spouses is disabled), cases have been heard by the High Court on circuit.

2. The LRDC is aware that the Ministry of Justice intends taking steps to ensure that the High Court is less Windhoek-based. It is strongly recommended that this process be speeded up - also to provide for more sittings outside Windhoek for divorce matters. This is an attempt to answer the question of accessibility without moving jurisdiction to the magistrates' courts, which presently do not have adequate capacity for a new category of cases. (See paragraph 4.3 of Report.)

3. Subclause (1) is intended to replace and make gender-neutral the provisions on jurisdiction over foreigners contained in the Matrimonial Causes Jurisdiction Act, 1939 (Act No. 22 of 1939) and the Matrimonial Causes Jurisdiction Act, 1945 (Act No. 35 of 1945). It gives the court jurisdiction in divorce applications in two situations:

- (a) Where either of the parties is domiciled in the court's area of jurisdiction at the time of the divorce application; and
- (b) where either party is ordinarily resident in Namibia at the time and has been ordinarily resident in Namibia for the past year.

4. Another significant development regarding domicile in the recent past has been the enactment of the Married Persons Equality Act, 1996 (Act No. 1 of 1996). Before the enactment of the above legislation the position was governed by Roman Dutch common law which provided that a woman automatically acquired the domicile of her husband upon marriage, and this gave the court authority to hear divorce cases only where the married couple was domiciled in the court's area of jurisdiction.

5. With the coming into effect of the Married Persons Equality Act, 1996 (Act No. 1 of 1996) the domicile of the married woman is now determined independently of her husband's.

6. This provision simply re-enacts section 1(1) to (4) of the Matrimonial Causes Jurisdiction Act, 1922 (Act No. 22 of 1939) and mirrors section 2 of the South African Divorce Act, 1979 (Act No. 70 of 1979 (as amended)).

3. Grounds for divorce

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

- (a) the irretrievable breakdown of the marriage as contemplated in clause 4;
or
- (b) the mental illness or the continuous unconsciousness of a party to the marriage as contemplated in clause 5.

Explanatory Note:

1. Clause 3 (a) to (b) sets forth the position that, unlike under the old dispensation, the new divorce legislation is based on irretrievable breakdown of the marriage rather than fault as a ground for divorce.

2. Two grounds are therefore proposed, namely:

- (a) irretrievable breakdown of the marriage; and
- (b) mental illness or continued unconsciousness of one spouse.

3. There are strong arguments for doing away with the fault – based grounds in Namibia:

- (a) Marriages are complex relationships and the distinction between guilt and innocence is too simplistic.
- (b) Where people want a divorce they will always manage to make their case fit the law, which in fact makes the fault system a legal fiction.

(c) *There is no point in trying to revive a dead marriage.*

4. *Clause 3 (b) introduces an additional ground for divorce, namely mental illness or continuous unconsciousness.*

5. *This ground is based on the premise that, while it is not desirable to encourage any spouse to shirk the promise to care for the other "in sickness and in health", it seems equally unfair to impose a legal responsibility on a person who is not willing or able to take on the moral responsibility of standing by a spouse who is suffering from a serious and permanent mental illness or who is unlikely to regain consciousness. In such cases, it would generally be impossible for the parties to maintain a meaningful marital relationship.*

6. *This clause is similar to section 3 of the South African Divorce Act, 1979 (Act No. 70 of 1979).*

4. Irretrievable breakdown

(1) For the purposes of this clause, "irretrievable breakdown" occurs when a marriage relationship has reached such a stage of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship.

(2) Spouses may apply singularly or jointly for a divorce on the grounds of irretrievable breakdown by means of the following procedures:

(a) A joint application for divorce shall be brought by way of an *ex parte* application in terms of the Rules of the High Court of Namibia, supported by affidavits of both parties.

(b) An application for divorce by one spouse only shall be brought by way of an application in terms of the Rules of the High Court of Namibia.

(c) Where an application for divorce is not made jointly, notices in the divorce application shall be as near as may be in accordance with the prescribed form and shall be served in a prescribed manner along with a copy of the applicant's affidavit.

(d) Affidavits shall be in a form substantially corresponding to the prescribed form.

(e) An application for divorce shall include a certified copy of the marriage certificate, which shall be *prima facie* proof of the existence of the marriage: Provided that affidavit evidence on the existence of the marriage shall be considered in the absence of such a certificate.

(3) If the spouses apply jointly for divorce, or if one spouse applies for divorce and the other spouse does not deny that the marriage is irretrievably broken down, then the court shall make a finding that the marriage is irretrievably broken down and inquire only into the ancillary arrangements relating to the divorce as necessary: Provided that there is no evidence that either party was coerced into agreeing to the divorce.

(4) If one spouse applies for divorce and the other spouse denies that the marriage is irretrievably broken down, then the court shall, after consideration of opposing affidavits and such oral evidence as the court may deem necessary-

- (a) make a finding that the marriage is irretrievably broken down and inquire only into the ancillary arrangements relating to the divorce as necessary; or
- (b) if there appears to be a reasonable prospect of reconciliation, postpone the matter for a period not exceeding six weeks to allow time for reflection, at the expiry of which time, if either of the parties continues to allege that the marriage is irretrievably broken down, the court shall make a finding that the marriage is irretrievably broken down and inquire only into the ancillary arrangements relating to the divorce as necessary: Provided that the court may make a further postponement if a party by way of substantial application convinces the court that there are special circumstances which justify such further postponement.

(5) The following factors may be evidence of the irretrievable breakdown of a marriage, without excluding any other factors which may have made the continuation of the marriage relationship intolerable:

- (a) the spouses have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date on which the divorce application is instituted;
- (b) either spouse has committed adultery;
- (c) either spouse has committed physical, sexual or psychological abuse against the other; or
- (d) either spouse has been sentenced to an effective term of imprisonment of at least 5 years.

(6) Regardless of anything else contained in this clause, no divorce shall be granted on the ground of irretrievable breakdown if either spouse is either mentally ill or continuously unconscious at the time of the divorce application, in which case the only acceptable grounds for divorce shall be those contained in clause 5.

Explanatory Note:

1. This clause sets out what constitutes irretrievable breakdown of the marriage. (See also paragraph 6 of the General Explanatory Note).

2. Clause 4 (1) defines the concept of irretrievable breakdown of the marriage as occurring where a marriage relationship has reached such a stage of disintegration that there is no reasonable prospect of restoring a normal marriage relationship. This subclause is modelled on the similar definition in the South African Divorce Act.

3. From the outset it has been a problem deciding on whether the procedure to be followed would be action or application. The main difference between action and application lies in the fact that the former procedure is used where there is a dispute of fact and is characterised by the use of oral evidence. With application procedure on the other hand, there is no dispute of fact and affidavit evidence is used instead.

4. After much debate, the issue has now been settled that the procedure for instituting divorce proceedings would now be by way of application. This position has even been supported by High Court Judges. (As a matter of fact two judges of the High Court have expressed their support for the position that divorce should be instituted by way of application procedure whilst leaving room for the court to call for oral evidence. Clause 20 now deals exclusively with oral evidence.)

5. Clause 4 (2) sets out who can initiate the divorce process. An application can be brought jointly by both parties, brought by one party and be unopposed by the other party, or brought by one party and opposed by the other party.

6. The approach in the above subclauses (2) to (4) and the rest of clause 4 is modelled on the Revised Code of Washington State (USA) (RCW 26.09.030) and is similar to the approach taken in the Nordic countries.

7. It is premised on the idea that it should not be the role of the court to force either spouse to remain in a marriage which is irretrievably broken down. Such a marriage would not be a marriage in anything more than name, and the result might be an informal separation which fails to settle the economic affairs of the spouses and does not serve the best interests of the children of the marriage. The term "shall" is used rather than the term "may" which is used in the South African Divorce Act, on the theory that there is no reason why a court should have the discretion to deny a divorce where there is an irretrievable breakdown of the marriage in the eyes of one or both spouses. Hardship to the other spouse should be addressed through provisions on the division of property and maintenance, rather than by requiring the legal persistence of the dead marriage. The proviso at the end of subclause 4(b) is meant to ensure that the court still has the discretion to make a postponement where special circumstances so justify.

8. Clause 4 (5) sets out the list of factors which should assist the court in determining whether a marriage has irretrievably broken down in the sole instance where the bill allows for such a factual determination – where one spouse alleges irretrievable breakdown and the other spouse opposes the divorce, the first spouse may choose to either accept a postponement or allege facts supporting an irretrievable breakdown as a basis for an immediate divorce. **This is the only circumstance which entails a factual finding of irretrievable breakdown by the court. In all other circumstances (joint or unopposed application for divorce), the conviction of the spouses themselves that the marriage has broken down is sufficient.**

9. Where neither spouse denies that there is irretrievable breakdown, there is no need for these factors to be pleaded. However, these factors should assist the court in cases where there is a difference of opinion on the question of irretrievable breakdown. The suggested waiting period should only apply where there is a genuine possibility of reconciliation, and not circumstances where one spouse is opposing the divorce simply to harass or control the other. In particular, where there has been any form of domestic violence, the abused spouse should face no obstacle to ending the marriage as soon as possible if he or she so wishes.

10. Clause 4 (6) attempts to close the loophole that was found in the South African Divorce Act, 1979 (Act No. 70 of 1979) whereby the intended protections for mentally ill or unconscious persons are circumvented.

5. Mental illness or continuous unconsciousness

(1) A court shall grant a decree of divorce on the ground of mental illness if it is satisfied that the applicant's spouse -

- (a) has been admitted to an institution used for the care of mentally ill persons in terms of a reception order and is, on the evidence of at least two medical doctors, one of whom is a state psychiatrist, expected to be required to remain in such institution indefinitely; or
- (b) is being detained as a President's patient at an institution used for the care of mentally ill persons; or
- (c) is being detained as a mentally ill convicted prisoner at any institution used for this purpose; or
- (d) is, on the evidence of at least two medical doctors, one of whom is a state psychiatrist, suffering from a serious mental illness which renders the continuation of a normal marriage relationship impossible, with no reasonable prospect that he or she will be cured.

(2) A court shall grant a decree of divorce on the ground of continuous unconsciousness if it is satisfied that the applicant's spouse

- (a) is by reason of a physical disorder in a state of continuous unconsciousness and has been so for at least one year immediately preceding the date of the divorce application; and
- (b) has, on the basis of the evidence of at least two medical doctors, one of whom is a court-appointed specialist with relevant expertise, no reasonable prospect of regaining consciousness.

Explanatory Note:

It should be pointed out that where one spouse is unconscious and the marriage is in community of property, the conscious spouse will be prevented from making major transactions unless he or she makes an application to the High Court or to a magistrate's court in terms of section 10 (or perhaps section 11) of the Married Person Equality Act, 1996 (Act No. 1 of 1996). The divorce procedure contains more safeguards for the unconscious spouse than the section 10-11 procedures in the Married Persons Equality Act, which were not designed with continued unconsciousness in mind. Therefore, the waiting period for a divorce in the case of continued unconsciousness might prejudice the unconscious spouse if it is too long.

(3) The court shall appoint a legal practitioner to represent the respondent at proceedings held in terms of this clause and may order the applicant to pay the costs of such representation, or if the applicant lacks the means to pay such costs, order that a legal practitioner be provided through legal aid or otherwise at state expense.

(4) The court may make any order it deems fit with regard to the furnishing of security by the applicant in respect of any patrimonial benefits to which the respondent may be entitled by reason of the dissolution of the marriage.

(5) For the purposes of this clause, the expressions “institution”, “mental illness”, “President’s patient” and “reception order” shall bear the meanings assigned to them in the Mental Health Act, 1973 (Act No. 18 of 1973)

Explanatory Note:

1. This clause introduces the second ground for divorce, namely mental illness or continuous unconsciousness of one of the spouses. This clause contains relevant procedural safeguards (the appointment of a legal practitioner as well as the furnishing of security) to ensure that there is sufficient protection for the incapacitated spouse. In addition, where a spouse is mentally ill or continuously unconscious within the meaning of the proposed provision, the other spouse may not seek a divorce under irretrievable breakdown (to ensure that the procedural safeguards cannot be side-stepped).

2. While the LRDC was not in favour of a waiting period of six months proposed under clause 5(2)(a), the three year period proposed by the LRDC has equally not found favour with the private legal practitioners and the High Court Judges alike. As a result a compromise has been reached in the form of a one year period.

3. This clause would then replace the outdated mental health provisions in the Divorce Laws Amendment Ordinance, 1955 (Ordinance 18 of 1955).

6. Division of assets and liabilities

(1) In the absence of an agreement between the spouses concerning the division of assets which is acceptable in terms of clause 19, the court may make such disposition of the assets and liabilities of the parties, whether community property or separate property and without regard to which spouse holds title to any immovable property or leasehold rights, as shall appear just and equitable after considering the following factors:

- (a) the property regime of the marriage, the provisions of an antenuptial contract and any agreement reached by the spouses thereafter during the marriage;
- (b) the duration of the marriage;
- (c) the duration of the separation of the parties;
- (d) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home, caring for the family and other domestic duties;
- (e) the unwarranted squandering of the marital property by either spouse;

- (f) the economic circumstances of each spouse at the time of the divorce, including their respective income, earning capacity, assets and other financial resources, and their respective financial obligations and responsibilities;
- (g) which parent is to have custody of any children of the marriage, including the desirability of awarding the family home or the right to live in the family home for a reasonable period of time to the custodial parent;
- (h) the value to a spouse or any child of the marriage of any benefit, including medical aid benefits, retirement fund benefits and life policy benefits, which such spouse or child loses or may lose as a result of a divorce;
- (i) any other factor which the court deems relevant, provided that fault in itself shall not be relevant to the division of assets and liabilities in terms of this clause.

(2) Any division of assets and liabilities in a divorce application must take into account a request for adjustment made in terms of section 8 of the Married Persons Equality Act, 1996 (Act No. 1 of 1996).

(3) The court's power to order a disposition of assets and liabilities in terms of this clause shall include the power to issue an order that an asset be transferred from one spouse to the other, regardless of whether the property consequences of the marriage are governed by Namibian law or foreign law.

(4) The court shall not make an order in terms of this clause unless it is satisfied that the party in whose favour the order is granted has contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, by the contribution of income, the rendering of services, or the savings of expenses which would otherwise been incurred, or in any other manner.

(5) A court making an order in terms of this clause may, on application of the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions as the court may deem just, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets.

(6) Any order for the division of assets and liabilities must include, at a minimum, detailed provisions for the disposition of the following types of assets and liabilities forming part of the joint estate:

- (a) immovable property;
- (b) shares, stocks, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or similar assets, or any investment held in a financial institution;
- (c) jewellery, coins, stamps, paintings, livestock or any other assets held mainly as investments;

- (d) furniture or other effects of the common household;
- (e) credit agreements as defined in the Credit Agreements Act, 1980 (Act No. 75 of 1980) and to which the provisions of that Act apply in terms of section 2 thereof; where either spouse is a credit receiver;
- (f) contracts as defined in the Sale of Land on Instalments Act, 1971 (Act No. 72 of 1971) and to which the provisions of that Act apply, where either spouse is a purchaser in terms of such a contract;
- (g) any other outstanding indebtedness which affects the joint estate; and
- (h) any costs, duties and professional fees incurred in the division of assets and liabilities under this clause.

(7) In the event of a court making an order giving a party any right to live for any period of time in or on immovable property belonging to the other party, that order shall also state that the right must be registered against the title deed and against any mortgage bond which may exist over such property.

Explanatory Note:

1. Major changes have been introduced under the new law with regard to the division of property.

2. Under existing divorce law, where the ground for divorce is either adultery or malicious desertion, the plaintiff (innocent party) may request a court order that the defendant (the guilty spouse) forfeit any past and/or future benefit that he or she derived or will derive from the marriage in community of property, or under an antenuptial contract if there is one. Under the proposed bill, **the narrow and punitive concept of forfeiture of benefits is replaced by the broader authorisation for judicial intervention in the division of marital property**

3. Clause 6 then presupposes two routes to the division of property:

3.1 Firstly, the court can choose to uphold an agreement between the parties provided that there has been no coercion of either spouse and that the agreement is not manifestly unfair, in other words acceptable in terms of the standard set in clause 19.

3.2 The second route gives the court judicial discretion to order a just and equitable disposition of assets and liabilities of the parties, regardless of whether these are community property or separate property and regardless of which spouse has title to immovable property. This second option follows the trend now being followed in various countries, with the courts now being given a wide discretion to adjust the division of marital property, regardless of the marital regime governing the marriage or the terms of any antenuptial contract. This option forms the basis of clause 6 (1). The factors listed there are intended to guide the court in exercising its discretion in this regard.

4. Many arguments have been put forward in favour of giving the courts wide discretion in this regard:

- (a) It is wrong to treat a marriage as business transaction as opposed to what it is meant to be: a life-long relationship between two adults to support each other and for the sake of children's education and the good of the community.

(b) *Two persons would not always be in an equal bargaining position when contracting a marriage and as such any antenuptial contract they may have entered into may be used by the economically stronger party to restrict property division and future maintenance in the event of a divorce.*

(c) *There is often no thorough understanding amongst people getting married about the various marital regimes and their implications.*

5. *Thus, if the courts are to exercise the principle of equity, there would be adequate protection for economically vulnerable spouses (especially women), some of whom may have invested substantial portions of their lives in managing a home and caring for children.*

6. *This provision is based on the Revised Code of Washington (USA) (RCW 26.09.080) and the Illinois Marriage and Dissolution of Marriage and Divorce Act, section 503(d), both of which are modelled on the US Uniform Marriage and Divorce Act. It also draws heavily on South African, Zimbabwean and Canadian precedents.*

7. *Clause 6 (1)(h) addresses the concern that after the divorce, the economically vulnerable who might have been dependants of a spouse on a medical aid fund may be left without any medical cover.*

8. *Clause 6 (2) is further intended to introduce elements of the Married Persons Equality Act, 1996 (Act 1 of 1996) into the Divorce Bill. Section 8 of the former allows either spouse married in community of property to ask for an adjustment upon division of the joint estate, on the grounds that the other spouse entered into a transaction which required the consent of the first spouse without obtaining such consent and that the other spouse knew or reasonably should have known that he or she would probably not obtain such consent, and that the joint estate suffered a loss as a result of the transaction. Upon dissolution of the marriage, the court is then expected to take into account the section 8 request for adjustment so as to ensure equity in the division of property.*

9. *Clause 6 (3) is intended to ensure that if parties get divorced in Namibia, then Namibian law on the division of property will apply.*

10. *Clause 6 (4) aims to ensure equity in the division of estates such that for a spouse to benefit, there must be evidence that he or she has contributed to the estate he/she is benefiting from. The nature of contributions is so varied that women who might have spent all their lives managing the home and caring for babies will clearly be considered to have made a sufficient contribution to obtain a benefit.*

11. *Clause 6 (6) is intended to ensure that orders for the division of marital property are detailed enough to prevent further disputes between the parties. This list mirrors the property for which spousal consent to transactions in respect of marriages in community of property is required by the Married Persons Equality Act, 1996 (Act No. 1 of 1996).*

12. *Clause 6 (7) is intended to ensure that the right to live on immovable property acquires some legal force and becomes easily ascertainable, which is only possible through registration with the Deeds Office.*

7. Donations between spouses

Subject to the provisions of the Insolvency Act, 1936 (Act No. 24 of 1936)-

- (a) no transaction effected before or after the commencement of this Act is void or voidable merely because it amounts to a donation between spouses;
- (b) any gift given in anticipation of a marriage becomes the property of the recipient, notwithstanding the subsequent dissolution of the marriage.

Explanatory Note:

1. Clause 7 (a) is adapted from the South African Matrimonial Property Act, 1984 (Act No. 88 of 1984). This provision is intended to rectify the old Roman relic which previously rendered donations between spouses revocable. This position worked unfairly to the donee in that the donation could always be claimed back, thereby diminishing the true meaning of what constitutes a donation.

2. Clause 7 (b) is aimed at dealing with the situation where in certain ethnic groups, gifts given to the potential spouse or the spouse's family are subsequently returned in the event of failure of the marriage. This situation is untenable because gifts then lose their true meaning as they are seen as some form of security.

8. Deemed assets

When granting an order for the division of assets and liabilities, a court shall deem the following as assets:

- (a) the value, at the time of the disposition, of every disposition of property not made for value, if such disposition was made by a spouse within 1 year prior to the institution of the divorce proceedings, and it is proved that the aggregate of such dispositions reduced the value of the joint estate or separate estate of a spouse by more than 20%;
- (b) subject to clause 9, any retirement fund benefit of a spouse as defined in clause 1; and
- (c) subject to clause 9, any life policy benefit of a spouse as defined in clause 1.

Explanatory Note:

1. This provision is intended to address two situations:

1.1 Clause 8 (a) is intended to deal with situations where a spouse in anticipation of divorce, gives assets away to third parties with the intention of prejudicing the other spouse. To remedy this situation, all dispositions not made for value within a year of institution of divorce proceedings shall be disregarded, provided they have the effect of reducing the value of the estate by 20% or more.

1.2 Clause 8 (b) deals with a vacuum in our law in that a divorced spouse has no claim to any portion of the retirement fund benefits of his or her ex-spouse. The LRDC, realising that the retirement fund benefits of a member constitute an important part of the member's assets, decided that under the proposed law, an interest and/or benefit should be deemed to be part of the assets of the spouse, which can be subject to division upon divorce.

1.3. Clause 8 (c) takes similar steps in relation to life policies where a spouse was named as the beneficiary, since the holder of the policy will in all likelihood change the beneficiary after the divorce takes place.

2. If the spouse who is a member of a retirement fund policy or the holder of the life policy changes the beneficiaries in anticipation of the divorce, clause 6(2)(h) would give the court discretion to take this into account in the overall division of assets and liabilities.

9. Retirement fund and life policy benefits

(1) The retirement fund and life policy benefits deemed to be part of the party's assets in terms of clause 8 shall be reduced by any such amount of such benefit which in a previous divorce-

- (a) was paid over or awarded to another party;
- (b) for the purposes of an agreement contemplated in clause 19, was accounted for in favour of another party.

(2) Clause 8(b) and (c) shall not apply to a divorce application in respect of a marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded and the accrual system is not applicable.

(3) Notwithstanding the provisions of any other law or the rules pertaining to any retirement fund or life policy-

- (a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that-
 - (i) any part of the retirement fund or life policy benefit which, is due or assigned to the other party to the divorce application concerned, shall be paid by that fund to that other party when such benefits accrue; and
 - (ii) an endorsement be made in the records of that retirement fund or life policy to the effect that that part of the benefit concerned is so payable to that other party.
- (b) any law which applies in relation to the reduction, assignment, transfer cession, pledge, hypothecation or attachment of the retirement fund benefits or life policy benefits, or any right in respect thereof, in that retirement fund or life policy, shall apply with the necessary changes to

the right of that other party in respect of that other part of the benefits concerned.

Explanatory Note

1. *This clause is adopted from section 7 (7) of the South African Divorce Act. It is worth noting that the South African Law Commission is presently working on a new formula, which the LRDC has decided not to adopt as it would be extremely complicated to apply in practice.*
2. *The approach adopted is considered easy and workable and will result in fair outcomes.*
3. *Reference is now made to retirement fund as well as retirement fund benefits as this is deemed to be the technically more correct classification which is in tune with the draft Retirement Fund Bill (see paragraph 3 of the Explanatory Note under clause 1), and which once passed will change all references to pension funds to retirement funds. Adopting this classification will prevent the amendment of this law in future.*
4. *The clauses dealing with retirement funds and life policy benefits were drafted in close consultation with NAMFISA.*

10. Best interests of children

(1) A court shall not grant a divorce decree until it is satisfied that the arrangements made in respect of the welfare of a minor or dependant child of the marriage are in the best interests of the child in the circumstances.

(2) A court may, on application, at any time, if it is in the best interests of the child, amend an order pertaining to the welfare of a minor or dependant child.

Explanatory Note

1. *This clause relates to the best interests of children. Clause 10 (1) takes the position that no divorce should be issued until the court is satisfied that appropriate arrangements in respect of minor or dependant children are in place. This is the trend currently followed in many countries and is based on the theory that the court is now given leverage to push the parties to agree upon suitable arrangements for the children. One major justification is that the court must always ensure that children's interests are put first in order to avoid delays which can be traumatic for children, especially the young ones.*
2. *Clause 10 (2) presupposes that an order pertaining to the welfare of minor or dependant children is not cast in stone. Such an order is always subject to amendment as needs of the minor children change.*

11. Custody

(1) A court granting a decree of divorce shall, when making an order concerning the custody of a minor or dependent child of the marriage which it deems to be in the best interests of such child, give particular regard to

- (a) the desirability of giving custody of the child to the parent who has been the child's primary caretaker prior to the divorce application, to ensure continuity of care; and
- (b) the ascertainable wishes and feelings of the child concerned, in light of the child's age and understanding;

(2) Notwithstanding subclause (1), custody shall not be awarded to a parent if there is *prima facie* evidence that that parent has engaged in physically violent behaviour towards the other spouse, any child of the marriage or any other family member, unless the court is satisfied that this will be in the best interests of the child.

(3) A primary caretaker is the person who carries out most of the following activities in respect of the child:

- (a) preparing and planning of meals;
- (b) bathing, grooming and dressing;
- (c) purchasing, cleaning and care of clothes;
- (d) medical care, including nursing and trips to physicians;
- (e) arranging for or monitoring social interaction among peers after school;
- (f) arranging alternative care;
- (g) putting the child to bed at night, attending to the child in the middle of the night, waking the child in the morning;
- (h) disciplining the child;
- (i) educating the child in the religious, cultural and social spheres; and
- (j) teaching the child elementary skills; or
- (k) any other care taking activity.

Explanatory Note:

1. A custody award should always be guided by the following three key factors:

1.1 which parent has been the child's primary caretaker;

1.2 the child's wishes or preferences; and

1.3 the need to protect the child against domestic violence.

2. The primary caretaker approach

2.1 This approach implies that the parent, who is the primary caretaker, would be given preference in respect of custody awards. A primary care-giver is the parent, who has prior to divorce been principally responsible for the day-to-day care of the child.

2.2 Various arguments have been advanced in favour of this approach:

2.2.1 It gives reasonable guidance to judicial discretion without unfairly disadvantaging either fathers or mothers.

2.2.2 It reduces uncertainty.

2.2.3 It is focussed on facts which are clearly related to the child's best interests.

2.2.4 It relies on demonstrable evidence of the past rather than guesses about the future.

3. The child's opinion

3.1 The other key factor in deciding whether to make a custodial award to a particular parent is the child's opinion. Here the court should have regard to the ascertainable wishes and feelings in the light of the child's age and understanding.

3.2 This theory is based in the premise that where the court is satisfied that a child has the necessary emotional and intellectual maturity to state a preference, which is a genuine and accurate reflection of the child's feelings towards the respective parents, then the court should give weight to the child's preference.

4. Protection against physical violence

4.1 Clause 11(2) relates to the protection of the child against physical violence. Children are often at risk of violent behaviour perpetrated by parents. The children can themselves get attacked as they intervene to protect the battered parent. They may become excessively anxious or live in constant fear of repeated violent episodes and they may even feel responsible for the violence, or guilty because they do not know how to prevent it. The presence of violence can then affect the children's health, self-esteem and behaviour.

4.2 The courts would therefore be precluded from making an award to a particular parent where there is *prima facie* evidence of physical violence towards the child, the other spouse or any other family member – but with an exception based on the child's best interests, which might be necessary in some cases, such as where one parent used violence to defend himself or herself against the other violent spouse.

12. Access by the non-custodial parent

(1) A court granting a decree of divorce may make an order granting or denying access to a minor or dependent child of the marriage by the non-custodial parent.

(2) In a case involving a request for access by a non-custodial parent where there is *prima facie* evidence that the parent requesting access has engaged in physical violence towards the other spouse, any child of the marriage or any other family member, the court

shall impose special measures to protect the safety of the child or children and the custodial parent.

(3) Special measures shall include, without being limited to, supervised access, access only at specified venues, or transfer of the child from one parent to the other only at specified venues.

Explanatory Note:

The same considerations on physical violence as they relate to custody are also applicable to access by the non-custodial parent. Violence does not preclude the right to access altogether but the court may put in place special safety measures to ensure the safety of the child and the custodial parent.

13. Other access

(1) The court may, on application, make an order granting or denying access to members of the family of the non-custodial spouse or any other person, who, in the opinion of the court, should have access in the best interests of the child.

(2) Such an order may include any conditions deemed necessary by the court in the best interests of the child.

Explanatory Note:

This clause seeks to ensure that contact rights of the non-custodial parent's extended relatives (e.g grandparents, siblings) are recognised where this is deemed to be in the best interests of the children. The words ".....or any other person .." in subclause 1 are aimed at accommodating persons who may otherwise not be relatives of the child(ren) as such, but who would over the years have built up a strong relationship with the child(ren) such as to warrant the right of access.

14. Joint custody

(1) The court may approve an application made jointly by both parents for joint custody of a minor or dependant child of the marriage, if it finds that:

- (a) both parents are fit to care for the child;
- (b) both parents desire continuous contact with the child;
- (c) both parents are perceived by the child as sources of emotional security;
- (d) both parents are able to communicate and co-operate in promoting the child's best interests; and

- (e) the parents live in sufficiently close physical proximity to make joint custody feasible.

(2) If an order for joint custody is made, that order shall specify that both parents shall have equal powers of guardianship.

(3) Any history of physical violence by either spouse against the other spouse, a child of the marriage or any other family member shall be treated as a factor strongly aggravating against a joint custody arrangement.

(4) Where any factor taken into account in the award of joint custody, or any other relevant factor, changes after the order for joint custody has been made, either party may approach the court to request a new custody arrangement.

Explanatory Note

1. This provision is intended to clarify the concept of joint custody in our law.

2. Proponents of joint custody assert that this arrangement encourages greater ongoing involvement by both parents (particularly fathers who often fail to get sole custody) and minimises detrimental conflict which could otherwise emerge in a winner-take-all battle for custody. However, the potential for conflict within a joint custody arrangement means that joint custody should be granted with caution. The concept should not be abused to avoid the financial implications of custody by one parent.

15. Guardianship

(1) (a) A court may on application, or on its own motion, make an order giving one parent or any other suitable person sole guardianship of any minor child of the marriage.

(b) Where a court has made an order giving sole guardianship to one parent, the consent of that parent alone shall be necessary in respect of the matters contained in section 14(2) of the Married Persons Equality Act, 1996 (Act No. 1 of 1996).

(2) (a) If the court does not make an order granting sole guardianship to one parent, the parents shall continue to exercise equal powers of guardianship after the divorce in terms of section 14 of the Married Persons Equality, 1996 (Act No.1 of 1996).

(b) In the event of a conflict between two persons with equal guardianship powers over a child, the wishes of the guardian who has custody over the child shall prevail: Provided that if neither guardian has custody of the child, the conflict shall be resolved by a competent court.

(3) Joint guardianship by ex-spouses may not be ordered in any circumstances.

Explanatory Note

1. *Guardianship refers to legal authority, such as the power to sign a contract or bring a court case on behalf of a minor child. At common law, the father was the guardian of the child born of the marriage.*

2. *With the coming into effect of the Married Persons Equality Act, 1996 (Act No. 1 of 1996), a more gender-neutral approach to guardianship has since been followed. Under this Act, both parents now enjoy equal guardianship, with each having the rights, powers and duties associated with acts of guardianship.*

3. *Clause 15 therefore entrenches the main principles of section 14 of the Married Persons Equality Act and has as its main principles the following:*

- (a) *The court is empowered to grant sole guardianship to one parent or to any other suitable person.*
- (b) *Where equal guardianship is maintained, any disputes arising would be resolved in favour of the custodial parent. The rationale here is to ensure that there is a necessary safeguard against a situation where a parent who takes little actual responsibility for child care tries to use custodial powers to control or limit the parent who is more involved with the daily lives of the children.*
- (c) *Joint guardianship would not be awarded as this requires consultation on all decisions and is always fraught with practical problems. Joint custody is not normally available even during the subsistence of a marriage. The Married Persons Equality Act, 1996 (Act No. 1 of 1996) provides for equal guardianship for married partners, which means that each spouse can exercise guardianship powers independently.*

16. Death of parent with sole custody or sole guardianship

(1) Where a court has made an order for sole custody of a child in terms of clause 11 or an order for sole guardianship of a child in terms of clause 15 -

- (a) the court may, upon the death of the parent who is the sole custodian or guardian, order that a person other than the surviving parent shall be the custodian or guardian of the minor; or
- (b) in the absence of an order made in terms of clause 16(1)(a), the parent with sole custody or guardianship may by testamentary disposition appoint any person to be the sole custodian or guardian upon his or her death.

(2) Where one parent has been awarded sole custody or guardianship, the other parent shall not be entitled to appoint any person to be the custodian or guardian of the minor upon his or her death.

Explanatory Note

1. This clause addresses what happens as regards custody and guardianship when the parent who has sole guardianship or custody dies.

2. Clause 16 (1) (a) presupposes that upon the death of the parent with sole custody, the fate of the child must be decided in the light of what is in the child's best interests. This is intended to prevent the situation whereby the surviving parent simply steps in the shoes of the deceased parent and assumes guardianship or custodian roles.

3. Clause 16 (1) (b) provides that the parent with sole custody or guardianship should have a greater say in what will happen to the child upon his or her death. It must, however, be noted that notwithstanding the contents of the testamentary disposition, nothing would preclude the court, as the upper guardian of minor children, from deciding anything contrary to the testamentary disposition as long as it is in the best interests of the child.

4. Clause 16 (2) merely confirms that the wishes of the deceased parent, who was during his lifetime entrusted with the responsibility of looking after the child's best interests, should carry substantial weight in determining what happens to the child after the parent's death.

17. Child maintenance

(1) A court granting a decree of divorce may make any order it deems fit with respect to maintenance of any minor or dependent child of the marriage, based on the needs of the child and the respective financial means of the parents, and taking into account the extra financial burden which normally falls onto the custodial parent.

(2) A maintenance order issued in terms of this clause shall be a "maintenance order" for the purposes of the Maintenance Act, 1960 (Act 23 of 1960), and may be substituted, varied, discharged or enforced by a maintenance court in terms of that act.

Explanatory Note:

Subclause 1 restates the common-law position that the court in making an order pertaining to maintenance, would be guided by -

(a) the parents' respective financial means;

(b) the needs of the children; and

(c) the additional financial burden which falls on the custodial parent.

18. Spousal maintenance

(1) In the absence of an agreement between the spouses as to spousal maintenance which is acceptable in terms of clause 19, a court granting a decree of divorce may make

any order it deems fit with respect to spousal maintenance after consideration of the following factors:

- (a) the duration of the marriage and the age of the spouses;
- (b) the standard of living of the parties immediately prior to the divorce;
- (c) the economic circumstances of each spouse at the time of the divorce, including their respective income, earning capacity, assets and other financial resources, and their respective financial obligations and responsibilities;
- (d) any impairment of the present or future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties, or having foregone or delayed education, training, employment or career opportunities due to the marriage;
- (e) contributions and services by the party seeking maintenance to the education, training, employment, career or career potential of the other spouse;
- (f) which parent is to have custody of any children of the marriage, taking into account any financial consequences arising from the daily responsibility for child care;
- (g) any economic hardship likely to arise from the breakdown of the marriage;
- (h) the goal of promoting, as far as practicable, the economic self-sufficiency of each spouse within a reasonable period of time; and
- (i) any other factor which the court deems relevant, provided that fault in itself shall not be relevant to determining spousal maintenance in terms of this clause.

(2) A maintenance order issued in terms of this clause shall be a “maintenance order” for the purposes of the Maintenance Act, 1960 (Act No. 23 of 1960), and may be substituted, varied, discharged or enforced by a maintenance court in terms of that act.

Explanatory Note:

1. The underlying idea behind spousal maintenance is to serve as a means of enabling an ex-spouse to get on his or her feet, after the sacrifices that he or she might have endured during the course of the marriage.

2. Spousal maintenance is a matter that parties can agree upon or leave it to be ordered by court after consideration of factors listed under clause 18(1)(a) to (h). These factors are drawn from South African, Canadian and American precedents. Subclause (f) does not refer to maintenance expenses, but to the fact that child custody may exclude the spouse in question from certain jobs, such as those with long hours or evening hours, or those involving extensive travel.

3. Factor (i) is aimed at making it possible for the court to consider the respective roles of *the* parties during the marriage, without bringing in the old concept of fault through the backdoor.

19. Agreements between spouses

A court granting a decree of divorce shall not confirm as an order of court any agreement between the spouses concerning ancillary arrangements relating to the divorce unless the court is satisfied that

- (a) there has been no coercion of either spouse;
- (b) the agreement is not manifestly unfair; and
- (c) any provisions of the agreement concerning minor children are in the best interests of the child.

Explanatory Note:

1. In most instances, spouses getting divorced do enter into agreements on all relevant matters such as division of assets and liabilities, custody of minor children and access to such minor children, child maintenance, spousal maintenance, etc.

2. Upon divorce the court can then confirm these kinds of agreements as order of court. This provision is aimed at ensuring that prior to confirming an agreement as an order of court, there is sufficient protection for parties with weaker bargaining power as well as minor children whose interests may be compromised in certain agreements. In addition, this provision is intended to give the court a more active role with regard to dealing with agreements between spouses.

20. Oral evidence

Notwithstanding the provisions of this act or anything contained in any other law, a court may direct that oral evidence be heard before granting a decree of divorce, regardless of whether there appears to be a dispute of fact.

Explanatory Note:

This clause is intended to meet half-way the proponents of the action procedure and to ensure that the door is not completely closed to the possibility of invoking oral evidence where the court deems it expedient.

21. Family Advisers

- (1) (a) The Minister of Justice, after consultation with the Law Society of Namibia, shall appoint one or more Family Advisers, who shall be admitted legal practitioners of the High Court and who shall have responsibility for

making recommendations on issues pertaining to minor or dependant children which arise in divorce applications at the request of the court.

(b) A Family Adviser who is not a staff member in the Public Service must be paid the remuneration and allowances in respect of his or her services as the Minister of Justice, in consultation with the Minister of Finance, determines.

(2) Either party to the divorce application may, on application to court and on good cause shown, request an investigation by the Family Adviser.

(3) In any case where the court is of the opinion that further information is required to determine what will be in the best interests of any minor or dependant children of the marriage, regardless of whether or not the parties are in agreement about child-related issues, the court shall order an investigation by the Family Adviser, which may include a report on the family situation from a social worker or a report from any other professional or expert.

(4) Notwithstanding the provisions of paragraph (3), the court shall order such an investigation and report from the Family Adviser whenever:

- (a) there is an intention to separate siblings; or
- (b) there is an intention to place children in the custody of someone other than a parent; or
- (c) the parties have requested joint custody; or
- (d) where either party makes an allegation of child abuse against the other.

(5) Where the court orders an investigation, the Family Adviser shall appear before court to report back no later than one month from the date on which the court requested the investigation, and shall present either a recommendation on issues pertaining to the welfare of the children in question or a report containing reasons why more time is needed before recommendations can be made, in which case there may be a postponement for a period not exceeding one month.

Explanatory Note:

1. In line with the position under South African Divorce Act, 1970 (Act No. 70 of 1979) (as amended), there shall be appointed Family Adviser(s). The term "Family Adviser" is used here rather than "Family Advocate" as in South Africa. The term "Family Legal Practitioner" is too long and awkward, but the clause makes it clear that the Family Adviser must be a legal practitioner.

2. The role of the Family Adviser would be to monitor divorce cases involving minor children in order to represent and protect children's interests. This would ideally be a legal practitioner of the High Court with relevant experience in family disputes.

3. The approach would, however, not be entirely similar to that followed in South Africa. It will only be in circumstances where the court is doubtful about what custody and access arrangements will be in the best interests of the child that the Family Advocate would get involved. Clause 21 (4) (a)

to (c) is intended to guide the court as to circumstances under which an investigation will be needed.

4. This kind of modified approach is therefore designed to minimise financial and human resources by only involving the Family Adviser in cases which appear to be problematic.

5. Justifications for introducing the Family Adviser in our legislation are the following:

- (a) The Family Adviser would be a neutral party with relevant legal experience, fully conversant with relevant issues particularly legal rights and what is in the best interests of the children.
- (b) The Family Adviser should be effective, for as a legal practitioner, he or she is an officer of the court.
- (c) The Family Adviser would be at liberty to get a social worker report before reaching his/her findings and making recommendations.
- (d) There is a problem with the current situation of having two legal practitioners on either side of the divide as they would often only concentrate on furthering specific interests of their respective clients and not adopt the neutral child-focused view that a Family Adviser would.
- (e) Empirical research in South Africa has pointed to the success of this approach.

22. Restriction on access to divorce records

Court records on divorces, other than the judgement or order of the court, shall not be available to the public, except for *bona fide* research, statistical purposes or for administration of justice.

23. Restrictions on publication of particulars of divorce

(1) Except for making known or publishing the names of the parties to a divorce application, or that a divorce application between the parties is pending, or that an order for decree of divorce has been granted, no person shall make it known in public or publish for the information of the public or any section of the public any particulars of a divorce application or any information which comes to light in the course of such an action.

(2) The provisions of subclause (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;
- (c) for bona fide research purposes or statistical purposes, provided that all details are published anonymously;
- (d) where both parties to the divorce application give written permission for such publication.

(3) Notwithstanding anything to the contrary in subclauses (1) and (2), the court may authorise the publication of particulars of a divorce application where the court deems such publication to be in the public interest.

(4) Any person who contravenes this clause shall be guilty of an offence and liable on conviction to a fine not exceeding N\$10 000 or to imprisonment for a period not exceeding one year, or to both such fine and imprisonment.

(5) To the extent that the provisions of this clause provide for a limitation of the fundamental rights contemplated in paragraph (a) of Sub-article (1) of Article 21 of the Namibian Constitution, in that they authorise interference with a person's freedom of speech and expression (including freedom of the media and the press), such limitation is enacted on authority of Sub-article (2) of the said article.

Explanatory Note:

1. Clauses 22 and 23 are to be read together. The two provisions are intended to protect the right to privacy of the spouses involved in a divorce application.

2. Clause 22 prohibits access to or availability of court records on divorce (other than judgement or order of court) with the exception of some justifiable exceptions namely,

(a) where this is needed for bona fide research purposes; or

(b) where this is needed for statistical purposes or the administration of justice.

3. This provision is in line with Article 12(1)(a) of the Namibian Constitution, which though guaranteeing all persons the right to a fair and public hearing in criminal and civil matters, has a limitation in that the court may still restrict this access for the reasons of morals, the public order or national security, as is necessary in a democratic society.

4. Clause 23 is intended to resolve the problem that spouses engaged in divorce proceedings regularly encounter with publication of salacious details about facts leading to their marital breakdown. In certain local publications this has amounted to salient juicy details, the publication of which would not always be in the children's best interests nor go down well with concerned spouses.

5. This clause therefore provides for the prohibition on the publication of any information about a divorce (other than the name of the parties, the court's judgment or order, or the fact that a divorce is pending), in so far as this is inconsistent with the Namibian Constitution. There would, however, be limited exceptions where publication is done for administrative or research purposes, where publication is authorised by both spouses or where the presiding officer or judge authorises the publication where he is of the opinion that such publication is justified.

24. Effect of High Court divorce order

A divorce order granted by a High Court shall have the effect of simultaneously dissolving any marriage relationship between the same two spouses, whether civil or customary in nature.

Explanatory Note:

1. It has often happens that the same two spouses get married under both customary and common law systems. What this clause then seeks to achieve is that if the same parties should get divorced in the High Court under civil law, then such a divorce order will have the effect of simultaneously dissolving any other marriage relationship between them.

2. The LRDC would obviously prefer that all the protections related to ancillary arrangements in this Bill should also apply to the dissolution of customary law marriages. The LRDC's Report on Customary Law Marriages is being finalised about the same time as this Report. The exact way in which such a policy is to be incorporated in the Recognition of Customary Law Marriages Bill, recommended in that Report, needs however much further attention.

25. Recognition of certain foreign divorce orders

The validity of a divorce order granted in a court of a foreign country or territory shall be recognised by a Namibian court if, on the date on which the divorce decree was granted, either party to the marriage:

- (a) was domiciled in the country or territory concerned in terms of the Namibian law on domicile;
- (b) was ordinarily resident in that country or territory;
- (c) was a citizen or national of that country or territory; or
- (d) was domiciled in a country or territory which would recognise the decree of divorce in question.

Explanatory Note:

1. The substantial part of this clause is adapted from the South African Divorce Act. It essentially codifies the common law, but applies the concept of domicile in a gender-neutral fashion consistent with the Married Persons Equality Act, 1996 (Act 1 of 1996).

2. The underlying idea behind a provision of this nature is to deal with a scenario whereby parties leave the country, obtain a divorce in foreign country where they can get favourable terms, and then return and seek recognition of the divorce here.

3. Clauses 25 (a) to (d) are intended to show that the party seeking recognition of a foreign divorce order is closely connected to the country that granted the divorce order. Clause 26 (a) is particularly aimed at preventing people from circumventing Namibian law by obtaining divorces in jurisdictions whose laws on domicile are lax.

26. 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, provided that this shall not affect the operation or validity of any such order issued before the commencement of this act.

Explanatory Note:

1. This provision essentially abolishes the current requirement that, before a court can grant a decree of divorce, the plaintiff must first obtain a restitution order ordering the defendant to resume marital relations within a certain period of time.

2. The change is intended to eliminate the delay and additional cost that results from restitution order requirement, as well as to reflect the reality that such an order is usually a futile exercise.

3. Research indicates that judicial separation has fallen into disuse and has no further useful function in our law.

27. Repeals

The Divorce Laws Amendment Ordinance, 1935 (Ordinance 18 of 1935), the Matrimonial Causes Jurisdiction Act, 1939 (Act No. 22 of 1939), the Matrimonial Causes Jurisdiction Amendment Act, 1945 (Act No. 35 of 1945) and the Matrimonial Affairs Ordinance, 1955 (Ordinance No. 22 of 1955) are repealed.

28. Short title and commencement

This Act shall be called the Divorce Act, 2004 and shall come into operation on a date to be determined by the Minister responsible for Justice by notice in the *Gazette*.

ANNEXURE B: ACCOMPANYING AMENDMENTS TO RULE 43 OF HIGH COURT RULES

General Note:

This amendment is necessary to make the principles in the proposed Divorce Bill workable. It should be implemented at the same time as the new law. The amendment is modelled on a proposed amendment being considered in South Africa.

Rule 43 of the Rules of the High Court shall be amended so as to read as follows:

“APPLICATIONS *PENDENTE LITE* IN FAMILY MATTERS

- (1) This Rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:
 - (a) maintenance *pendente lite*;
 - (b) interim custody of any child;
 - (c) interim access to any child;
 - (d) a contribution towards the costs of a pending matrimonial action or an application in terms of this Rule;
 - (e) an interdict restraining the other spouse from unlawfully disposing of, alienating or encumbering-
 - (i) any assets of the joint estate;
 - (ii) any asset which may form part of the accrual of the estate of a spouse.
 - (f) an order restraining the other spouse from committing any act of physical violence or threats of physical violence against the applicant spouse and or children, which may include an order requiring the other spouse to stay away from the applicant spouse or children, from his or her residence, and from his or her workplace or school.
- (2) The applicant shall commence proceedings in terms of this Rule on notice of motion as near as may be in accordance with Form of the First Schedule, supported by affidavit evidence. The application shall, save as is set out hereunder, otherwise be in accordance with the provisions of Rule 6.

- (3) A notice of intention to oppose is to be filed within 5 days of receipt of the application.
- (4) The respondent's answering affidavit is to be filed within 5 days of receipt of the application.
- (5) The applicant's replying affidavit is to be filed within 5 days of receipt of the answering affidavit.
- (6) In the event that no notice of opposition is filed, the Registrar shall set the matter down for hearing on the following motion court date.
- (7) Any affidavits filed on behalf of the parties in an application in terms of this Rule shall be concise and shall not traverse irrelevant matter.
- (8) (a) As soon as possible after filing of the replying affidavit, the parties shall attend to the office of the Registrar to apply for a date to bring the matter before the court for summary hearing.

(b) The Registrar shall set the matter down for hearing not more than (2) weeks from the date of application for summary hearing.
- (9) (a) The court hearing the matter shall decide the application on the papers only.

(b) After considering the evidence the court shall:
 - (i) grant the application;
 - (ii) dismiss the application;
 - (iii) order an early set down of the trial action;
 - (iv) make such order as it thinks fit;
 - (v) may make an appropriate costs order, including determination of the level and/or rate at which the fees of counsel and/or the attorneys acting on behalf of the parties shall be taxed;
 - (vi) make an adverse costs order against any party who does not comply properly with the provisions of Rule 43(7).
- (10) Affidavits in respect of Rule 43 applications may be made on the forms prescribed in Schedule B to this Act.”.

Explanatory Note:

1. Under current law, Rule 43 of the High Court Rules is a powerful tool for parties seeking interim relief pending the finalisation of divorce proceedings.

2. The rule provides for a simple and quick procedure whereby a spouse can seek the following from the other spouse:

- (a) maintenance while the case is pending;
- (b) contributions towards the costs of a pending case;
- (c) interim custody of a child; and
- (d) interim access to a child.

3. In terms of the proposed draft bill, the scope of Rule 43 will be extended to include:

- (a) threats of domestic violence; and
- (b) prevention of unfair dealings in marital property while the divorce is still pending.

4. The latter two are seen as some of the common interim problems not covered by the current Rule 43.

5. A further improvement to the existing Rule 43 is that applications would now be simplified as far as possible and done on the basis of affidavit evidence unless the court insists on a hearing.

6. Parties further have the option of using standard affidavit forms thereby making the process easier.

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