



Republic of Namibia

---

LAW REFORM AND DEVELOPMENT COMMISSION

---

**REPORT**  
**ON**  
**MARITAL PROPERTY**

---

**PROJECT 19**

---

LRDC 15  
Windhoek, Namibia  
March 2010

**ISSN 1026-8405**  
**ISBN 978-0-86976-793-1**

## **PUBLICATIONS OF THE LRDC:**

### **ANNUAL REPORTS (ISSN 1026-8391)\***

First Annual Report - 1992 (ISBN 0-86976-382-2)\*  
Second Annual Report - 1993 (ISBN 0-86976-383-0)\*  
Report on Activities from 1994 to 2002 (ISBN 0-86976-604-X)  
Annual Report - 2003 (ISBN 0-86976-643-0)  
Annual Report - 2004 (ISBN 0-86976-667-8)  
Annual Report - 2005 (ISBN 0-86976-700-3)  
Annual Report - 2008 (ISBN 0-86976-790-0)

### **OTHER PUBLICATIONS (ISSN 1026-8405)\***

LRDC 1\* Aspects of Family Law: The Abolition of Marital Power and Equalization of Rights between Spouses (ISBN 0-86976-384-9)\*  
LRDC2 The Ascertainment of Customary Law and the Methodological Aspects of Research into Customary Law: Proceedings of Workshop, February/ March 1995 (ISBN 0-86976-385-7)  
LRDC3 T.W. Bennett, Customary Law and the Constitution, October 1996 (ISBN 0-86976-397-0)  
LRDC4 Report on the law pertaining to Rape (ISBN 0-86976-406-3)  
LRDC5 Report on Maintenance (ISBN 0-86976-407-1)  
LRDC6 Report on Small Claims Courts (ISBN 0-86976-412-8)  
LRDC7 Violence against and Abuse of Women and Children Project: Formal Addresses made at the National Hearing-May 1997 (ISBN 0-86976-412-6)  
LRDC8 Violence against and Abuse of Women and Children Project: Verbatim Discussions held at the National Hearing-May 1997 (ISBN 0-86976-490-X)  
LRDC9 Domestic Violence Cases reported to the Namibian Police - Case Characteristics and Police Responses (ISBN 0-86976-516-7)  
LRDCIO Report on Domestic Violence (ISBN 0-86976-555-8)  
LRDC II Report on Uniform Consequences of Common Law Marriages (Repeal of Section 17(6) of Native Administration Proclamation, 1928 (Proclamation 15 of 1928)) (ISBN 999916-63-57-6)  
LRDC12 Report on Customary Law Marriages (ISBN 0-86976-651-1)  
LRDC 13 Report on Divorce (ISBN 0-86976-654-6)  
LRDC I4 Report on Public Gatherings (ISBN 0-86976-689-9)  
LRDC 15 Report on Marital Property (ISBN 978-0-86976-793-1)

**\*Number of publication and ISSN and ISBN numbers not printed on all copies.**

# **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 Marital Property.

.....  
ADV JR WALTERS

**ACTING-CHAIRPERSON: LRDC**

2010-03-01 #

# with effect from 5 November 2007, a new LRDC, with five new members was appointed. Adv J R Walters was appointed Acting-Chairperson. The position of Chairperson (full-time) remains vacant.

## **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 4 November 2007 were:**

Adv 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)
Mr S K Amoo	(Lecturer at the Law Faculty of the University of Namibia nominated by the Vice Chancellor of the University of Namibia)
Mr A Vaatz	(Legal Practitioner: Acting Chairperson)
Mr T Kamuhanga-Hoveka	(Legal Practitioner)
Ms M Samson	(Legal Adviser in the Office of the Attorney- General)

### **The members of the LRDC on 1 March 2010 are (see # on page (iii)):**

Adv JR Walters	(Ombudsman: Acting Chairperson)
Ms T Hancox	(nominated by the Law Society of Namibia)
Ms N N Shivute	(Deputy Chief: Lower Courts in the Ministry of Justice)
Mr F Nghishililwa	(Lecturer at the Law Faculty of the University of Namibia, nominated by the Vice Chancellor of the University of Namibia)
Mr A Denk	(Legal Practitioner)
Dr S Akweenda	(Legal Practitioner)
Ms B Burger (now late)	(Legal Adviser in the Office of the Attorney-General)

The Secretariat of the Commission (Directorate Law Reform) is housed in the Ministry of Justice, Justitia Building, Independence Avenue, Windhoek.

All correspondence to the Commission should be addressed to:

The Secretary  
Law Reform and Development Commission  
Private Bag 13302  
WINDHOEK  
Republic of Namibia

**Fax:** (09264) (61) 240064  
**Tel.:** (09264) (61) 2805111  
**E-mail:** [mvisagie@moj.gov.na](mailto:mvisagie@moj.gov.na)

## CONTENTS

	Page
1. Introduction and Background.....	1
2. Project Committee.....	1-2
3. Consultations.....	2
4. Recommendations.....	3

**Annexure A:** Overview of Marital Property Reform Bill

**Annexure B:** Draft Marital Property Bill (with Summary and Explanatory Notes)

## 1. **Introduction and Background**

There are two different laws on marital property regimes currently operating in Namibia. Due to an old law dating back to the colonial era, the Native Administration Proclamation, 15 of 1928, a couple may be married "*in community of property*" or "*out of community of property*". These two regimes enable a couple to manage their property in different ways. A couple married "in community of property", have a joint estate which means that all their possessions and debts are part of one estate and each spouse holds equal shares in the estate regardless of their individual financial contributions. A couple married "out of community of property", each have his or her own separate estate and no property is jointly owned, and neither one is responsible for the other's debts.

With the exception of civil marriages between "natives" north of the old "Police Zone" on or after 1 August 1950, all civil marriages in Namibia are automatically "in community of property", unless the couple makes an "ante-nuptial" contract indicating the marriage to be "out of community of property". Marriages north of the old "Police Zone" are automatically "out of community of property", unless a declaration establishing another property regime was made to the marriage officer before the marriage took place.

This legal difference which originated in the Native Administration Proclamation is discriminatory in that it differentiates between people depending on their race and place of residence.

This project is an attempt to bring Namibian law on Marital Property in tune with the rest of the world. Our neighbouring South Africa, from which we inherited these outdated laws, has embarked on reform in this area 25 years ago with the passing of the Matrimonial Property Act, 1984 (Act No. 88 of 1984) . The time has now come for Namibia to liberate itself from these colonial laws, and embark on similar reform.

The choices of marital property proposed in this new law, are also made applicable to customary marriages.

## 2. **Project Committee**

- 2.1 The Law Reform and Development Commission (LRDC) has for quite some time been considering reform in the area of the law pertaining to marital property regimes.

At its meeting held on 30 September 2004, the LRDC decided to officially embark on a Project on Marital Property and appointed a Committee for this purpose, constituted by Mr. T Kamuhanga-Hoveka (a member of the LRDC, as Chairperson), Ms. H Duvenhage (a partner in the law firm Etzold-Duvenhage) and Ms. Dianne Hubbard (a law researcher at the Legal Assistance Centre).

- 2.2 The Committee had its first meeting on 13 June 2006 and rounded up discussions on 11 April 2007. At the latter meeting, it was decided to task two members of the Committee, Ms. Dianne Hubbard and Ms. Hannelie Duvenhage, to do the final layman's draft of the Marital Property Bill. The Committee adopted the Legal Assistance Centre's publication: *Marital Property in Civil and Customary Marriages (Proposals for Reform)* as a basic framework for its further work. The Committee's first recommendations were discussed by the LRDC on 24 July 2008.
- 2.3 The LRDC would like to thank the Committee members for their willingness to contribute towards the work of the Commission, and for their valuable contributions made while working on this Project.

### 3. **Consultations**

A consultative workshop on the Draft Marital Property Bill was held at Otjiwarongo from 24-25 September 2008. The facilitator at the workshop was Ms. Dianne Hubbard. Various stakeholders were invited to the workshop including,

Master of the High Court  
Society of Advocates  
Bank of Namibia  
Bankers Association of Namibia  
Women Action for Development (WAD)  
Ministry of Gender Equality and Child Welfare  
Ministry of Home Affairs and Immigration  
Legislative Drafting  
Magistrate's Commission  
Law Society of Namibia (LSN)  
Ministry of Lands and Resettlement  
Law Reform  
Law Faculty (UNAM)  
Ministry of Health and Social Services  
Namibia Women's Association (NAWA)

Represented at the workshop was:

Law Reform  
Ministry of Gender Equality and Child Welfare  
Bankers Association of Namibia  
Ministry of Home Affairs and Immigration  
Legislative Drafting  
Ministry of Health and Social Services  
Law Society of Namibia (LSN)

#### 4. **Recommendations**

##### **Format of Recommendations**

**Annexure A** contains an Overview of the Marital Property Reform Bill.

**Annexure B** contains the proposed **Draft Marital Property Bill**. A general explanatory note is 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.

The LRDC recommends:

- 4.1 The enactment of the proposed Draft Marital Property Bill (as in Annexure B);
  - 4.2 The repeal of the property provisions of the **Married Persons Equality Act, 1996 (Act 1 of 1996)** and their re-enactment with the suggested amendments in this law. The repeal of marital power, the provisions on head of household and the provisions on domicile would remain in the MPEA.
-



**OVERVIEW OF MARITAL PROPERTY REFORM BILL**  
**LRDC Subcommittee on Marital Property, 2008**

**PART 1- INTRODUCTORY**

**(1) FOUR BASIC MARITAL PROPERTY REGIMES**

Currently, most Namibians who marry in civil marriages make use of two basic property regimes: in community of property and out of community of property. This law would expand on these two existing regimes by subdividing them into four basic choices:

- (a) **"simple community of property"**: community of property but only with respect to assets and debts acquired on or after the date of the marriage

**Assets and debts are shared as from the date of the marriage.** All the money, property and other assets of husband and wife from BEFORE the marriage remain their separate property, and all the debts and other liabilities from BEFORE the marriage remain their separate debts. All the money, property and other assets gained AFTER the date of the marriage are put together into a "joint estate" (with a few exceptions such as inherited property). The debts of both husband and wife AFTER the date of the marriage become debts against the joint estate, as long as both spouses consented to the debt. Both spouses have separate control of their separate property, but they must consent to any major transactions involving the joint estate.

- (b) **"extended community of property"**: complete community of property, including assets and debts dating from before the marriage

**All assets and debts are shared, including those from before the date of the marriage.** All the money, property and other assets of husband and wife from BEFORE AND AFTER the marriage are put together into a "joint estate" (with few exceptions such as inherited property). The debts and other liabilities of both the husband and the wife from BEFORE the marriage become debts against the "joint estate", as long as both spouses have been informed of these debts before the marriage takes place. The debts of both husband and wife AFTER the marriage become debts against their shared property, as long as both spouses consented to the debt. Both spouses must consent to any major transaction involving the joint estate.

- (c) **"out of community of property with profit sharing"**: known in the past as the accrual system

**Assets and debts stay separate during the marriage, but profits made by either spouse are shared equally when the marriage ends because of death or divorce.** All the money, property and other assets of husband and wife from BEFORE AND AFTER the marriage are kept separate. The debts and other liabilities of both the husband and the wife from BEFORE AND AFTER the marriage are kept separate.

The husband and the wife each have control over their separate money and property. They do not need each other's consent for transaction.

BUT WHEN THE MARRIAGE ENDS BECAUSE OF DEATH OR DIVORCE, husband and wife will share equally in the profits to their separate property since the marriage began. They will not share the debts, but the debts of each spouse are subtracted from the value of that spouse's separate property before the profit is calculated. In order to calculate the profit correctly, both spouses must indicate the value of their property and belongings as of the date of the marriage on the front of the marriage certificate. If either spouse has substantial property, that spouse must list the property and its approximate value on a separate page, which must be signed by both spouses, by two witnesses and the marriage officer. If no value is listed, it will be assumed that both spouses started out with nothing.

(d) **"strict out of community of property"**: complete out of community of property

**Assets and debts stay separate. Nothing is shared.** All the money, property and other assets of husband and wife from BEFORE AND AFTER the marriage are kept separate. The debts and other liabilities of both husband and wife from BEFORE AND AFTER the marriage are kept separate. The husband and the wife each have control over their separate money, property and other assets. They do not need each other's consent for transactions.

These four basic regimes would be applicable to both civil and customary marriages. Any couple wanting a different arrangement would be free to enter into an ante-nuptial agreement.

## (2) NO DEFAULT

The current system provides for different default systems based on the race and residence of the intending spouses, in terms of the notorious Native Administration Proclamation 15 of 1928.

This proposed law would eliminate that discriminatory approach. Under the new system, there would be no default regime. All couples would be asked to choose a marital property regime at the time of their marriage by indicating their choice on the marriage certificate (much as couples now indicate "with ANC" or "without ANC", without realising that such a designation is not sufficient to effect a change to the default under the current legal framework).

A simple standard explanation of each of the four basic choices would be printed on the back of all marriage certificates, and the certificate book used by marriage officers would contain an official translation of this explanation into all major Namibian languages. If no designation is indicated on the marriage certificate, "out of community of property with profit sharing" would be applied to the marriage, unless there was evidence that both spouses actually intended to apply some other regime. (It is necessary to provide some fall back position, but this would not be the same as a default, as all couples would be asked to indicate a choice.)

### **(3) SAME CHOICES FOR CIVIL AND CUSTOMARY MARRIAGES**

The proposed law would make the same choices on marital property regimes applicable to both civil and customary marriages. Applying a single marital property framework to all marriages will be more clear and simple than a dual system of property regimes, and the range of choices provided together with the option of making an ante-nuptial contract would seem to be broad enough to cater for all family situations.

If a couple intending to marry under customary law wanted unaltered customary law to determine their marital property regime, they could still arrange this by ante-nuptial contract - which would ensure that they both understand what the applicable customary law would entail.

Previously, the failure to make most of the provisions of the Married Persons Equality Act applicable to customary marriages was widely criticised. This proposal would avoid a similar error, as well as making the rules on spousal consent to transactions involving a joint estate applicable to all marriages in community of property.

Law reform which would provide for marriage officers and marriage certificates for customary marriages is underway. It would probably be necessary to delay the application of the proposed marital property system to customary marriages until this accompanying law reform is enacted.

Conflict with other aspects of customary law is avoided by excluding traditional property from the joint estate where it is supposed to be held personally by the spouse in question (such as symbolic pots or certain articles of clothing), or held in trust for the benefit of other members of the spouse's kin group (such as sacred cattle).

## **PART 2- "SIMPLE COMMUNITY OF PROPERTY" AND "EXTENDED COMMUNITY OF PROPERTY"**

### **(1) PROPERTY EXCLUDED FROM JOINT ESTATE**

The main change here from the conu11on law position is the exclusion of *all* inherited property from the joint estate, regardless of whether or not the inheritance is by way of a will which expressly excludes the inheritance from forming part of the joint estate.

This position seems fundamentally fair, and it does not preclude spouses from concluding an ante-nuptial or a post-nuptial contract making inheritances part of the joint estate if they so desire. However, the default position of excluding *all inheritances* would prevent one person from marrying another in hopes of getting hold of that spouse's accumulated family wealth.

This would also be helpful in customary marriages, where the inherited property of a spouse may in fact be held in trust to be used for the support of other blood relatives. Including this exclusion would make the two "community of property" options more attractive and appropriate for customary situations.

Another new exclusion is traditional property, in cases where it is in terms of customary law required to be held personally by the spouse in question, or held in trust for the benefit of other members of the spouse's kin group. Such property is often inherited, but this is not always the case. Therefore this additional exclusion helps to make the "in community of property regimes" realistic choices for customary marriages as well as civil marriages.

## **(2) ACCOUNTING IN RESPECT OF JOINT ESTATES**

Either spouse would be able to demand an accounting from the other spouse of income and property received by that spouse which forms part of the joint estate. This right could be enforced in a Magistrate's Court if necessary, and willful omission of assets or items from the accounting would result in the loss of benefit from those assets, or sole responsibility for those liabilities. This provision is designed to help place the spouses on an equal footing with respect to joint estates.

## **(3) DEBTS INCURRED BY THE SPOUSES**

**Prior to marriage:** Under the common law, in a marriage "in community of property", the ante-nuptial debts of both spouses become joint debts upon the marriage, to be paid out of the joint estate. This law would modify that position by requiring that debts incurred by one spouse prior to a marriage in "extended community of property" should be satisfied in the first instance out of that spouse's separate property, before the joint estate becomes liable for the debt. If joint property is used to satisfy the debt, a corresponding adjustment would be made at the time of the division of the joint estate. This modification is necessary to be fair to the un-indebted spouse, as the debt in question could easily be hidden from him or her. However, the proposed solution also ensures that creditors are not disadvantaged.

**During marriage:** Debts incurred by either spouse after the marriage would lie against the joint estate, provided that the rules on spousal consent regarding administration of the joint estate are correctly followed. If the required consent was not obtained, the debt should be satisfied in the first instance out of the indebted spouse's separate property, before the joint estate becomes liable for the debt. If joint property is used to satisfy the debt, a corresponding adjustment would be made at the time of the division of the joint estate.

#### (4) DELICTS

The common law rules are revised here along the following lines:

- **damages for delicts by a third party:** Damages awarded to a spouse for patrimonial loss become part of the joint estate, while damages for non-patrimonial loss remain separate property .
- **damages for delicts by one spouse against the other spouse:** All damages whether for patrimonial or non-patrimonial loss become the separate property of the wronged spouse. This would apply, for example, to civil suits for damages caused by domestic violence.
- **liability for delicts:** These would be ultimately charged against the guilty spouse rather than the joint estate, as the sharing of liabilities should not be deemed to include equal sharing of acts which are found to be legally wrongful. This change resolves a split of opinion in the case law.

#### (5) JOINT ADMINISTRATION OF JOINT ESTATE

The provisions from the Married Persons Equality Act 1 of 1996 relating to the joint administration of joint estates are re-enacted with improvements aimed at closing loopholes and addressing shortcomings identified since 1996, particularly with respect to improved enforcement mechanisms. The main changes are:

(a) **Written consent:** This proposed law requires *written* consent with two witnesses for all major financial transactions involving the joint estate.

(b) **Consent for large cash transactions:** A major loophole at present is that cash transactions of any amount do not require spousal consent. The proposal is that cash transactions in excess of a prescribed amount (perhaps N\$500) would require consent, unless the couple has made a written agreement authorising each other to make independent transactions up to a higher maximum amount. This higher amount could be reflected on the marriage certificate.

(c) **No subsequent ratification of transactions without consent:** The provision in the Married Persons Equality Act on ratification of transactions after they take place have been deleted here , as this appears to substantially undermine the intended protection for the spouses and reduce the duty of care which must be taken by third parties . Subsequent ratification is allowed only for transactions which take place in emergency situations or urgent matters.

**(d) Coerced consent invalid:** A Magistrate's Court or the High Court would have the power to vary or set aside any agreement which was obtained by actual or threatened violence, if it would cause serious injustice to enforce the agreement. This reform is important in the context of Namibia's widespread domestic violence.

**(e) Consequences of lack of consent:** The possible remedies improve on those already provided in the Married Persons Equality Act by making explicit provision for *the recovery of assets from third parties* in cases where the third party must reasonably have known that there was no consent, or else failed to exercise reasonable care to ensure that the necessary consent had been obtained. It also improves accessibility by making both Magistrates' Courts and the High Court competent forums for (a) requests for adjustment of the estate in respect of a transaction without the required spousal consent during the subsistence of the marriage and (b) procedures for the recovery of assets from third parties.

**(f) Settlement of debts:** If a debt for more than \$500 (or such higher amount as is agreed to by the parties) is incurred without the consent of the other spouse, then only the portion of the estate which can be rightfully allocated to the spouse who incurred the debt should be available for satisfaction of the debt.

**(g) Division of joint estate during subsistence of marriage:** The limited remedies provided by the Married Persons Equality Act are expanded by providing for the division of the joint estate during the subsistence of the marriage to avert serious prejudice to one spouse because of the conduct or proposed conduct of the other spouse, so long as no third parties will be prejudiced by the division. Only the High Court would have jurisdiction for this.

### **PART 3 - "OUT OF COMMUNITY OF PROPERTY WITH PROFIT SHARING"**

The draft provides a statutory framework for the re-named "accrual system" similar to that adopted in South Africa. Even though the "accrual system" can be applied in Namibia by means of an ante-nuptial contract, a clear statutory framework for this regime would encourage its use.

The draft also follows South Africa by interpreting all ante-nuptial (and post-nuptial) contracts establishing strict "out of community of property" as referring to the "accrual system", unless profit-sharing is expressly excluded by the couple in question. The reasoning is that "strict out of community of property" severely disadvantages women who leave the workforce after their marriage to care for the home and the children, and whose separate estates therefore do not increase in value during the marriage whilst the separate estates of their working husbands do increase.

As in the case of joint estates, inheritances are excluded from the profit calculation and the High Court has the power to order a division of the profit during the subsistence of the marriage where there is a serious risk of prejudice to one of the spouses, and where no third parties will be disadvantaged by the division.

#### **PART 4 - "STRICT OUT OF COMMUNITY OF PROPERTY"**

This property regime would operate in the same way as that regime currently known as "out of community of property", subject to the general changes applicable to all marriages (discussed below).

#### **PART 5- MATRIMONIAL HOME**

The matrimonial home is defined in section 1 as "the dwelling where a married couple ordinarily resides, or ordinarily resided prior to the death of one spouse, and the necessary and essential household goods regularly used by the married couple".

##### **(1) DURING THE MARRIAGE**

Currently, in terms of the common law, regardless of the marital property regime, both spouses have a right to occupy the matrimonial home, and both are under a reciprocal duty to contribute to its upkeep. Neither spouse has a right to eject the other spouse from the matrimonial home without providing suitable alternative accommodation, even if the matrimonial home is owned by one spouse alone. A similar principle applies to the appurtenances of the matrimonial home, such as the furniture. As one court said, a spouse's right of occupation cannot "*be reduced to the empty shell of the matrimonial home*". Despite the fact that disputes about the matrimonial home are common in Namibia, the common law rules appear to be not well known or applied.

The proposed draft codifies and expands upon the common law by providing that both spouses should have an explicit right to occupy the matrimonial home and a reciprocal duty to contribute to its upkeep, regardless of the couple's marital property regime and regardless of which spouse owns the matrimonial home. In addition, neither spouse is competent to engage in any transaction pertaining to the matrimonial home without the written consent of the other spouse. Following the common law, the only exception is that a spouse who owns the matrimonial home as his or her separate property may engage in transactions concerning it without the consent of the other spouse if suitable alternative accommodation is provided by that spouse.

It should be noted that many other jurisdictions have similar provisions pertaining to the matrimonial home.



## **(2) UPON DIVORCE**

The law reform proposals already put forward by the Law Reform and Development Commission in respect of divorce propose fairly broad judicial discretion for re-allocating and re-distributing marital property, but do not make any specific mention of the matrimonial home.

This provision would extend judicial discretion in connection with divorce to allow for an award of the matrimonial home and its contents to one spouse, regardless of the marital property regime, or for a right of occupation on the part of the spouse with custody of the children in appropriate cases, for a temporary period, or until the children have completed their schooling. Custody of the children would not automatically lead to retention of the matrimonial home, as this might encourage parents to seek custody for the wrong reasons.

In exercising judicial discretion with respect to the matrimonial home, the court would be expected to consider factors similar to those enumerated in section 14(2) (c) of the *Combating of Domestic Violence Act 4 of 2003*, as well as the amount of assets available to the other spouse if the matrimonial home is placed aside for the occupation of one spouse.

## **(3) UPON DEATH**

The subcommittee engaged in extensive debate on what should happen to the matrimonial home in the event of the death of one of the spouses. However, it was decided that this issue should be addressed as part of overarching reform on inheritance and not in isolation.

## **PART 6 - GENERAL PROVISIONS ON MARITAL PROPERTY**

**Gifts:** The draft makes gifts between spouses acceptable, thus overruling the outdated Roman rule that makes donations spouses between spouses void or voidable.

It also states that any gift given in anticipation of a marriage or as part of the marriage rites - including bride-wealth or *lobola* - remain the property of the recipient, even if the marriage is subsequently dissolved. This means that a request to return gifts - whether it is the engagement ring or a gift of cattle or lobola - becomes a private matter between the parties and is not enforceable in the Namibian courts.

The draft also states that gifts, including lobola, will not affect the property consequences of the marriage or the rights of either spouse under the law on marital property. This approach allows religious and customary law customs to continue between parties, but without involving the general courts of law in these matters. Also, by explicitly separating the exchange of gifts from basic property rights, it ensures that surviving customs are not the basis for sex discrimination.



**Insolvency:** In terms of the proposed reforms, creditors of the indebted spouse are expected to either join the other spouse in an insolvency proceeding, or to provide evidence that the debtor is not married " in community of property" (which would include both simple and extended community of property) . If there is any doubt about the marital property regime, then the other spouse should be joined - or at least notified and given an opportunity to participate in the proceedings. This provision would be made much less onerous for creditors by the establishment of a central, computerised register of marriages and divorces which is accessible to the public, with marriage certificates which list the applicable marital property regime.

Another proposed change to the law on insolvency is based on the discussion in the 1998 South African Constitutional Court case of *Harksen v Lane*. The Insolvency Act as it now stands vests the *separate* property of the solvent spouse in the Master during the sequestration of the insolvent spouse, regardless of the marital property regime which applies to the marriage.

The stated purpose is to prevent fraud, but as the dissenters in the RSA case pointed out, fraud could just as easily happen with other persons in close relations to the insolvent, such as family members or business associates. The SA Law Reform Commission has recommended the repeal of these spousal provisions in South Africa.

We suggest that experts in insolvency should be requested to look for broader and more effective ways to guard against fraudulent transactions (based on the various examples from other countries) instead of singling out spouses for suspicion.

**Household necessities:** As at present, spouses in marital property regimes which are not forms of community would be jointly and severally liable for household necessities, and are expected to make a contribution in accordance with their respective means.

**Choice of law:** At present, the proprietary consequences of the marriage are determined by the domicile of the husband at the time of marriage - the last remaining common law rule on marital property which is blatantly discriminatory on the grounds of sex. The draft proposed gender-neutral rules based on the 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes (even though Namibia is not a party).

The proposal is that spouses domiciled in different countries would have the right to make an express agreement stating which law on marital property would apply to their marriage. They could choose:

- the law of the country where either spouse is a citizen ;
- the law of the country where either spouse habitually resides;
- the law of the country where one or both of the spouses establishes a new habitual residence after marriage; or

- in respect of immovable property, the law of the country where the property is situated.

If they do not make any agreement, the applicable law would be that of the country where both spouses establish their first habitual residence after marriage, or (if this cannot be determined) by the law of the country where the marriage took place.

**Division of marital property when one spouse dies:** The draft places an explicit duty on the executor of the deceased spouse's estate to ensure that the marital property is properly divided, taking into account any adjustment provided for in the law, before the estate is distributed.

## **PART 7 - POLYGAMOUS MARRIAGES**

Since polygamous customary marriages are still possible, the law must cater for them.

For marriages entered into **after** the implementation of the intended legislation, the first marriage would remain as it is. The second marriage would then be in "strict out of community of property".

The subcommittee has noted that this system might cause hardships in practice, but it should be seen as a fall-back position in a context where we expect polygamy to be discouraged and in decline.

At the same time, in order to allow for choice, a narrow exception has been crafted for a different agreement for polygamous marriages by ante-nuptial or post-nuptial contract made by a notary, where *all of the spouses appear in person and give consent*. A broader use of agreements by consent should not be allowed, as this option is being tried in South Africa and is reportedly not working well in practice.

Polygamous marriages concluded **before** the new law comes into force would be governed by the relevant customary law. Since the proposed law allows for post-nuptial contracts, this option could be used to alleviate any hardships arising from this rule.

## **PART 8 - ANTE-NUPTIAL AND POST-NUPTIAL AGREEMENTS**

There are two categories of agreements here: (a) ante-nuptial and post-nuptial **notices** which can involve only the four basic statutory regimes, without individualised adjustments and (b) ante-nuptial and post-nuptial **contracts**, which can cover anything that can currently be done by means of an ANC (except where the law specifies that certain rules cannot be changed or waived).

**Ante-nuptial agreements:** The marriage officer is authorised to make an ante-nuptial notice, which will be indicated on the marriage certificate and signed by both spouses, the marriage officer and two witnesses. A couple who want an ante-nuptial contract must go to a notary. In both cases, copies must be kept on file at the Registrar of Deeds and the Ministry of Home Affairs.

**Post-nuptial agreements:** The best approach to post-nuptial agreements involved much more debate within the subcommittee, as it was considered desirable to provide an accessible option for post-nuptial changes by mutual consent if no third parties are prejudiced, and yet it was also felt that the law should not make post-nuptial changes too "easy". Another issue is that changes out of any of the regimes which entail joint estates or profit sharing would require that the spouses agree on the division of the joint estate or the shared profit.

## **PART 9 - MARRIAGE REGISTRY**

The subcommittee felt strongly that there should be a publicly-accessible marriage registry at the Registrar of Deeds, which would include the designation of the marital property regime on the marriage certificate or the accompanying ante-nuptial contract. This would have several advantages:

- It would assist with effective enforcement of the rules on administration of joint estates, without being too onerous for third parties.
- Conveyancers could be required to check the register to ensure that all property transfers were in accordance with the rules contained in the law.
- It would help to prevent fraud and bigamy.

It is envisaged that duplicate documents (or a second set of originals) could be filed at the Ministry of Home Affairs, but it was recommended that original copies of all marriage certificates, and all ante-nuptial and post-nuptial agreements should be kept together at the Registrar of Deeds.

## **PART IO-MAINTENANCE OF SURVIVING SPOUSES UPON DISSOLUTION OF MARRIAGE BY DEATH**

A section based on South Africa's *Maintenance of Surviving Spouses Act 27 of 1990* provides for claims for maintenance of a surviving spouse in a manner analogous to claims for maintenance of a dependent child. It improves on the South African approach by clearly covering multiple spouses in the case of polygamous marriages.

The theory is that the first priority of a deceased estate should be to provide for immediate family members who were dependent on the deceased, with the goal of ensuring that the death causes the least possible financial disruption to the living.

If the estate of the deceased is insufficient for the maintenance of the minor children as well as the surviving spouse, then maintenance of the children would take precedence - even if the minor children are not children born of the marriage.

## **PART 11 - JOINT BANK ACCOUNTS**

Commercial banks in Namibia do not currently allow married couples to open joint accounts, even though there is no law specifically forbidding this. Yet for couples married "in community of property", joint accounts would in many cases be the best way to allow for joint administration of cash assets of the joint estate.

Although local banks raise objections to this idea, joint bank accounts for married couples are utilised in many other countries, including Kenya, Ireland, Australia and New Zealand. Furthermore, in Namibia, business partners may open joint accounts, so this system could provide a template for joint accounts for married partners.

The subcommittee felt strongly that this option should not be left to the discretion of local banks, but that all banks which wish to do business in Namibia should be *required* to offer this option.

## **PART 12 - GENERAL**

**Amendment of term "spouse":** The subcommittee has provided a list of statutes which use the term "spouse" or "dependent", where these terms should be deemed to include a spouse in a customary marriage and a spouse in any marriage concluded under any generally-recognised system of religious law to avoid unfairness as well as possible constitutional challenges. The list should be re-examined by the technical legal drafters. It is noted that a number of recent Namibian statutes have begun to define spouse broadly to include customary and religious marriages.

**Regulations:** The Act would allow for the promulgation of regulations to prescribe forms and more detailed procedures, particularly in respect of transactions which require mutual spousal consent.

**Repeals:** The law would repeal the provisions of the Native Administration Proclamation 15 of 1928 on marital property regimes, leaving only the provisions of that notorious law on inheritance remaining to be addressed.

**Short title and commencement:** Law reform which would provide for marriage officers and marriage certificates for customary marriages is underway. It would probably be necessary to delay the application of the proposed marital property systems to customary marriages until this accompanying law reform is enacted.

## **BANK OF NEW ZEALAND: RULES REGARDING JOINT ACCOUNTS**

- Deposits : Where the bank receives a deposit in favour of any one joint account holder (whether by cheque, draft, bill of exchange or other instrument or payment authority), the bank will credit it to the joint account unless instructed in writing to pay the deposit into a separate account in the name of the individual in question.
- Operating the joint account: Unless specified otherwise in writing, either spouse may instruct the bank to act in respect of the joint account. In other words, any one joint account holder can operate the joint account separately, unless all account holders have given the bank written instructions to the contrary. This means that either spouse may withdraw all of the money credited to the joint account or incur the maximum debt allowed against the account.
- Death of one spouse: If any joint account holder dies, the remaining account holder automatically becomes the owner of all funds in the joint account and has full authority to operate the account. The bank will treat any credit balance in the joint account as payable and belonging to the surviving joint account holder, and the bank will incur no liability in paying or delivering such funds to the surviving spouse.
- Debts to bank: Each joint account holder is jointly and individually liable for the whole of the amount owing to the bank in respect of a joint account. This means that the bank can require each joint account holder to pay either a part or all of such amount. If any joint account holder dies, no liability to the bank will be discharged as a result of that death.
- Notices: Any notice given to one joint account holder is deemed to be sufficient notice to all joint account holders.
- Suspension or closure of joint account: The bank has the right to suspend the operation of or close a joint account without prior notice if:
  - there is any dispute between any of the joint account holders and this has not been resolved to the bank's satisfaction;
  - one joint account holder attempts to withdraw or notifies the bank of his or her intention to withdraw from the joint account ;
  - the bank learns that any joint account holder has committed an act of bankruptcy or been declared bankrupt or that a petition has been presented to declare any joint account holder bankrupt; or
  - any joint account holder purports to assign or dispose of his or her interest in the joint account.

In such a case, each joint account holder prior to suspension or closure of the account will continue to be jointly and individually liable for any outstanding debt; and the bank will not be liable to any joint account holder for any consequences of the suspension or closure of the joint account. The bank will also have no liability to any joint account holder if it does not suspend or close a joint account when it could have done so.

- Joint security: When jointly owned assets are provided as security for borrowing, independent legal advice should be sought about individual liability for debts incurred now and in the future and the implications of this for the assets given as security.
- Disputes: If a dispute occurs between joint account holders, they have a duty to advise the bank immediately and should seek independent legal advice.
- Closure of joint accounts: Unless the account holders have specified that two or more signatories are required to operate the joint account, the joint account may be closed on the instructions of any one account-holder. In such a case, the bank will not be liable to the other joint account holder(s) for any consequences arising from the closure.

Bank of New Zealand at <http://www.bnz.co.nz/About Us/1, 1184, 3-50-547,FF.html#Terms and Conditions Specific to Joint Accounts>.

**FORM X-MARRIAGE CERTIFICATE WITH  
EXPLANATIONS OF STANDARD MARITAL PROPERTY REGIMES**

**MARRIAGE CERTIFICATE**

**Wife's** name & surname..... ID or passport number.....

Citizenship..... Date of birth.....

**Husband's** name & surname..... ID or passport number.....

Citizenship..... Date of birth.....

Date of marriage..... Place..... District.....

Name of marriage officer..... Designation number.....

**MARITAL PROPERTY REGIME**

(1) SIMPLE COMMUNITY OF PROPERTY

We agree that each spouse may engage in cash transactions up to a maximum of N\$..... without the consent of the other spouse.

(2) EXTENDED COMMUNITY OF PROPERTY

We agree that each spouse may engage in cash transactions up to a maximum of N\$..... without the consent of the other spouse.

(3) OUT OF COMMUNITY OF PROPERTY WITH PROFIT SHARING

Estimated value of wife's money and property on date of marriage.....

Estimated value of husband's money and property on date of marriage.....

(4) STRICT OUT OF COMMUNITY OF PROPERTY

(5) ANTE-NUPTIAL CONTRACT ALREADY MADE IN FRONT OF NOTARY

We, the undersigned, have indicated on this certificate the marital property regime which will apply to our marriage. We have both chosen this marital property regime of our own free will. We understand that the property regime we have chosen will remain in force unless we both agree to a new property regime after the marriage takes place by following the rules and procedures in Marital Property Reform Act x of 200x.

THUS DONE, CONTRACTED AND AGREED UPON at (place) .....,  
on (date) ....., in the presence of the undersigned witnesses, and of the undersigned marriage officer:

AS WITNESSES:

1. ....

.....  
(HUSBAND)

2. ....

.....  
(WIFE)

.....  
(MARRIAGE OFFICER)



## REVERSE SIDE OF MARRIAGE CERTIFICATE

If you have not already made an ante-nuptial contract with the assistance of a notary, you may choose any one of the four basic marital property systems which are defined by the Marital Property Reform Act of 2001 to apply to your marriage. This law contains the rules for each property regime. Below is a short summary of the key provisions of the law.

### (1) SIMPLE COMMUNITY OF PROPERTY

**Assets and debts are shared as from the date of the marriage.** All the money, property and other assets of husband and wife from *BEFORE* the marriage remain their separate property, and all the debts and other liabilities from *BEFORE* the marriage remain their separate debts. All the money, property and other assets gained *AFTER* the date of the marriage are put together into a "joint estate" (with a few exceptions such as inherited property). The debts of both husband and wife *AFTER* the date of the marriage become debts against the joint estate, as long as both spouses consented to the debt. Both spouses have separate control of their separate property, but they must consent to any major transaction involving the joint estate.

### (2) EXTENDED COMMUNITY OF PROPERTY

**All assets and debts are shared, including those from before the date of the marriage.** All the money, property and other assets of husband and wife from *BEFORE AND AFTER* the marriage are put together into a joint estate" (with a few exceptions such as inherited property). The debts and other liabilities of both the husband and the wife from *BEFORE* the marriage become debts against the joint estate, as long as both spouses have been informed of these debts before the marriage takes place. The debts of both husband and wife *AFTER* the marriage become debts against their shared property, as long as both spouses consented to the debt. Both spouses must consent to any major transaction involving the joint estate.

### (3) OUT OF COMMUNITY OF PROPERTY WITH PROFIT SHARING

**Assets and debts stay separate during the marriage, but profits made by either spouse are shared equally when the marriage ends because of death or divorce.** All the money, property and other assets of husband and wife from *BEFORE AND AFTER* the marriage are kept separate. The debts and other liabilities of both the husband and the wife from *BEFORE AND AFTER* the marriage are kept separate. The husband and the wife each have control over their separate money and property. They do not need each other's consent for transactions. **BUT WHEN THE MARRIAGE ENDS BECAUSE OF DEATH OR DIVORCE,** husband and wife will share equally in the profits to their separate property since the marriage began. They will not share the debts, but the debts of each spouse are subtracted from the value of that spouse's separate property before the profit is calculated. In order to calculate the profit correctly, both spouses must indicate the value of their property and belongings as of the date of the marriage on the front of the marriage certificate. If either spouse has substantial property, that spouse must list the property and its approximate value on a separate page, which must be signed by both spouses, by two witnesses and by the marriage officer. If no value is listed, it will be assumed that both spouses started out with nothing.

### (4) STRICT OUT OF COMMUNITY OF PROPERTY

**Assets and debts stay separate. Nothing is shared.** All the money, property and other assets of husband and wife from *BEFORE AND AFTER* the marriage are kept separate. The debts and other liabilities of both husband and wife from *BEFORE AND AFTER* the marriage are kept separate. The husband and the wife each have control over their separate money, property and other assets. They do not need each other's consent for transactions.

**Matrimonial home:** No matter which marital property regime applies to the marriage, both spouses have a right to live in the matrimonial home and both need the other spouse's written consent for any transaction involving the home or its necessary and essential contents.

**Necessities for the joint household:** If the spouses are married in "simple or extended community of property", the costs of household necessities should come out of the joint estate. If they are married in "out of community of property with profit sharing" or "strict out of community of property", both spouses must contribute a fair share to the costs of household necessities in light of their respective financial positions.

**Joint estates or shared profits:** If the spouses have shared property or a future right to shared profits, then either spouse can go to court for help if the other spouse is acting in bad faith.

## MARITAL PROPERTY REFORM BILL

LRDC Subcommittee on Marital Property, 2008

To amend the civil and customary law on marital property; to establish four statutory marital property regimes; to regulate ante-nuptial and post-nuptial contracts; and to provide for matters connected therewith.

This draft Bill uses the term "marital property" to refer to the property arrangements which apply to couples who marry, by reference to different "marital property regimes". Another term which is sometimes used in this context is "matrimonial property". For example South Africa has a piece of legislation entitled the "Matrimonial Property Act". However, South African family law expert June Sinclair asserts that "matrimonial property" is a new term in South African law, pointing out that it can be properly understood to refer only to the property acquired during the marriage by the joint efforts or contributions of the parties (*The Law of Marriage, Volume I, Juta:1996, at 373, note 36*).

There will be much overlap between this new law and the Married Persons Equality Act (MPEA). To avoid confusing cross-references, it would be better to repeal the property provisions of the MPEA and re-enact them (with the suggested amendments) in this law. The repeal of marital power, the provisions on head of household and the provisions on domicile would remain in the MPEA.

### PART 1-INTRODUCTORY

Definitions

Establishment and application of marital property systems

### PART 2 - "SIMPLE COMMUNITY OF PROPERTY" AND "EXTENDED COMMUNITY OF PROPERTY"

Application of this Part Simple  
community of property

Extended community of property

Property excluded from the joint estate

Accounting in respect of joint estates

Debts incurred by one spouse prior to marriage

Debts incurred by one spouse during marriage

Damages for delict committed against one spouse by a person other than his or her  
spouse

Damages for delict committed against one spouse by the other spouse

Liability for delicts committed by spouses

Equal powers of spouses married in community of property

Spouse's juristic acts generally not subject to other spouse's consent

Acts requiring other spouse's consent

Consequences of acts performed without required consent

Litigation by or against spouses

Settlement of debts incurred by spouses married in simple or extended community of  
property

Power of court to dispense with spouse's consent with regard to specific act

Power of court to suspend power of spouse

Power of court where consent to transaction was obtained by threat or coercion  
Power of High Court to order division of joint estate  
Deferment of satisfaction of claim for share of joint estate

#### PART 3 - "OUT OF COMMUNITY OF PROPERTY WITH PROFIT SHARING"

Application of this Part  
Qualification of "out of community of property with profit-sharing"  
Operation of "out of community of property with profit sharing"  
Calculation of profit of estate of each spouse  
Inheritances, legacies and donations excluded from profit calculation  
Proof of commencement value of estate  
Obligation to furnish particulars of value of estate  
Power of High Court to order division of profit during subsistence of marriage  
Deferment of satisfaction of claim for share of profit

#### PART 4 - "STRICT OUT OF COMMUNITY OF PROPERTY"

Application of this Part  
Operation of "strict out of community of property"  
Qualification of "strict out of community of property"

#### PART 5-MATRIMONIAL HOME

Rights and duties pertaining to the matrimonial home during the subsistence of the marriage  
Treatment of matrimonial home upon divorce

#### PART 6 GENERAL PROVISIONS ON MARITAL PROPERTY

Application of this Part  
Donations between spouses permissible  
Effect of donations between spouses or their families  
Debts of spouses generally  
Liability of spouses married in "out of community of property with profit sharing" or in "strict out of community of property" for household necessities  
Choice of law for determining proprietary consequences of marriage  
Division of marital property prior to execution of deceased estate

#### PART 7 - POLYGAMOUS MARRIAGES

Property consequences of polygamous marriages

#### PART 8 - ANTE-NUPTIAL AND POST-NUPTIAL AGREEMENTS

Ante-nuptial contracts  
Ante-nuptial notices  
Post-nuptial changes to marital property regimes  
Invalidation of ante-nuptial or post-nuptial agreements

#### PART 9 - MARRIAGE REGISTRY

Public marriage registry

**PART 10-MAINTENANCE OF SURVIVING SPOUSES  
UPON DISSOLUTION OF MARRIAGE BY DEATH**

**Definitions applicable to this Part**

**Claim for maintenance against estate of deceased spouse**

**Determination of reasonable maintenance needs**

**Maintenance of minor children to take priority over maintenance of surviving spouse**

**PART 11 - JOINT BANK ACCOUNTS**

**Joint bank accounts for married couples**

**PART 12-GENERAL**

**Amendment of definition of spouse**

**Repeals**

**Short title and commencement**

**PART 1 - INTRODUCTORY**

**Definitions**

1. In this Act , unless the context indicates otherwise-

"ante-nuptial agreement" includes both an ante-nuptial contract and an ante-nuptial notice;

"ante-nuptial contract" means an ante-nuptial contract concluded before a notary and registered in the prescribed manner;

"ante-nuptial notice" means the indication of a marital property regime on a marriage certificate in the prescribed manner;

"couple " means a man and a woman who are engaged to be married or are otherwise intending by mutual consent to be married, or who have married in terms of either civil or customary law

"court" means the High Court of Namibia unless otherwise specified

"date of the marriage" means

- (a) in respect of a civil marriage, the date on which the marriage was solemnized before a marriage officer, and
- (b) in respect of a customary marriage, the date of the conclusion of the rituals required to establish a marriage in terms of the customary laws of the community in question, provided that this date shall not be dependent on the full delivery of any bridewealth , *lobola* or other gifts ,

and "at the time of marriage" and any similar phrases shall have a corresponding meaning;

"extended community of property" means the marital property regime set forth in Part 2;

"in community of property" when used in this law or in any other statute passed prior to this law, shall be interpreted to cover both "simple community of property" and " extended community of property" as defined in this statute;

"joint estate" means the joint estate of a husband and a wife married in community of property;

"marriage", where used without qualification, means a civil or a customary marriage;

To avoid objections such as those levelled at the Married Persons Equality Act, this law would apply equally to both civil and customary marriages. It is envisaged that in future, after the passage of the Divorce Bill and Recognition of Customary Marriages Bill, that all marriages will have the following in common:

- (a) they will have a marriage certificate which looks identical for all marriages, and simply has a space for designating civil or customary marriage
- (b) they will be presented with the same four choices of marital property regimes, subject to the limitations placed on property regimes for polygamous marriages
- (c) they will be concluded by a marriage officer
- (d) they will be subject to identical no-fault grounds for divorce and similar protections for vulnerable spouses and minor children upon the dissolution of the marriage by divorce
- (e) divorces must be formally recorded for both, since marriages of both types will be formally registered.

The differences between civil and customary marriages will be as follows:

- (a) different groups of persons may be specified as marriage officers for civil and customary marriages, with traditional leaders playing a role in customary marriages
- (b) the formalities for solemnizing the marriage will be different
- (c) there will be different forums for initiating divorce proceedings
- (d) some customary marriages will be polygamous in practice; even if polygamous marriages are forbidden in future, past polygamous marriages will still be in existence.

"marriage officer" means anyone appointed as a marriage officer in terms of the Marriage Act 25 of 1961 or any other legislation, or a comparable official duly recognised by law in any other country to solemnize or register civil or customary marriages;

"matrimonial home" means the dwelling where a married couple ordinarily resides, or ordinarily resided prior to the death of one spouse, and the necessary and essential household goods regularly used by the married couple;

"net value" means the value of the assets in a spouse's estate after subtracting all debts and liabilities against such estate;

"notary" means a notary public appointed in terms of section 86(2) of the Legal Practitioners Act, No 15 of 1995;

"out of community of property with profit sharing" means the marital property regime set forth in Part 3, and is identical with the marital property regime known at common law as the "accrual system" subject to the modifications made in this statute ;

"post-nuptial agreement" includes both a post-nuptial contract and a post-nuptial notice ;

"post-nuptial contract" means a post-nuptial contract concluded before a notary and registered in the prescribed manner;

"post-nuptial notice" means the indication of a marital property regime prescribed by statute before a Magistrate or a notary on the prescribed form in the prescribed manner ;

"simple community of property" means the marital property regime set forth in Part 2;

"spouse" means a husband or a wife in a civil or customary marriage ;

"strict out of community of property" means the marital property regime set forth in Part 4, and is identical with the marital property regime known at common law as "out of community of property " subject to the modifications made in this statute.

The statute uses the terms "estate", "non-patrimonial loss" and "patrimonial loss", but it is suggested that these terms should not be defined in the statute but their meanings at common law should apply so as to avoid confusion.

## **Establishment and application of marital property systems**

2. (1) There are hereby established four basic marital property systems which couples may choose by means of designation on their marriage certificate at the time of their marriage, in accordance with section x [*Ante-nuptial notices*]:

- (a) "simple community of property", as set forth in Part 2
- (b) "extended community of property", as set forth in Part 2
- (c) "out of community of property with profit sharing", as set forth in Part 3; and
- (d) "strict out of community of property", set forth in Part 4.

(2) Couples who wish to make other property arrangements or to modify any of the four statutory marital property regimes may do so by means of ante-nuptial contract as provided in section x [*Ante-nuptial contracts*] or by post-nuptial agreement as provided in section x [*Post-nuptial changes to marital property regimes*], provided that

- (a) no couple may at any time contract out of any of the provisions of the *Married Persons Equality Act, No 1 of 1996*;

(b) no couple may at any time contract out of any the provisions of this law, except where specified herein; and

(c) in the case of a polygamous customary marriage which is concluded after the commencement of this Act and during the existence of a customary marriage with another spouse, the only available marital property regime will be "strict out of community of property" as provided in section x [*Property consequences of polygamous marriages*], unless all the spouses in question consent to a different regime in an ante-nuptial or post-nuptial contract as provided in that section.

(3) (a) There shall be no default marital property regime for any marriages concluded after the commencement of this Act: Provided that if intending spouses fail to specify a marital property regime on their marriage certificate or in an ante-nuptial contract, there will be a rebuttable presumption that the marriage is in "out of community of property with profit sharing" as set forth in Part 3 of this statute.

(b) The presumption in subsection (a) may be rebutted by evidence that both spouses had the explicit or implicit intention to apply another property regime, or the explicit or implicit understanding that another property regime was automatically applicable to their marriage.

(c) If "out of community of property with profit sharing" is applied to a marriage in terms of this section, the value of each spouse's estate at the time of the marriage shall be deemed to be zero, unless either spouses can prove that another value should be applied to either spouse's estate at the time of the marriage.

After surveying a range of approaches used in other countries, we conclude that it is useful to stick with systems which are already somewhat familiar to Namibia's population and which will fit into Namibia's existing statutory framework.

We suggest that there should be four basic systems established by statute for use by couples who are intending to marry:

- "simple community of property"
- "extended community of property"
- "out of community of property with profit sharing" (a more descriptive name for the accrual system)
- "strict out of community of property".

Couples who wish to make other property arrangements by ante-nuptial agreement should be free to arrange their property affairs as they wish, provided that they should not be allowed to contract out of any of the statutory provisions designed to protect vulnerable parties.

We would suggest that there should be no default regime. Couples should rather be required to indicate on their marriage certificates which of the four basic property regimes they are choosing to govern their marriage, after listening to a standardised explanation provided by the marriage officer from information provided on the marriage certificate itself. (A draft marriage certificate with simple explanations of the four regimes to be printed on the reverse side is appended to this draft statute.)

Marriage officers should be equipped to answer questions about the possible regimes, and to provide additional information. They should also be charged with the duty of ensuring that both spouses are making informed choices of their own free will.



It is envisaged that in future there will be marriage officers who register customary marriages as well as marriage officers who register civil marriages, so the increased involvement of marriage officers in explaining property regimes could work in practice for both types of marriages.

Since marriage certificates are publicly witnessed, it seems appropriate to allow couples to choose one of the basic regimes by means of an indication on the certificate, rather than requiring preparation of an ante-nuptial contract by a lawyer.

However, the use of a detailed ante-nuptial contract should continue to be open to any couples who wish to choose this route.

Because of the recommendations concerning the possibility of changing one's marital property regime after the marriage, we propose that any new approach to default regimes could be applied prospectively, with all couples already married at the time the law reform comes into force (in civil marriage or in customary marriage) having the option to change their property regimes as provided.

Some persons consulted suggest that pre-marital counselling should be a legal requirement, to allow for an opportunity for marriage counsellors to explain the different property regimes. No such legal requirement has been included here, but persons who may engage in pre-marital counselling, such as pastors and traditional leaders, could be provided with explanatory material on the different marital property regimes and encouraged to discuss these with couples intending to marry.

If no designation is indicated on the marriage certificate, "out of community of property with profit sharing" would be applied to the marriage, unless there was evidence that both spouses actually intended to apply some other regime. This regime would be one of the easiest to apply retroactively without unfairness to either spouse, since it allows for separate administration of separate property during the subsistence of the marriage. (It is necessary to provide for some fall-back position in case of an oversight, but this would not be the same as a default, as all couples would be asked to indicate a choice.)

## **PART 2 - "SIMPLE COMMUNITY OF PROPERTY" & "EXTENDED COMMUNITY OF PROPERTY"**

The provisions from the Married Persons Equality Act 1 of 1996 relating to marital property are either re-enacted here, or in most cases improved, to address loopholes and shortcomings identified since 1996. It will be easier for all provisions relating to marital property to be combined in a single statute.

### **Application of this Part**

(I) Unless otherwise stated, the provisions of sections x - x of this Part [*Property excluded from the joint estate – Deferment of satisfaction of claim for share of joint estate*] shall apply to all marriages in "community of property", "simple community of property" or "extended community of property", regardless of the date of marriage, and may not be-

- (a) waived, or

- (b) changed or altered by means of ante-nuptial or post-nuptial agreement  
except as expressly provided in this law.

### **Simple community of property**

(1) (a) In a marriage in "simple community of property" , all of the assets and liabilities acquired by or accruing to either spouse *on or after* the date of the marriage shall constitute one joint estate, subject to section x [*Property excluded from the joint estate*] below.

(b) Each spouse shall own an undivided half share of the joint estate.

(c) Each spouse shall be entitled to administer the joint estate, subject to the rules contained in this Part or any other legislation.

(2) (a) Any money or property owned by a spouse *before* the date of the marriage shall remain that spouse's separate property, and any debts accrued before the date of the marriage shall remain the sole and exclusive responsibility of that spouse, subject to section x below, and shall be administered by the said spouse accordingly.

(b) Property acquired by one spouse after marriage shall be the separate property of that spouse where the acquisition is made by exchange of equal value for other separate property, or with money owned personally or derived from the sale of other separate property.

(c) Subject to section x [*Property excluded from the joint estate*] below, all money and property acquired on or after the date of the marriage shall be deemed to be part of the joint estate, even if registered in the name of only one spouse, unless a spouse proves that the money or property in question is his or her separate property.

It would be advisable for the spouses to list money and property held prior to the marriage, but we suggest that this should not be a legal requirement given the differing literacy skills and educational levels of different segments of the population. In any event, the real function of listing separate property would be only to shift the onus of proof from one spouse to the other.

Awareness-raising campaigns about the four basic regimes should point out the advantages of identifying and listing separate property held prior to the marriage. The Act will also allow for future regulations which could elaborate on the listing of separate property at a later stage if necessary. It is also open to creditors to ask spouses to whom this system applies to list their separate property before extending credit to them.

(d) Each spouse has the right to administer, encumber, alienate, donate or otherwise transact with his or her separate property.

(e) Any income derived from property owned by either spouse prior to the marriage and accruing to that spouse on or after the date of the marriage shall form part of the joint estate, with the exception of income on cash deposits , shares, stocks, debentures , debenture bonds, insurance policies, mortgage bonds, fixed deposits or similar assets.

Essentially, "simple community of property" is equivalent to "in community of property" BUT ONLY with respect to the debts, income and assets of either spouse AFTER the date of the marriage - like accrual, but with joint management of the joint estate during the marriage.

This system is likely to be the fairest option for most people as it retains most of the advantages of "extended community of property" but makes the date of the marriage the starting point for the pooling of debts and assets. In this way, the married couple starts out with a "clean slate ", with pre- existing debts and assets accruing individually to the spouse who incurred or acquired them.

This system is the only option available to married couples in Ethiopia, and is similar to the default system in Mozambique. Lawyers from these countries report that the public, particularly women, find the "simple community of property" system to be a very positive one. Men (who are usually the economically stronger partners) should also welcome it, as it prevents marriage from being seen as a winning lottery ticket with respect to previously-accrued wealth, while still providing a basis for an equitable partnership from the date of marriage forward.

It was recommended in consultations that the income from property owned before the marriage (such as offspring of livestock or rent paid on property which is hired out) should form part of the joint estate, as the direct or indirect contributions of the other spouse or inputs from the joint estate are more likely than not to have contributed to such income. This provision excludes forms of income such as interest on cash bank deposits and stock dividends or increases in share value, which are more likely to accrue automatically. It should be noted that this approach differs from the common-law treatment of separate property excluded from the joint estate, where income from the excluded property appears to remain the separate property of the spouse in question.<sup>1</sup>

### **Extended community of property**

(1) In a marriage in "extended community of property", all of the assets and liabilities acquired by or accruing to either spouse *before or during* the marriage shall constitute one joint estate, subject to section x [*Property excluded from the joint estate*]below .

(2) Each spouse shall own an undivided half share of the joint estate.

(3) Each spouse shall be entitled to administer the joint estate, subject to the rules contained in this Part or any other legislation.

(4) Subject to section x [*Property excluded from the joint estate*] below, all money and property acquired before or during the marriage shall be deemed to be part of the joint estate, even if registered in the name of only one spouse, unless a spouse proves that the money or property in question is his or her separate property in terms of the rules set forth in this Part or any other legislation.

---

See *Erasmus*, 1942 AD 157 at 1 61 -2.

### **Property excluded from joint estate**

(1) Regardless of anything contained in the common law, the property of a husband and wife acquired before or during a marriage in "extended community of property", or during a marriage in "simple community of property", shall form part of the estate with the following exceptions:

- (a) assets expressly excluded from the joint estate by an ante-nuptial or post-nuptial contract made in accordance with this Act;
- (b) assets acquired by either spouse by way of inheritance, whether by means of intestate succession or testamentary disposition, and irrespective of whether or not there is an express condition in the relevant testamentary disposition excluding such bequest from the joint estate;
- (c) traditional property acquired before or after the marriage which in terms of the relevant customary law must be held personally by the spouse in question, or held in trust by the spouse in question for the benefit of other members of the spouse's kin group;
- (d) assets subject to a *fideicommissum* or usufruct;
- (e) the engagement ring and other gifts made with a view to marriage;
- (f) life insurance policies which are exempted from the joint estate by the *Long-term Insurance Act, No. 5 (1998)*;
- (g) benefits paid under the *Friendly Societies Act, No. 25 of 1956*; and
- (h) any other property excluded by legislation from the joint estate.

(2) Where any property of a spouse excluded in terms of section 1 is replaced by cash or other assets, the substituted assets shall remain the separate property of such spouse and shall not form part of the joint estate: Provided that the onus of proving that the assets in question were so acquired shall rest with the spouse who is claiming the exclusion.

(3) Any assets excluded from the joint estate by this section may be included in whole or in part by ante-nuptial or post-nuptial contract.

(4) Regardless of whether or not the matrimonial home is excluded from the joint estate by an ante-nuptial or post-nuptial contract made in accordance with this Act, the provisions on the matrimonial home in section x [*Matrimonial home*] shall apply and the spouses are not competent to contract out of these provisions.

(5) Any order of costs imposed in a matrimonial action before the marriage is dissolved shall be satisfied out of the separate property of the spouse against whom the order is made, or if there is insufficient separate property, then the division of the joint estate shall be adjusted accordingly.

Most of these points are covered by the common law, but the exclusions would be clearer to intending spouses if the list is codified.
---------------------------------------------------------------------------------------------------------------------------------------

It should also be noted that the provision on the exclusion of bequests is broader than the common law position. The position stated here would seem to accord with fundamental fairness, and it does not preclude spouses from concluding an ante-nuptial or a post-nuptial contract making inheritances part of the joint estate if they so desire. However, the default position of excluding *all inheritances* would prevent one person from marrying another in hopes of getting hold of that spouse's accumulated family wealth.

This would also be helpful in customary marriages, where the inherited property of a spouse may in fact be held in trust to be used for the support of other blood relatives. Including this exclusion would make the two "community of property" options more attractive and appropriate for customary situations.

### **Accounting in respect of joint estates**

(1) At the request of a spouse, the other spouse must render an account to the latter of any income, property or other assets received by or due to him or her which form part of the joint estate, and of any debts or other liabilities against the joint estate.

(2) A Magistrate's Court may, on the application of one spouse, compel the other spouse to render an account to the applicant spouse of any income or property received by him or her which forms part of the joint estate, and of any debts against the joint estate.

(3) If any assets or debts are willfully omitted from an accounting made in terms of subsections (1) or (2), then the division of the joint estate must be adjusted so that-

- (a) any assets omitted are credited in full to the portion of the joint estate allocated to the spouse to whom the falsified accounting was made rather than being divided equally between the two spouses, and
- (b) any debts omitted are charged in full against the portion of the joint estate allocated to the spouse who falsified the accounting.

This provision provides for full disclosure of the assets and debts of the joint estate to both parties who share in that estate, to be achieved by court order if necessary. The penalty for willfully falsifying an accounting is that assets omitted are applied to the sole benefit of the wronged spouse, and debts omitted become attributable solely to the spouse who falsified the account upon the dissolution of the estate.

### **Debts incurred by one spouse prior to marriage**

(1) Any debt incurred by one spouse prior to the date on which the marriage is concluded shall be satisfied out of the indebted spouse's separate property.

(2) If the marriage is in "extended community of property" and the indebted spouse has no separate property or insufficient separate property to settle the debt, then a debt incurred prior to the date of the marriage may be recovered out of the joint estate, and upon the division of the joint estate an adjustment in respect of the amount paid out of the joint estate in satisfaction of the debt shall be effected in favour of the other spouse or his or her estate, as the case may be.

In terms of the common law, in a marriage "in community of property", the ante-nuptial debts of both spouses become joint debts upon the marriage, to be paid out of the joint estate. This applies not only to contractual and delictual debts, but also to maintenance obligations toward parents, siblings, children from a previous marriage, and extra-marital children. It is not possible to stipulate in an ante-nuptial contract that there will be a community of assets but not of debts.

This provision modifies that position by requiring that debts incurred by one spouse prior to the marriage should be satisfied in the first instance out of that spouse's separate property, before the joint estate becomes liable for the debt. If joint property is used to satisfy the debt, a corresponding adjustment would be made at the time of the division of the joint estate. This modification is necessary to be fair to the un-indebted spouse, as the debt in question could easily be hidden from him or her. However, the proposed solution also ensures that creditors are not disadvantaged.

Debts incurred by either spouse after the marriage would lie against the joint estate, provided that the rules on spousal consent regarding administration of the joint estate are correctly followed, as the following section indicates.

#### **Debts incurred by one spouse during marriage**

(1) Subject to the other provisions in this Part, debts incurred by one spouse during a marriage in simple or extended community of property may be recovered from the joint estate, subject to section x [*Settlement of debts incurred by spouses married in simple or extended community of property*].

(2) Where a debt has been incurred in the interest of the household and with the consent of both spouses, it shall be deemed to be a joint and several obligation of both spouses and may be recovered from the joint estate or from the separate property of either of the spouses.

#### **Damages for delict committed against one spouse by a person other than his or her spouse**

(1) Notwithstanding the fact that a spouse is married in simple or extended community of property, any amount recovered by him or her as damages for a delict committed against him or her by any person other than his or her spouse-

(a) if for patrimonial loss in respect of assets or property which fall into the joint estate, shall become part of the joint estate;

(b) if for patrimonial loss in respect of assets or property which do not fall into the joint estate, shall not become part of the joint estate but shall become his or her separate property; and

(b) if for non-patrimonial loss, shall not become part of the joint estate but shall become his or her separate property.

At common law, damages recovered by one spouse for a delict (a wrong) committed against him or her (including damages for both patrimonial and non-patrimonial loss) become part of the joint estate, unless the court makes an express order that the damages awarded should be excluded from the estate.

In South Africa, the common law position on this point has been changed by the *Matrimonial Property Act 88 of 1984*, which provides that any damages recovered by a spouse in respect of *non-patrimonial* loss are automatically *excluded* from the joint estate, becoming the separate property of the injured spouse.

The South African change is a logical one - damages paid in respect of losses to the joint estate (patrimonial losses) become part of the joint estate, while damages based on an injury to personality (non-patrimonial losses) are automatically kept out of the joint estate since they relate only to the injured party. This position is proposed for Namibia.

### **Damages for delict committed against one spouse by the other spouse**

(1) Notwithstanding anything to the contrary in any other law, a spouse married in community of property may recover damages from the other spouse in respect of a delict committed against him or her which is attributable either wholly or in part to the fault of the other spouse.

(2) Any amount recovered by him or her from the other spouse as damages for such delict shall not form part of the joint estate for any purpose, regardless of whether the damages are for patrimonial or non-patrimonial loss.

(3) Such damages must be paid out of the separate property of the spouse who committed the delict, and if there is insufficient separate property, then upon the division of the joint estate an adjustment in respect of the outstanding damages shall be effected in favour of the wronged spouse or his or her estate, as the case may be.

(4) This subsection shall apply only to damages recovered in respect of delicts committed after the date on which this Act comes into force.

(5) Subsections (1)-(4) shall apply, with the necessary changes, to compensation awarded in terms of section 326 of the *Criminal Procedure Act J 25 of 2004* in respect of a criminal offence committed by one spouse against the other.

The common law still precludes spouses in Namibia who are married "in community of property" from suing each other in delict. The reasoning is that because there is only one estate, any damages which the injured spouse might recover would of necessity come out of this joint estate and then immediately fall back into it.

Situations where one spouse commits a wrong against the other spouse jointly with a third party are covered in part in Namibia by the *Apportionment of Damages Act 34 of 1956* (as amended in 1971). This Act provides that an injured spouse can sue a third party and the other spouse as joint wrongdoers in the same action, for both patrimonial and non-patrimonial loss. The injured spouse can alternatively sue the third party alone, and the third party can then make a claim for contributory negligence against the guilty spouse. Damages awarded to the injured spouse in respect of non-patrimonial loss (such as damages for pain and suffering) are protected from being taken by a third party in a claim for contribution against the guilty spouse. This protection is very limited, however, since it applies only to the context where a third party makes a claim for contribution. If the marriage is dissolved, the damages awarded to the innocent spouse are for this purpose considered part of the joint estate, meaning that the spouse who was involved in the wrongdoing *can benefit from his or her own wrong* by receiving a half-share of the damages awarded to the other spouse for the wrong. The statute has been very narrowly interpreted in the *Delpont* case, apparently to apply only to situations where the third party who is a joint wrongdoer wishes to join the spouse to the action against him or her.



The *Delport* case held that the 1971 amendments do not remove the general prohibition on claims for delicts between spouses married "in community of property", regardless of whether the spouse who has committed the wrong is a sole or a joint wrongdoer.<sup>2</sup>

In South Africa, this issue was addressed more comprehensively by section 18(b) of the Matrimonial Property Act 88 of 1984 which provides that a spouse may sue to recover damages from the other spouse, but **only** for damages "*other than damages for patrimonial loss in respect of bodily injuries suffered by the spouse and due wholly or in part to the fault of the other spouse*". However, in the 2005 case *Van der Merwe v Road Accident Fund and Others*, the Constitutional Court of South Africa held that the South African restriction on the damages recoverable from one spouse in respect of a delict committed by the other spouse is unconstitutional. The Court ruled that the restriction of such damages to those "other than for patrimonial loss" is unconstitutional, and that all damages in respects of such a delict must become the separate property of the injured spouse. The court's reasoning was that the statute as drafted drew a distinction between marriages in community of property and other marriages and domestic partnerships, but that this distinction was not related to a rational purpose and therefore violated the Constitutional right to equal protection and benefit of the law.

The proposed Namibian provision would avoid the mistake made in South Africa on this point, by going farther than the 1984 reforms in South Africa as follows:

- The proposed provision would make it possible for a spouse married in simple or extended community of property to receive damages for a delict committed against him or her by the other spouse for either patrimonial or non-patrimonial loss.
- The damages awarded are to be paid out of the separate property of the spouse who committed the wrong, if possible. If there is no separate property, then the damages should be provided by means of an adjustment to the joint estate in favour of the wronged spouse at the time of division of the joint estate.
- The damages awarded to the innocent spouse should not be considered as part of the joint estate for any purpose.
- Filling in the gap which caused confusion in South Africa, the Namibian draft specifies that these rules apply only to delicts committed after the date on which the reforms come into force.<sup>3</sup>

The same rules should apply to compensation awarded under section 326 of in the *Criminal Procedure Act 125 of 2004* in respect of a criminal offence committed by one spouse against the other.

## Liability for delicts committed by spouses

(1) When a spouse is liable for the payment of damages for patrimonial or non-patrimonial loss by reason of a delict committed by that spouse, or when a contribution is recoverable from a spouse under the Apportionment of Damages Act, 1956 (Act 34 of 1956), such damages or contribution and any costs awarded against that spouse are recoverable from the separate property, if any, of that spouse, and only in so far as he or she has no separate property, from the joint estate.

<sup>2</sup> See *Delport v Mutual and Federal Insurance* 1984 (3) SA 191 (Durban and Coast Local Division), which held that section IA of the *Apportionment of Damages Act* (inserted by the 1971 amendments) was intended to work in the interests of the wrongdoer and not to confer a right of action on a plaintiff spouse against a husband to whom she is married "in community of property". Thus, it was decided that a spouse had no right of action at common law for a delict committed against her by her spouse, and that the Act does not confer such a right whether her husband is a sole or joint wrongdoer.

<sup>3</sup> See June D Sinclair and Felicity Kaganas, "Law of Persons" in *Annual Survey of South African Law*, 1984 at 94.



(2) Insofar as such damages, contribution or costs have been recovered from the joint estate, a corresponding adjustment shall, upon the division of the joint estate, be effected in favour of the other spouse or that spouse's estate, as the case may be.

Case law does not agree on the treatment of damages in respect of a delict (a wrong) committed by a spouse. One view is that liability during the subsistence of the marriage is chargeable only against the half-interest in the joint estate of the spouse who committed the delict.<sup>4</sup> The principle here is that no one should be held liable for the wrongs of another, meaning that each spouse should bear sole responsibility for debts arising from their own wrongdoing

The other view is that the joint estate can be made liable in full for damages payable in respect of delicts committed by either of the spouses during the subsistence of the marriage.<sup>5</sup> The innocent spouse probably has a claim for adjustment in respect of such debts against the other spouse upon dissolution of the marriage, but this principle is not clearly established in modern case law.<sup>6</sup> The underlying argument here is that community of property contemplates community of all debts and assets, and that there is no justification for making exceptions in respect of some particular kinds of debts but not others.<sup>7</sup>

In South Africa this confusion has been laid to rest by the section 19 of the *Matrimonial Property Act 88 of 1984*. A similar provision is proposed above.

While it is true that a marriage "in community of property" is a financial partnership which generally encompasses both debts and assets, it does not seem fair to assume that the intending spouses have contemplated equal sharing of acts which are found to be legally wrongful in any way. It makes sense to charge damages arising from civil liability against any separate property of the spouse who has committed the delict in the first instance, and to allow an adjustment in favour of the innocent spouse for any such damages taken out of the joint estate upon dissolution of the estate. This approach does not prejudice the creditor in any way, but still ultimately places responsibility for the delict (insofar as possible) only on the half-share of the estate which belongs to the spouse who committed the delict.

---

<sup>4</sup> See *Levy v Fleming* 1931 TPD 62; *Boezaart & Potgieter v Wenke* 1931 TPD 70 at 87. This view was stated in *Pretoria Municipality v Esterhuizen* 1928 TP D 678 (in dicta): *The weight of authority seems to be in favour of the view that as between husband and wife the one is not liable for damages recovered by a third person for a delict by the other, except in special circumstances, for instance ... when the delict is committed in the interests of the joint estate.* [citation omitted].

<sup>5</sup> *Erikson Motors v Scholtz* 1960 (4) SA 791 stated that the joint estate of spouses married in community of property is liable in full for the independent and uninstigated delicts of the wife. In *Oppermann v Opperman* 1962 (3) SA 40 (N), it was held that where a wife who is married in community of property has committed a delict, the person entitled to claim damages can claim from the joint estate. The innocent spouse's request for an immediate dissolution of the community to protect his half-share of the estate was declined by the court, even though the existing assets of the entire estate were insufficient to cover the delict. The question of whether or not there could be an adjustment in favour of the innocent spouse at the time of dissolution was not decided, but the court indicated that this was doubtful.

<sup>6</sup> Hahlo, *The South African Law of Husband and Wife* (4<sup>th</sup> edition, 1975) at 238.

<sup>7</sup> *Id* at 233-38.

### **Equal powers of spouses married in community of property**

Subject to this Part or any other legislation, a husband and wife married in community of property have equal capacity -

- (a) to dispose of the assets of the joint estate;
- (b) to contract debts for which the joint estate is liable; and
- (c) to administer the joint estate.

---

This repeats section 5 of the Married Persons Equality Act, No I of 1996.

---

### **Spouse's juristic acts generally not subject to other spouse's consent**

Subject to this Part, a spouse married in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

---

This repeats section 6 of the Married Persons Equality Act, No 1 of 1996.

---

### **Acts requiring other spouse's consent**

(1) A spouse married in simple or extended community of property shall not without the written consent of the other spouse signed by two witnesses, engage in any transactions involving the joint estate where such transactions involve cash or property in excess of a value set by regulation from time to time, except in the cases of transactions involving-

- (a) moneys in a joint account held by the spouses at a banking institution; or
- (b) moneys in an account held by one spouse where that spouse has given written consent for the other spouse to act as a signatory on the account, in writing, with two witnesses; or
- (c) cash withdrawals from any account made at automated teller machines or cash obtained in similar electronic fashion;

or where the spouses have made an express written agreement signed by two witnesses mutually authorizing each other to engage in such transactions of any higher amount: Provided that such an agreement may be revoked in writing at any time by either of the spouses.

(2) A spouse married in simple or extended community of property shall not without the written consent of the other spouse signed by two witnesses, engage in the following transactions in respect of the joint estate, regardless of the amount of money or the value of the property involved-

- (a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;

- (b) enter into any contract for the alienation , mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate;
- (c) alienate , cede, or pledge any shares, stocks, debentures , debenture bonds, insurance policies, mortgage bonds, fixed deposits or similar assets, or any investment by or on behalf of the other spouse in a financial institution , forming part of the joint estate;
- (d) alienate or pledge any jewellery, coins, stamps , paintings , livestock, or any other assets forming part of the joint estate and held mainly as investments ;
- (e) alien ate, pledge, or otherwise burden any furniture or other effects of the common household forming part of the joint estate;
- (f) as a credit receiver enter into a credit agreement as defined in the section 1 of Credit Agreements Act, 1980 (Act 75 of 1980) , regardless of whether that Act applies to such credit agreement in terms of section 2 thereof, or into any other credit agreement;
- (g) as a purchaser enter into a contract as defined in the Sale of Land on Instalments Act, 1971 (Act 72 of 1971), and to which the provisions of that Act apply;
- (h) bind himself or herself as surety;
- (i) receive any money due or accruing to that other spouse or the joint estate by way of -
  - (i) remuneration , earnings, bonus, allowance , royalty, pension or gratuity by virtue of the other spouse' s employment, profession, trade, business , or services rendered by him or her;
  - (ii) compensation for loss of any income contemplated in sub-paragraph (i);
  - (iii) inheritance, legacy, donation , bursary or prize left, bequeathed , made or awarded to the other spouse;
  - (iv) income derived from the separate property of the other spouse;
  - (v) dividends or interest on or the proceeds of shares or investments in the name of the other spouse; or
  - (vi) the proceeds of any insurance policy or annuity in favour of the other spouse; or
- (j) donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate, and which is not contrary to any of the provisions of paragraph (a), (b), (c), (d) and (e).

(4) Notwithstanding subsection (2)(c), a spouse married in simple or extended community of property may without the consent of the other spouse -

- (a) sell listed securities which form part of the joint estate on a stock exchange and cede or pledge such listed securities in order to buy other listed securities; or
- (b) alienate, cede, or pledge building society shares registered in his or her name which form part of the joint estate.

(5) Notwithstanding subsection (1), a spouse married in simple or extended community of property may, in the ordinary course of his or her profession, trade, occupation, or business perform any of the acts referred to in paragraphs (b), (c), (f) and (g) of subsection (2), without the consent of the other spouse as required by that subsection.

(6) Notwithstanding subsection (1), a spouse married in simple or extended community of property may engage in any of the listed transactions without the consent of the other spouse whenever the transaction takes place in an emergency situation or in respect of a matter of urgency, and the joint estate shall be liable for the transaction provided that it is subsequently ratified by the spouse whose prior consent was not obtained.

(7) In determining whether a donation or alienation contemplated in subsection (2) (j) does or probably will unreasonably prejudice the interest of the other spouse in the joint estate, the court shall have regard to the value of the property donated or alienated, the reason for the donation or alienation, the financial and social standing of the spouses, their standard of living and any other factor which in the opinion of the court should be taken into account.

(8) One spouse shall not engage in transactions involving money held in the name of the other spouse at a bank or any other banking or savings institution, unless

- (a) the account is a joint one; or
- (b) one spouse is a signatory on an account held by the other spouse;

and even if one spouse is so authorized to deal with money held in the name of the other spouse, the other provisions of this section shall continue to apply if the money in question forms part of the joint estate.

This repeats section 7 of the Married Persons Equality Act, No I of 1996, with significant improvements - some of which are based on comparison with the South African Matrimonial Property Act, No 88 of 1984. The corresponding provisions of Namibia's Married Persons Equality Act, No 1 of 1996 seem to favour the protection of third parties to the extent that meaningful enforcement for married couples is not sufficiently provided for.

We recommend that the Namibian statute be strengthened along the lines of the comparable South African law, to make it more effective in practice. This proposed provision requires *written* consent with two witnesses, for all major financial transactions involving the joint estate, including all transactions involving cash or property in excess of an amount set by regulation (which we suggest setting at N\$500 at this time).

The small number of Namibian couples who regularly engage in transactions above this amount could make a single agreement authorizing transactions up to a higher maximum amount.

Section 15 of the South African Matrimonial Property Act, No 88 of 1984 requires written consent for a similar list of transactions. (One important distinction is that the South African law does not cover cash transactions, which are dealt with in subsection (1) of the draft proposed above. The South African law also fails to supply a minimum value, which is used here to allow for unrestricted transactions involving minimal financial obligations.)

The subsections from the Married Persons Equality Act, No 1 of 1996 on (a) oral consent to transactions and (b) ratification of transactions after they take place have been deleted here, as these appear to substantially undermine the intended protection for the spouses in practice and reduce the duty of care which must be taken by third parties.

Both the Namibian Married Persons Equality Act and the relevant South African law allow a spouse to alienate, cede or pledge "a deposit held in his or her name at a building society or bank" without the other spouse's consent. Since all bank accounts of married couples must at present be held in name of one spouse, this provision undermines the other protections considerably - since it is likely that the couple 's entire assets might be held in a bank deposit in the name of one spouse. This provision might, if widely-known and understood, even discourage the use of bank accounts by married couples. Therefore, we recommend the deletion of this sub-clause.

The exception for listed securities in subsection (4) above should be discussed with relevant financial experts, as the subcommittee was not clear on the necessity for this exception. We recommend leaving this sub-clause intact until it is discussed further.

Despite these provisions, it would still of course be possible for one spouse to have a power of attorney for the other spouse, or to be appointed to deal with the property of an incapacitated spouse by means of court order.

It should be noted that the most controversial aspect of the proposed reforms is the requirement of spousal consent for transactions in cash and in kind where a marriage is in one of the community of property regimes. The **advantages** of adding this requirement are as follows:

- \* Allowing unlimited transactions in cash or property is a huge loophole which can be used to undermine the other protections provided
- \* Many couples in Namibia do in practice conduct transactions in cash or in kind involving significant amounts of assets. For low- income couples, such transactions may involve substantial portions of the couple s joint estate.
- \* Remedies available after a transaction has taken place (such as asking a court to suspend the powers of one spouse or to make an adjustment to the ultimate division of the joint estate) involve legal procedures which are less accessible to low income couples. Furthermore, there may be few assets left to divide in a joint estate if major cash transactions have already taken place unilaterally by one spouse.
- \* Omitting major cash transactions from the requirements of mutual consent makes the law inconsistent. For example, this would mean that a person would need spousal consent to enter into a hire-purchase contract for N\$10 000 but would not need consent to spend N\$10 000 in cash for the same goods. Yet the impact on the joint estate would be similar in each case.

The **disadvantages** of adding a spousal consent requirement for transactions in cash or in kind are as follows:

- \* This could cause inconvenience in commerce if purchasers must show copies of their marriage certificates and their spousal consents.
- \* Some persons consulted felt that such a requirement would be excessive interference by the law in daily life.
- \* It should also be noted that South Africa's similar legislation does not cover transactions in cash or in kind.

The exemptions for transactions involving joint accounts and accounts where both spouses are signatories are intended to help alleviate practical inconveniences.

ATM withdrawals were exempted at the suggestion of a representative of the Bankers Association since there is no way to enforce consent to such withdrawals. However, banks could be required to request spousal consent if necessary before authorising individual account-holders married in community of property regimes to make ATM withdrawals in excess of the amount set by regulation.

It was asked during consultations whether the law should allow couples to authorise different amounts for maximum cash transactions for husband and wife. Most felt that this would be unwise as it would undermine the principle of equal powers of administration.

It was noted in consultations that some of the difficulties of implementing this requirement in practice would be alleviated once the envisaged central credit record is in place as provided for in the forthcoming Financial Institutions and Markets Bill.

### **Consequences of acts performed without required consent**

(1) When a spouse enters into a transaction with a person contrary to the provisions of section X [*Acts requiring other spouse's consent*], or an order under section X [*Power of court to suspend power of spouse*], and that person knew or should reasonably have known that the transaction is being entered into contrary to those provisions or that order, or failed to exercise reasonable care to ensure that the necessary consent had been obtained or that there was no contrary court order under section X [*Power of court to suspend power of spouse*] --

- (a) the other spouse may seek an order from a Magistrate's Court or the High Court reversing the transaction or ordering the person who was the other party to the transaction to pay compensation for any loss to the joint estate as a result of that transaction; or
- (b) upon the division of the joint estate an adjustment in respect of any loss suffered by the joint estate as a result of that transaction shall be effected in favour of the wronged spouse or his or her estate, as the case may be; or
- (c) the wronged spouse may approach a Magistrate's Court or the High Court for an adjustment in respect of any loss suffered by the joint estate as a result of that transaction at any time during the subsistence of the marriage.

(2) When a spouse enters into a transaction with a person contrary to the provisions of section X [*Acts requiring other spouse's consent*], or an order under section X [*Power of court to suspend power of spouse*], and that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order then-

- (a) upon the division of the joint estate an adjustment in respect of any loss suffered by the joint estate as a result of that transaction shall be effected in favour of the wronged spouse or his or her estate, as the case may be; or
- (b) the wronged spouse may approach a Magistrate 's Court or the High Court and demand an adjustment in respect of any loss suffered by the joint estate as a result of that transaction at any time during the subsistence of the marriage .

(3) In determining for the purposes of subsections (1) (b) or (2) whether or not a joint estate has suffered any loss as a result of the alienation of any property, regard shall be had not only to the economic value of the property in question but also to any sentimental value which, at the time of alienation of that property, such property had to the spouse without whose consent the property was alienated.

(4) Where the amount of a loss determined for the purpose of subsection (1)(b) or (2) consists of, or includes , an amount representing -

- (a) the sentimental value of any property as contemplated in subsection (3); or
- (b) the value of any asset being a personal effect of the spouse without whose consent such asset was alienated

the amount representing that value shall upon the making of an adjustment be allocated in full for the benefit of the spouse without whose consent the property in question was alienated, and no deduction shall be allowed in respect of the other spouse by virtue of his or her interest in the joint estate.

(5) Where pursuant to an application by a spouse in terms of subsection (1)(c) or (2) (b) for an adjustment during the subsistence of a marriage an amount is determined to be payable to that spouse in settlement of such adjustment-

- (a) the amount in question shall be recovered from the separate property, if any, of the other spouse, and only insofar as such other spouse has no separate property, from the joint estate: Provided that where an amount is recovered from the joint estate, there shall, upon *ii* subsequent division of the joint estate, be allocated to the spouse to whom the payment was made, and as a first charge against the value of the assets available for distribution , such an amount as that spouse may have contributed to the said adjustment by virtue of his or her interest in the joint estate.
- (b) where there is separate property from which the amount in question can be recovered, the court shall have the power to issue a warrant of execution against such property.



This repeats and expands on the limited remedies provide in section 8 of the Married Persons Equality Act, No 1 of 1996. As an addition, it makes explicit provision for *the recovery of assets from third parties*, in cases where a transaction took place without the necessary consent of the other spouse, and the third party must reasonably have known that there was no consent, or else failed to exercise reasonable care to ensure that the necessary consent had been obtained.

To improve accessibility, this proposed provision makes the Magistrate's Court and the High Court both competent forums for (a) requests for adjustment of the estate to rectify a transaction without the required spousal consent during the subsistence of the marriage and (b) procedures for the recovery of assets from third parties in appropriate cases.

### **Litigation by or against spouses**

(1) A spouse married in simple or extended community of property shall not without the written consent of the other spouse institute legal proceedings against another person or defend legal proceedings instituted by another person, except legal proceedings -

- (a) in respect of his or her separate property;
- (b) for the recovery of damages, other than damages for patrimonial loss, by reason of the commission of a delict against his or her person;
- (c) in respect of a matter relating to his or her profession, trade, occupation, or business.
- (d) where the other spouse is potentially liable in whole or in part for a delict committed against him or her.

(2) A party to legal proceedings instituted or defended by a spouse may not challenge the validity of the proceedings on the ground of want of the consent required in terms of subsection (1).

(3) If costs are awarded against a spouse in legal proceedings instituted or defended by him or her without the consent required in terms of subsection (1), the court may, with due regard to the interest of the other spouse in the joint estate and the reason for the want of consent, order that those costs be recovered from the separate property, if any, of the first-mentioned spouse and, insofar as those costs cannot be recovered, that they be recovered from the joint estate, in which case the court may order that upon the division of the joint estate an adjustment shall be effected in favour of the other spouse or his or her estate, as the case may be.

---

This essentially repeats section 9(1)-(3) of the Married Persons Equality Act, No 1 of 1996.



### **Settlement of debts incurred by spouses married in simple or extended community of property**

(1) Any debt incurred by one spouse in excess of N\$500 without the written consent of the other spouse signed by two witnesses, by means of a transaction listed in section X [*Acts requiring other spouse's consent*] or otherwise, shall be settled out of the indebted spouse's separate property, and if the indebted spouse has insufficient separate property to settle such debt, then upon the division of the joint estate an adjustment in respect of the amount paid out of the joint estate in settlement of the debt shall be effected in favour of the other spouse or his or her estate, as the case may be.

(2) If the debt incurred by one spouse was incurred with the consent of the other spouse, then the debt may be settled out of the separate property of the indebted spouse or the joint estate, and the creditor may as a last resort proceed against the separate property of the other spouse to settle the debt if the separate property of the indebted spouse and the assets in the joint estate are insufficient.

(3) Where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for necessities for the joint household, the spouses may be sued jointly or severally therefor.

(4) (a) An application for the surrender of a joint estate shall be made by both spouses.

(b) An application for the sequestration of a joint estate shall be made against both spouses: Provided that no application for the sequestration of the estate of a debtor shall be dismissed on the ground that such debtor's estate is a joint estate if the applicant satisfies the court that despite reasonable steps taken by him or her, he or she was unable to establish the debtor's marital property regime or the name and address of the spouse of the debtor.

If a debt for more than \$500 (or such higher amount as is agreed to by the parties) is incurred without the consent of the other spouse, then only the portion of the estate which can be rightfully allocated to the spouse who incurred the debt should be available for satisfaction of the debt.

Subsections (1)-(3) apply and limit the holding in *Du Plessis and Pienaar NO & Others* 2003 (1) SA 671 (SCA), which found that debts by spouses married in community of property could be satisfied out of the separate property of both spouses as well as from the joint estate. This principle is limited here by (a) specifying that the consent of both spouses is required before the separate property of the other spouse can be attached for the settlement of the debt, and (b) making the separate property of the other spouse last in the order of priority for settlement of such a debt.

The remainder of this section is based on section 9(4)-(5) of the Married Persons Equality Act, No 1 of 1996.

### **Power of court to dispense with spouse's consent with regard to specific act**

When a spouse withholds the consent required in terms of section x (1) or (2) [*Acts requiring other spouse's consent*], or when that consent can for any other reason not be obtained, a Magistrate's Court or the High Court may on the application of the other spouse give him or her leave to enter into the transaction without the required consent if it is satisfied, in the case where the consent is withheld, that such withholding is unreasonable or, in any other case, that there is good reason to dispense with the consent.

---

This essentially repeats section 10 of the Married Persons Equality Act, No 1 of 1996.

---

### **Power of court to suspend power of spouse**

If a Magistrate's Court or the High Court is satisfied that it is essential for the protection of the interest of a spouse in the joint estate, it may on the application of that spouse suspend for a definite or an indefinite period any power which the other spouse may exercise in respect of that joint estate, either in general or in relation to a particular act as the court may specify in its order.

---

This essentially repeats section 11 of the Married Persons Equality Act, No 1 of 1996.

---

### **Power of court where consent to transaction was obtained by threat or coercion**

Where a Magistrate's Court or the High Court is satisfied that consent of one spouse was obtained or influenced by actual or threatened violence or coercion, either at the time of negotiations or at any time before the consent was given, and that it would cause serious injustice to enforce the consent given or any of its terms, such court may -

- (a) issue an order varying or setting aside the transaction;
- (a) issue an order for the recovery of assets or losses from third parties in any case where the third party knew or ought reasonably to have known that the consent was improperly obtained or influenced;
- (b) issue an order for an appropriate adjustment to the property of the respective spouses or to their shares in the joint estate;
- (c) issue a warrant of execution against the separate property of the spouse who used threats or coercion in order to make restitution for loss to the other spouse resulting from the transaction in question; or
- (d) make any other order which the court deems appropriate.

This provision gives a Magistrate's Court or the High Court express power to vary or set aside any agreement where it is satisfied that the agreement was influenced by actual or threatened violence (either at the time of negotiations or at any time before the agreement was made), if it would cause serious injustice to enforce the agreement or any of its terms. The provision also suggests a range of appropriate remedies, without limiting the courts' discretion. In the context of Namibia's widespread domestic violence, this provision is an important one.

## **Power of High Court to order division of joint estate**

(1) The High Court may on the application of a spouse, if it is satisfied that the interest of that spouse in the joint estate is being or is likely to be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the joint estate in equal shares or on such other basis as the court may deem just.

(2) A High Court making an order under subsection (1) may order that simple or extended community of property be replaced by another marital property system, subject to such conditions as it may deem fit.

(3) When an order is made under subsection (2), the registrar shall send a copy thereof to the Registrar of Deeds, who shall if necessary cause an appropriate reference to the new marital property system to be made on the registry duplicate of the ante-nuptial contract concerned and on every copy thereof tendered to the Registrar for endorsement.

This expands on the limited remedies provided by the Married Persons Equality Act, No 1 of 1996 by providing for the division of the joint estate during the subsistence of the marriage to avert serious prejudice to one spouse because of the conduct or proposed conduct of the other spouse, so long as no third parties will be prejudiced by the division. As in South Africa, it gives the court discretion to divide the joint estate in equal shares, or "on such other basis as the court may deem just", and authorises the court to substitute another marital property system, subject to such conditions as it deems fit. Because this is a rather radical step, it was recommended by a majority of the Subcommittee that jurisdiction for this step, as opposed to for some of the other remedies in the Bill, should be limited to the High Court. It was suggested in consultations that legal aid should be made available for this purpose if necessary to make the procedure accessible to couples with limited means.

## **Deferment of satisfaction of claim for share of joint estate**

The High Court may, on the application of a person against whom lies a claim for a share of the joint estate, upon dissolution of a marriage or when there is an application for a division of the estate in terms of section X [*Power of High Court to order division of joint estate*] during the subsistence of a marriage, order that satisfaction of the claim be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the Court may deem just.

## **PART 3 - "OUT OF COMMUNITY OF PROPERTY WITH PROFIT SHARING"**

### **Application of this Part**

(1) The provisions of this Part shall apply to all marriages subject to "out of community of property with profit-sharing" concluded after the commencement of this Act and may not be-

- (a) waived, or
- (b) changed or altered by means of ante-nuptial or post-nuptial contract

except as expressly provided in this Part.

(2) Every marriage out of community of property in terms of an ante-nuptial contract or a post-nuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, shall automatically be "out of community of property with profit-sharing" as specified in this Part, except in so far as that system is expressly excluded by such agreement.

We recommend following South Africa by interpreting all agreements establishing strict "out of community of property" as referring to the "accrual system", unless accrual is expressly excluded by the couple in question. The reasoning is that "strict out of community of property" severely disadvantages women who left the workforce after their marriage to care for the home and the children, and whose separate estates therefore did not increase in value during the marriage whilst the separate estates of their working husbands did. Under the regime of "strict out of community of property", wives in these circumstances had no legal claim upon dissolution of the marriage to share the growth in their husbands' estates. A regime with such potentially harsh consequences should not be chosen without clear and informed consent.

### **Qualification of "out of community of property with profit-sharing"**

Any marriage which is "out of community of property with profit-sharing" is subject to the provisions on the matrimonial home in section x [*Matrimonial home*] and on household necessities in section X [*Liability of spouses married out of community of property for household necessities*], and the spouses are not competent to contract out of these provisions.

### **Operation of "out of community of property with profit sharing"**

- (I) In a marriage which is "out of community of property with profit sharing",
- (a) all of the assets acquired by or accruing to either spouse before the date of marriage remain that spouse's separate property;
  - (b) debts and liabilities incurred by either spouse before, on or after the date of marriage remain the sole and exclusive responsibility of that spouse and shall be administered by the said spouse accordingly; and
  - (c) assets acquired by or accruing to either spouse on or after the date of marriage are administered as separate property: Provided that at the dissolution of the marriage by divorce or by the death of one or both of the spouses, the spouse whose estate shows no profit or a smaller profit than the estate of the other spouse acquires a claim against the other spouse or the other spouse's estate for an amount equal to half of the difference between the profits of the respective estates of the spouses;

(2) Subject to the provisions of section X(1) [*Power of court to order division of accrued profit*], a claim in terms of subsection (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the profit of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse .

## Calculation of profit of estate of each spouse

(1) (a) The profit accruing to the estate of a spouse is the amount by which the net value of that spouse's estate at the dissolution of his marriage exceeds the net value of that spouse's estate at the commencement of that marriage.

(b) In the determination of the profit accruing to the estate of a spouse-

- (i) any amount which accrued to that estate by way of damages , other than damages for patrimonial loss, is left out of the account ;
- (ii) an asset which has been excluded from the calculation of profit in terms of the ante-nuptial or post-nuptial contract of the spouses, as well as any other asset which a spouse acquired by virtue of the possession or former possession of an excluded asset, is not taken into account as part of that estate at the commencement or the dissolution of the marriage ;
- (iii) the net value of that estate at the commencement of the marriage is calculated with due allowance for any difference which may exist in the value of money at the commencement and dissolution of his marriage, and for that purpose the court may base its calculation on any appropriate evidence proffered in respect of Namibia, or in the absence of any appropriate Namibian measure shall apply the weighted average of the consumer price index as published from time to time in the South African *Government Gazette* as *prima facie* proof of the change in the value of money.

(2) The profit accruing to the estate of a deceased spouse is determined before effect is given to any testamentary disposition, donation *mortis causa* or succession out of that estate in terms of the law of intestate succession.

## Inheritances, legacies and donations excluded from profit calculation

(1) An inheritance, a legacy or a donation which accrues to a spouse during the subsistence of the marriage, as well as any other asset which that spouse acquired by virtue of the possession or former possession of such inheritance, legacy or donation, does not form part of the profit accruing to that spouse's estate, except insofar as the spouses may agree otherwise in their ante-nuptial or post-nuptial contract or insofar as the testator or donor may stipulate otherwise.

(2) In the determination of the profit accruing to the estate of a spouse a donation between spouses during the lifetime of the spouses is not taken into account either as part of the estate of the donor or as part of the estate of the donee.

---

Subsection (2) is an expression of the principle that "gifts are forever".

---

### **Proof of commencement value of estate**

(1) A party to an intended marriage may for the purpose of proof of the net value of his or her estate at the commencement of the marriage declare that value

- (a) before the marriage is entered into , on the prescribed marriage certificate or in an ante-nuptial contract; or
- (b) within six months after the date of the marriage in a statement which is signed by the other spouse and attested by a notary .

(2) One original statement made in terms of subsection (I) (b) shall be kept by the spouses and a second original shall be filed with the Registrar of Deeds together with the marriage certificate of the spouses.

(3) A notary attesting a statement made in terms of subsection (1)(b) shall keep a third original of the statement in his or her protocol together with the copy of the ante-nuptial contract of the parties, if there was such an ante-nuptial contract, and if he or she is not the notary before whom the ante-nuptial contract was executed, he or she shall send a fourth original statement by registered post or personal delivery to the notary in whose protocol the ante-nuptial contract is kept, or to the custodian of such protocol, as the case may be, and the last-mentioned notary or that custodian shall keep such original statement together with the copy of the ante-nuptial contract of the parties in such protocol.

(4) A prescribed marriage certificate or an ante-nuptial contract contemplated in subsection (1)(a) or a certified copy thereof, or a statement signed and attested in terms of subsection ( I)(b) or a certified copy thereof, shall serve as *prima facie* proof of the net value of the estate of the spouse concerned at the commencement of the marriage.

(5) The net value of the estate of a spouse at the commencement of his marriage is deemed to be nil if-

- (a) the liabilities of that spouse exceed his assets at such commencement; or
- (b) that value was not declared by any of the methods set forth in subsection (I), and the contrary is not proved.

### **Obligation to furnish particulars of value of estate**

When it is necessary to determine the profit accruing to the estate of a spouse or a deceased spouse, that spouse or the executor of the estate of the deceased spouse, as the case may be, shall within a reasonable time at the request of the other spouse or the executor of the estate of the other spouse, as the case may be, furnish full particulars of the value of that estate.

### **Power of High Court to order division of profit during subsistence of marriage**

(1) The High Court may on the application of a spouse whose marriage is "out of community of property with profit sharing" and who satisfies the court that his right to share in the profit accruing to the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrued profit in accordance with the provisions of this Part or on such other basis as the court may deem just.

(2) Where the High Court makes an order under subsection (1), it may also order that the marital property system applicable to the marriage be replaced by "strict out of community of property".

(3) When an order is made under subsection (2), the Registrar of the High Court shall send a copy thereof to the Registrar of Deeds, who shall cause an appropriate reference to the new matrimonial property system to be made on the registry duplicate of the ante-nuptial contract concerned and on every copy thereof tendered to him or her for endorsement, or in the absence of an ante-nuptial agreement, the Registrar of Deeds shall file a copy of the order together with a copy of the marriage certificate.

### **Deferment of satisfaction of claim for share of profit**

The High Court may, on the application of a person against whom lies a claim for a share of the profit accruing to the estate of the other spouse, upon dissolution of a marriage or when there is an application for a division of accrued profit in terms of section X [*Power of High Court to order division of profit during subsistence of marriage*] during the subsistence of a marriage, order that satisfaction of the claim be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the Court may deem just.

This framework is similar to that adopted in South Africa for the "accrual system". Even though the "accrual system" can be applied in Namibia by means of an ante-nuptial contract, a clear statutory framework for this regime would encourage its use. The change of name from "accrual system" to "out of community of property with profit sharing" would also make this regime easier to understand and thus possibly more attractive.

## **PART 4 - "STRICT OUT OF COMMUNITY OF PROPERTY"**

### **Application of this Part**

(1) The provisions of this Part shall apply to all marriages concluded after the commencement of this Act where "strict out of community of property" is expressly specified on the prescribed marriage certificate, or in an ante-nuptial contract or a post-nuptial contract where the sharing of accrued profit is clearly and expressly excluded.



(2) The marital property regime for a polygamous customary marriage which is concluded after the commencement of this Act and during the existence of a customary marriage with another spouse must be in "strict out of community of property", unless a different property regime is prescribed in an ante-nuptial or post-nuptial contract as provided for in section X [*Property consequences of polygamous marriages*].

### **Operation of "strict out of community of property"**

- (1) In a marriage which is in "strict out of community of property",
- (a) all of the assets and acquired by or accruing to either spouse before, on or after the date of marriage remain that spouse's separate property;
  - (b) debts and liabilities incurred by either spouse before, on or after the date of marriage remain the sole and exclusive responsibility of that spouse and shall be administered by the said spouse accordingly.

### **Qualification of "strict out of community of property"**

Any marriage with a "strict out of community of property" system is subject to the provisions on the matrimonial home in section x [*Matrimonial home*] and on household necessities in section X [*Liability of spouses married out of community of property for household necessities* ], and the spouses are not competent to contract out of these provisions .

This property regime would operate in the same way as that regime currently known as "out of community of property", subject to the general changes applicable to all marriages (discussed below).

## **PART 5 - MATRIMONIAL HOME**

The subcommittee engaged in extensive debate on what should happen to the matrimonial home in the event of the death of one of the spouses. However, it was decided that this issue should be addressed as part of overarching reform on inheritance and not in isolation.

Therefore, this part of the Bill applies only to the matrimonial home (a) during the subsistence of the marriage and (b) upon dissolution of the marriage by divorce.

It should be noted that the references to the "matrimonial home" automatically includes the necessary and essential household goods regularly used by the married couple by virtue of the definition of "matrimonial home" in section 1.

### **Rights and duties pertaining to the matrimonial home during the subsistence of the marriage**

(1) Both spouses have a right to occupy the matrimonial home, subject to the provisions of the Combating of Domestic Violence Act, No 4 of 2003 and any protection order issued pursuant to that Act, or any other order issued in respect of the matrimonial home by a competent court, which right is exercisable in respect of the other spouse but not in respect of third parties.



(2) Both spouses have a reciprocal duty to contribute to the upkeep of the matrimonial home in proportion to their respective financial positions.

(3) Neither spouse is competent to engage in any transaction pertaining to the matrimonial home - including buying, selling, donating or encumbering the home or its necessary and essential contents - without the prior written consent of the other spouse: Provided that a transaction pertaining to the home or its contents may not be challenged for lack of consent if it took place more than one year prior to the date of death of one of the spouses.

(4) The provisions of this section shall apply without regard to

- (a) which spouse owns or leases the home, or in the case of communal land, which spouse has been allocated the land in terms of the Communal Land Reform Act, No 5 of 2002;
- (b) whether the matrimonial home was inherited by one of the spouses;
- (b) the marital property regime which applies to the marriage; or
- (c) whether the marriage is a civil or a customary marriage.

Provided that a spouse who owns a matrimonial home as his or her separate property may engage in transactions concerning that home without the consent of the other spouse if he or she provides suitable alternative accommodation.

Currently, in terms of the common law, regardless of the marital property regime, both spouses have a right to occupy the matrimonial home, and both are under a reciprocal duty to contribute to its upkeep.<sup>8</sup> Neither spouse has a right to eject the other spouse from the matrimonial home without providing suitable alternative accommodation, even if the matrimonial home is owned by one spouse alone.<sup>9</sup> A similar principle applies to the appurtenances of the matrimonial home, such as the furniture. As one court said, a spouse's right of occupation cannot "*be reduced to the empty shell of the matrimonial home*".<sup>10</sup> Despite the fact that disputes about the matrimonial home are common in Namibia, the common law rules appear to be not well known or applied.

<sup>8</sup> This is according to Hahlo, is one of the "in variable consequences of marriage". Hahlo, *The South African Law of Husband and Wife* (4th edition, 1975) (hereinafter "Hahlo (4th edition)") at 121-22.

<sup>9</sup> See Hahlo (4th edition) at 121; June Sinclair, *The Law of Marriage, Volume I* (Juta, 1996) at 476, citing Owen 1968 (1) SA 480 (E) and *Badenhorst* 1964 (2) SA 676 (T). See also, for example, *Oglodzinski* 1976 (4) SA 273 (D).

In general, the right of a spouse to remain in the matrimonial home is enforceable only against the other spouse, not against third parties. Hahlo (4th edition) at 122, citing *Tabha v Fyzoo* 1965 (1) SA 461 (N); *Norden NO v Bhanki* 1974 (4) SA 647 (AD); *Cattle Breeders Farm (Pvt) Ltd v Veldman* 1973 (2) PH B14 (R).

<sup>10</sup> Hahlo (4th edition) at 122, citing *Whittingham* 1974 (2) SA 636 (R) and *Petersen* 1974 (1) PH BS (R). The quote comes from *Whittingham* at 637. See also, for example, *Du Randt* 1995 (1) SA 401 (0) (motor vehicle); *Ross* 1994 (1) SA 865 (E) (household goods); *Manga* 1992 (4) SA 502 (ZSC) (car and furniture); *Coetzee* 1982 (1) SA 933 (C) (car); *Rosenbruch* 1975 (1) SA 181 (W) (furniture).

---

The proposed draft codifies and expands upon the common law by providing that both spouses should have an explicit right to occupy the matrimonial home and a reciprocal duty to contribute to its upkeep, regardless of the couple's marital property regime and regardless of which spouse owns the matrimonial home. In addition, neither spouse is competent to engage in any transaction pertaining to the matrimonial home or its ordinary household contents - including buying, selling, donating or encumbering the home and contents - without the written consent of the other spouse.

It should be noted that many other jurisdictions have similar provisions pertaining to the matrimonial home.

---

### **Treatment of matrimonial home upon divorce**

(I) Upon dissolution of a marriage by divorce, regardless of the marital property regime, the High Court may

- (a) award the matrimonial home to one spouse for a limited or an unlimited period, and on such terms and conditions as the High Court may see fit, or
- (b) provide for a right of occupation on such terms and conditions as the High Court may see fit by the spouse with custody of the children of the marriage
  - (i) for a temporary period, or
  - (ii) until the children have completed their schooling:  
provided that custody of the children should not automatically lead to a right of occupation of the matrimonial home,

after giving due regard to

- (a) the length of time that the residence has been shared by the spouses
- (b) the accommodation needs of the spouses and any other occupants of the residence
- (c) the interests of any child in the care of either spouse
- (d) any undue hardship that may be caused to either spouse or to any other person as a result of an order pertaining to the matrimonial home; and
- (e) the assets available to the other spouse if the matrimonial home is placed aside for the occupation of one spouse.

(2) If the matrimonial home is sold or in the process of being sold to satisfy the debts of a former spouse during the period of occupation-

- (a) the former spouse who was residing in the house must have the right to go back to the court which granted the order for divorce for consideration of alternative arrangements, and such court shall be empowered to re-assess the circumstances and make an appropriate order, which may include appropriate spousal maintenance for the expected period of residence in the matrimonial home which has been frustrated by the sale of the house in question if appropriate, or

(b) regardless of anything to the contrary contained in the Maintenance Act 9 of 2003, the spouse so deprived of the expected right of continued residence in the matrimonial home shall have the right to approach the maintenance court for spousal maintenance in respect of the expected period of continued residence, regardless of the fact that no spousal maintenance was granted in the original divorce order.

(3) A spouse who occupies the matrimonial home after the dissolution of the marriage by virtue of this section has an obligation to take all reasonable steps to maintain such home, and failure to do so will be grounds for loss of any right of occupation granted in terms of subsection (1)(b).

The law reform proposals already put forward by the Law Reform and Development Commission in respect of divorce propose fairly broad judicial discretion for re-allocating and re-distributing marital property, but do not make any specific mention of the matrimonial home.<sup>11</sup>

This provisions would extend judicial discretion in connection with divorce to allow for an award of the matrimonial home and its contents to one spouse, regardless of the marital property regime, or for a right of occupation on the part of the spouse with custody of the children in appropriate cases, for a temporary period, or until the children have completed their schooling. Custody of the children would not automatically lead to retention of the matrimonial home, as this might encourage parents to seek custody for the wrong reasons.

In exercising judicial discretion with respect to the matrimonial home, the court would be expected to consider factors similar to those enumerated in section 14(2)(c) of the *Combating of Domestic Violence Act 4 of 2003*, as well as the amount of assets available to the other spouse if the matrimonial home is placed aside for the occupation of one spouse.

## **PART 6- GENERAL PROVISIONS ON MARITAL PROPERTY**

### **Application of this Part**

(1) Unless otherwise specified, the provisions in this Part apply to all marriages, regardless of the date of marriage.

(2) The provisions in this Part may not be-

(a) waived, or

(b) changed or altered by means of ante-nuptial or post-nuptial contract

except as expressly provided in this Part.

<sup>11</sup> Law Reform and Development Commission, *Report on Divorce*, Project 8, LRDC 13, November 2004.

## Donations between spouses permissible

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 or in furtherance of the conclusion of the marriage, including but not limited to bride-wealth or *lobola*, becomes the property of the recipient, notwithstanding the subsequent dissolution of the marriage .

This provision has already been proposed in the context of the Divorce Bill. If not already enacted by that Bill, it should be included here.

Clause (a) is adapted from the South African Matrimonial Property 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.

Clause (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.

## Effect of donations between spouses or their families

(1) No donation made between the spouses, or family members of the two spouses, or between a spouse and a family member of the other spouse prior to, simultaneous with or after a civil or customary marriage shall have any effect on the consequences of the marriage or on the operation of any of the rules contained in this law.

This provision would not forbid the exchange of *lobola* or marriage gifts, but it would prevent such customs from having any effect on the legal rights and duties of either spouse under this law.

(2) It shall not be permissible for any traditional or judicial authority as a condition of the dissolution of a civil or customary marriage to require, or to enforce any requirement for, the return of any donation made between the spouses or any family members of the spouses prior to, simultaneous with or after such marriage.

Requiring the return of such gifts or *lobola* as a condition of divorce, as is the case in some ethnic groups, also arguably constitutes unconstitutional sex discrimination, as it results in differential rules and procedures for divorce for husband and wife.

## Debts of spouses generally

(1) The following is substituted for section 9(3) of the Insolvency Act, No 24 of 1936:

(3) *Such a petition shall set forth-*

(a) the amount, cause and nature of the claim in question

(b) the full names and date of birth or identity number of the debtor;

(c) the marital status of the debtor and, if he or she is married. The full names and date of birth or identity number of the spouse; and

*shall state whether the claim is or is not secured and, if it is, the nature and value of the security, and shall set forth the debtor's act of insolvency upon which the petition is based or otherwise allege that the debtor is in fact insolvent. The facts stated in the petition shall be confirmed by affidavit and the petition shall be accompanied by a certificate of the Master given not more than ten days before the date of such petition that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs of administering the estate until a trustee has been appointed, or if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration .*

The proposed additions are based on section 9(3)(a)(ii) of South Africa ' s similar Insolvency Act, No 24 of 1936 , which includes amendments which were not made applicable to Namibia or which were added after Namibia became independent. The amendments proposed above are necessary to give meaningful practical effect to the previous section on debts against the joint estate.

In terms of these provisions, creditors are expected to either join the spouse or to provide evidence that the debtor is not married "in community of property" (which would include both simple and extended community of property). If there is any doubt about the marital property regime, then the other spouse should be joined - or at least notified and given an opportunity to participate in the proceedings. If the applicant creditor can show that it was not possible to locate the other spouse or to ascertain the debtor ' s marital status after reasonable efforts, then the court could exercise its discretion in terms of section X(5)(b) [*Settlement of debts incurred by spouses married in simple or extended community of property*] to allow the application to proceed against the one spouse alone.

It is strongly recommended that the government establish a computerised register of marriages and divorces, which lists the applicable marital property regime and is accessible to the public. This would help give protection to creditors and to spouses, as well as being a useful tool in the prevention of fraud and bigamy.

(2) Section 21 of the Insolvency Act, No 24 of 1936, is hereby repealed.

(3) Section 64(2) of the Insolvency Act, No 24 of 1936 , is hereby amended by the removal of the indicated words:

*(2) The officer who is to preside or who presides at any meeting of creditors may summon any person who is known or upon reasonable ground believed to be or to have been in possession of any property which belonged to the insolvent before the sequestration of his estate or which belongs or belonged to the insolvent estate ~~or to the spouse of the insolvent~~ or to be indebted to the estate, or any person (including the insolvent's spouse) who in the opinion of said officer may be able to give any material information concerning the insolvent or his affairs (whether before or after the sequestration of his estate) or concerning any property belonging to the estate ~~or concerning the business, affairs or property of the~~*

~~insolvent's spouse~~, to appear at such meeting or adjourned meeting for the purpose of being interrogated under section sixty-five.

(4) Section 65(1) of the Insolvency Act, No 24 of 1936, is hereby amended by the removal of the indicated words:

*(J) At any meeting of the creditors of an insolvent estate the officer presiding thereat may call and administer the oath to the insolvent and any other person present at the meeting who was or might have been summoned in terms of subsection (2) of section sixty-four and the said officer, the trustee and any creditor who has proved a claim against the estate or the agent of any of them may interrogate a person so called and sworn concerning all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate, and concerning any property belonging to his estate, ~~and concerning the business, affairs or property of his or her spouse~~: Provided that the presiding officer shall disallow any question which is irrelevant and may disallow any question which would prolong the interrogation unnecessarily.*

(5) Section 65(2) of the Insolvency Act, No 24 of 1936, is hereby amended by the removal of the words indicated by striking out, and the addition of the underlined words:

*(2) In connection with the production of any book or document in compliance with a summons issued under subsection (3) of section sixty-four or at an interrogation of a person under subsection (J) of this section, the law relating to privilege as applicable to a witness summoned to produce a book or document or giving evidence in a court of law, shall apply: Provided that a banker at whose bank the insolvent in question ~~or his or her spouse~~ keeps or at any time kept an account, shall be obliged to produce, if summoned to do so under subsection (3) of section sixty-four, any cheque in his possession which was drawn-*

*(a) by the insolvent, or*

*(b) in the case of a joint account operated by the insolvent and his or her spouse, or an account of the insolvent on which the spouse of the insolvent was a signatory by his or her spouse*

*within one year before the sequestration of the insolvent's estate, or if any cheque so drawn is not available, then any record of the payment, date of payment and amount of that cheque which may be available to him, or a copy of such record and if called upon to do so, to give any other information available to him in connection with such cheque or any ~~:-he~~ account operated by of the insolvent or jointly by the insolvent and any other person ~~his or her spouse~~; and provided further that a person interrogated under subsection (J) shall not be entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him.*

(6) Section 65(7) of the Insolvency Act, No 24 of 1936, is hereby amended by the removal of the indicated words:

*(7) Any person summoned to attend a meeting of creditors for the purpose of being interrogated under this section (other than the insolvent ~~and his or her spouse~~) shall be entitled to witness fees to be paid out of the estate, to which he would be entitled ([he were a witness in any civil proceedings in a court of law.*



(7) Section 65(8) of the Insolvency Act, No 24 of 1936, is hereby amended by the removal of the indicated words:

(8) *If the insolvent ~~or his or her spouse~~ is called upon to attend any meeting of creditors held after the second meeting or an adjourned second meeting, he or she shall be entitled to an allowance out of the insolvent estate to defray his or her necessary expenses in connection with such attendance.*

The South African Constitutional Court case of *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) canvassed the Constitutionality of the provisions relating to spouses in sections 21, 64 and 65 of the South African version of the Insolvency Act. These provisions provide that the effect of an order of sequestration is to vest the *separate* property of the spouse of the debtor in the Master, regardless of the marital property regime which applies. The onus then falls on that spouse to prove that the property in question was acquired prior to the marriage, property which was acquired in terms of a marriage settlement or property which was acquired during the marriage "by a title valid as against creditors of the insolvent". If this is proved, then the spouse's property is released back to the spouse. There is also some provision in section 21(10) for possible release of property belonging to a solvent spouse who is in business as a trader, or who will suffer serious prejudice - but in these cases, the solvent spouse must satisfy the court that he or she can make other arrangements to safeguard the interest of the insolvent estate.

Sections 64 and 65 relate to the summoning and interrogation of the solvent and insolvent spouse, and any person who may have information about their property, business and affairs. For the purposes of these provisions, section 21(13) provides that the term "spouse" encompasses partners in civil or customary law marriages, as well as cohabiting partners living together as husband and wife.

The purpose of these provisions is to prevent spouses from colluding to evade debts by transferring property from the indebted spouse to the other spouse. Another purpose is to obtain information which will help to unravel which property is whose, in the case of honest spouses married out of community of property (or simply cohabiting), who will not usually keep clear financial records on what belongs to whom or what was purchased with whose assets. The majority of the Court upheld these provisions against Constitutional challenge.

However, the dissenters argued that these provisions constitute unfair discrimination because they affect only "spouses" and not other persons in equally close relations to the insolvent such as family members or business associates. Four justices found that the provisions in question should be viewed as unconstitutional. Justice Sachs argued that the provision impugns personal dignity, as it is based on stereotypical notions of marriage which deny the individual marriage partners their full independence as separate persons who have simply chosen to share their lives.

The SA Law Commission concluded that the provision was an anachronism and recommended that it be abolished.<sup>12</sup>

<sup>12</sup> SA Law Commission Discussion Paper 66 Project 63 *Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum* (1996) at 63, para 11.16.

In the United Kingdom, collusion is addressed by means of voidable transactions. Preferential transactions or transactions which undervalue assets are voidable if entered into within a certain period of the insolvency; where those transactions are between the insolvent and an associate, which includes spouses, relatives and business partners, the time period within which they may be set aside is considerably longer. The law also provides that where there is a loan by the solvent spouse to the insolvent spouse, the solvent spouse will be repaid only after all other creditors have been paid in full.<sup>13</sup> Australia and New Zealand take similar approaches. A similar approach was also recommended for South Africa by the SA Law Commission.<sup>14</sup>

In Canada, the primary mechanism to address collusion is the "reviewability" of transactions. Transactions with persons who share a blood relationship or are related by marriage or adoption fall into this category. There is also a rebuttable presumption that all property in the possession of the insolvent at the time of the insolvency belongs to him or her.<sup>15</sup>

A broad provision aimed at addressing collusive transactions designed to frustrate creditors would seem to be beyond the scope of a law reform on marital property, but we recommend the removal of the provisions in section 21 of the Insolvency Act which single out spouses in an unfair way.

Section 21 appears below as it currently reads. The proposed amendments to section 64 and 65 are consequential on the removal of section 21 and also to cover the possibility of joint bank accounts for married couples (as proposed below) and bank accounts of an insolvent spouses where the other spouse was a signatory:

## **21 Effect of sequestration on property of spouse of insolvent**

(1) The additional effect of the sequestration of the separate estate of one of two - spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section .

- (2) The trustee shall release any property of the solvent spouse which is proved-
- (a) to have been the property of that spouse immediately before his or her marriage to the insolvent or before the first day of October, 1926; or
  - (b) to have been acquired by that spouse under a marriage settlement; or
  - (c) to have been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent; or

<sup>13</sup> See sections 329 and 339- 342 of the UK Insolvency Act, 1986

<sup>14</sup> See SA Law Commission Project 63 at para 1.1 and 1.1.15.

<sup>15</sup> See Part IV of the Bankruptcy and Insolvency Act, RSC 1985. The provisions of this legislation are supplemented by provisions of provincial legislation, for example, sections 4 and 5 of the Ontario Assignments and Preferences Act, RSO 1990 relating to suspect transactions, and by provisions of the common law, in regard to which see *Koop v Smith* (1915) 25 DLR 355 (SCC). For a full discussion, see Robert A Klotz *Bankruptcy and Family Law* (Carswell, Toronto 1994) at 197-200.



- (d) to be safeguarded in favour of that spouse by section twenty-eight of this Act or by the Insurance Act, 1923 (Act 37 of 1923) or by the Insurance Ordinance, 1927 (Ordinance 12 of 1927 of the Territory); or
- (e) to have been acquired with any such property as aforesaid or with the income or proceeds thereof.

(3) If the solvent spouse is in the Republic and the trustee is able to ascertain his or her address, the trustee shall not, except with the leave of the court, realize property which ostensibly belonged to the solvent spouse, until the expiry of six weeks' written notice of his intention to do so, given to that spouse. Such notice shall also be published in the Gazette and in a newspaper circulating in the district in which the solvent spouse resides or carries on business, and shall invite all separate creditors for value of that spouse to prove their claims as provided in subsection (5).

(4) The solvent spouse may apply to the court for an order releasing any property vested in the trustee of the insolvent estate under subsection (1) or for an order staying the sale of such property or, if it has already been sold, but the proceeds thereof not yet distributed among creditors, for an order declaring the applicant to be entitled to those proceeds; and the court may make such order on the application as it thinks just.

(5) Subject to any order made under subsection (4) any property of the solvent spouse realized by the trustee shall bear a proportionate share of the costs of the sequestration as if it were property of the insolvent estate but the separate creditors for value of the solvent spouse having claims which could have been proved against the estate of that spouse if it had been the estate under sequestration, shall be entitled to prove their claims against the estate of the insolvent spouse in the same manner and, except as in this Act is otherwise provided, shall have the same rights and remedies and be subject to the same obligations as if they were creditors of the insolvent estate; and the creditors who have so proved claims shall be entitled to share in the proceeds of the property so realized according to their legal priorities inter se and in priority to the separate creditors of the insolvent estate, but shall not be entitled to share in the separate assets of the insolvent estate.

(6) If any property of the solvent spouse (other than property mentioned in paragraph (d) of subsection (2)) has been released by virtue of subsection (2) or (4) the separate creditors of that spouse shall only be entitled to share in the proceeds of any property of the solvent spouse which has been realized by the trustee, after the property so released and any property of that spouse acquired by her or him since the sequestration, have been excused.

(7) Before awarding any such creditor a share in such proceeds, the trustee may require the creditor to lodge with him, within a period to be determined by the Master, an affidavit, supported by such evidence as may be available, setting forth the result of such excussion and disclosing the balance of his claim which remains unpaid. He shall then be entitled to share as aforesaid in respect of that balance only: Provided that any creditor who has incurred costs in excussing the separate property of the solvent spouse and has been unable to recover those costs from the proceeds of that property shall be entitled to add the amount of those costs to the amount of his claim as proved.

(8) If, during the period determined by the Master, any such creditor has failed either to lodge with the trustee such an affidavit as aforesaid, or to excuss any separate property of the solvent spouse still available for the satisfaction of his claim, he shall be debarred from sharing as aforesaid unless the court otherwise orders.

(9) A creditor of the solvent spouse who has proved a claim as provided in subsection (9) shall not be liable to make any contribution under section one hundred and six, and shall not be entitled to vote at any meeting of the creditors of the insolvent estate held in terms of section forty, forty-one or forty-two; but any direction of the creditors of the insolvent estate which infringes the rights of any first-mentioned creditor may be set aside by the court on the application of such creditor.

(10) If the solvent spouse is carrying on business as a trader, apart from the insolvent spouse or if it appears to the court that the solvent spouse is likely to suffer serious prejudice through the immediate vesting of the property of that spouse in the Master of the trustee, and the court is satisfied in either case that the solvent spouse is willing and able to make arrangements whereby the interest therein of the insolvent estate in the said property will be safeguarded without such a vesting, the court, either when making the sequestration order or at some later date, but subject to the immediate completion of such arrangement as aforesaid, may exclude that property or any part thereof from the operation of the order, for such period as it thinks fit. During that period the solvent spouse shall lay before the trustee the evidence available in support of his or her claim to such property and within that period the trustees shall notify the solvent spouse in writing whether or not he will release such property in accordance with subsection (2). If the property has not been so released, then upon the expiry of the said period that property shall vest in the Master or in the trustee, but subject to the provisions of this section.

(11) If application is made to the court for the sequestration of the estate of the solvent spouse on the ground of an act of insolvency committed by that spouse since the vesting of his or her property in the Master or the trustee of the insolvent estate, and the court is satisfied that the act of insolvency alleged in that application was due to such vesting, then if it appears-

- (a) that an application is being or, if necessary, will be made under subsection (4) for the release of any property of the solvent spouse; or
- (b) that any property of the solvent spouse has been released since the making of the sequestration order, and that the solvent spouse is now in a position to discharge his or her liabilities,

the court may postpone the hearing of the said application or may make such interim order thereon as to it may seem just.

(12) If the trustee has in accordance with the preceding provisions of this section released any property alleged to belong to the solvent spouse, he shall not be debarred thereby from proving that it belongs to the insolvent estate and from recovering accordingly.

(13) In this section the word "spouse" means not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another.

### **Liability of spouses married in "out of community of property with profit sharing" or in "strict out of community of property" for household necessities**

(1) Spouses married in "out of community of property with profit sharing" or in "strict out of community of property" are jointly and severally liable to third parties for all debts incurred by either of them in respect of necessities for the joint household.

(2) Unless the parties agree otherwise, a spouse married out of community of property before the commencement of this Act or in "out of community of property with profit sharing" or in "strict out of community of property" after the commencement of this Act is liable to contribute to necessities for the joint household *pro rata* according to his or her financial means, and shall be deemed to have been so liable as from the beginning of such marriage.

(3) A spouse married in "out of community of property with profit sharing" or in "strict out of community of property" has a right of recourse against the other spouse in so far as he or she has contributed more in respect of necessities for the joint household than for which he or she is liable in terms of subsection (2).

(4) Section 15 of the Married Persons Equality Act is hereby repealed, except insofar as it applies to marriages concluded or actions commenced before the date of commencement of that Act.

### **Choice of law for determining proprietary consequences of marriage**

(1) Prior to the conclusion of a marriage, a couple may designate in an ante-nuptial contract or other marriage contract any of the following as the law which shall apply to their marital property-

(a) the law of any country of which either spouse is a national at the time of designation;

(b) the law of the country in which either spouse has his or her habitual residence at the time of designation; or

(c) the law of the first country where one or both of the spouses establishes a new habitual residence after marriage;

and the law designated by the couple before marriage will apply to the whole of their property: Provided that the spouses may designate with respect to all or some of their immovable property, the domestic law of the place where such immovable property is situated.

(2) If the couple, before marriage, have not designated the applicable law, their matrimonial property regime will be governed by the law of the country in which both spouses establish their first habitual residence after marriage, or, if no habitual residence can be identified, by the law of the country where the marriage was concluded.

(3) This section shall be applied to determine the law governing the marriage regardless of anything contained in the common law.

At present, the proprietary consequences of the marriage are determined by the matrimonial domicile (*lex domicilii matrimonii*), which is the domicile of the husband at the time of marriage. Although the Married Persons Equality Act, No 1 of 1996 gives married women domicile independent of the domicile of their husbands, this common law rule was not affected by the statute.

The Hague Convention on the Law Applicable to Matrimonial Property Regimes, concluded on 14 March 1978, deals with choice of law questions pertaining to marital property. This Convention entered into force internationally on 1 September 1992. As of 2005, however, only nine nations had ratified it: Austria, France, Luxembourg, the Netherlands and Portugal. Namibia is not a party to the Convention, nor is any African nation as yet. Even though Namibia is not bound by the Hague Convention on the Law Applicable to Matrimonial Property Regimes, it is recommended that the common law rule which makes the husband's domicile the guiding rule for choice of law on marital property regimes should be replaced by provisions similar to those found in the Hague Convention.

We suggest that (a) spouses domiciled in different countries could make an express agreement stating which law on marital property would apply to their marriage; and (b) in the absence of such an agreement, the applicable law would be that of the country where both spouses establish their first habitual residence after marriage, or if this cannot be determined, by the law of the country where the marriage took place. (This simplifies the Hague Convention somewhat, while still following its basic principles.)

This change would remove the last remaining vestige of differential legal treatment of husband and wife.

### **Division of marital property prior to execution of deceased estate**

The executor appointed to administer a deceased estate in terms of the Administration of Estates Act, No 66 of 1965 shall have the duty to ensure that marital property is divided in accordance with the applicable marital property regime and any applicable ante-nuptial or post-nuptial contract before distribution of the estate takes place, with due regard to any adjustments to the division of marital property-

- (a) authorized by this statute or by the Married Persons Equality Act, No 1 of 1996 ;
- (b) for damages for delicts paid by one spouse, or received by one spouse for non-patrimonial damages;
- (c) for damages in respect of delicts committed by one spouse against the other spouse; and
- (d) for any other adjustments involving matters which were concluded prior to the death of one of the spouses.

## PART 7 - POLYGAMOUS MARRIAGES

### Property consequences of polygamous marriages

(1) Where a spouse in a customary marriage enters into a further customary marriage with another spouse after the commencement of this Act, the second or subsequent customary marriage will be in "strict out of community of property", and the marital property regime of the first or prior customary marriage or marriages will not be affected by the second or subsequent customary marriage.

(2) Notwithstanding subsection (1), the property regime of a second or subsequent polygamous marriage may be changed in an ante-nuptial or post-nuptial contract concluded by a notary in accordance with Part 8, provided that

- (a) such contract makes appropriate corresponding adjustments to the property regimes of all the marriages in question, and
- (b) all the spouses of existing polygamous marriages with that husband appear in person before such notary and consent to such different property regime.

(2) Where a man enters into polygamous customary marriage with more than one spouse simultaneously, all such marriages shall be in "strict out of community of property" unless the spouses have entered into an ante-nuptial contract in respect of which all the spouses have appeared in person before the notary and consented to such contract.

(3) Where a spouse in a customary marriage has entered into polygamous customary marriages before the commencement of this Act, the proprietary consequence of such marriage will be determined in accordance with the applicable customary law: Provided that the spouses in question may enter into a post-nuptial contract in terms of the procedures specified in section x [*Post-nuptial changes to marital property regimes*] specifying the property arrangements of the marriages if all of the spouses in question are in agreement.

(4) A husband who is a party to more than one customary marriage shall be liable to maintain all wives who are party to such marriages in accordance with the respective assets of the spouses and without regard to the order of the marriages or the age or status of the wives in question.

(5) A husband who is a party to more than one customary marriage shall be jointly and severally liable with each wife to third parties for all debts incurred by either of them in respect of necessities for the joint household of the husband and the wife in question, and section x [*Liability of spouses married in "out of community of property with profit sharing" or in "strict out of community of property" for household necessities*] shall apply with the necessary changes to such household necessities.

For marriages entered into **after** the implementation of the intended legislation, the first marriage would remain as it is. The second marriage would then be in "strict out of community of property". The subcommittee has noted that this system would cause hardships in practice but it should be seen as a fall-back position in a context where we expect polygamy to be discouraged and in decline.

At the same time, in order to allow for choice, a narrow exception has been crafted for a different agreement for polygamous marriages by ante-nuptial or post-nuptial contract made by a notary, where all of the spouses appear in person and give consent. (A provision has been added to apply similar rules to polygamous customary marriages concluded simultaneously, as it was reported in consultations that this is possible in some communities.)

It was decided that all parties involved in polygamous marriages concluded **before** the new law comes into force be given an option to enter into a written agreement specifying their preferred proprietary arrangements. With regard to polygamous marriages that are entered into prior to the coming into operation of this law, the position is that the proprietary consequences would be governed by the customary law of the time the marriage was concluded. The option of concluding post-nuptial contracts would help to alleviate any hardships here.

It should be noted that this draft provisions should not be seen as implying that the subcommittee favours the continuation of polygamous marriages. However, this issue is yet to be decided, in the Recognition of Customary Marriages Act. As long as polygamy is still a possibility, the law on marital property regimes must make provision for it.

## **PART 8 - ANTE-NUPTIAL AND POST-NUPTIAL AGREEMENTS**

### **Ante-nuptial contracts**

(1) All couples who wish to enter into marriage, regardless of the marriage being civil or customary, may enter into an ante-nuptial contract which shall govern their marital property regime.

(2) A couple who intend to marry may enter into an ante-nuptial contract by signing a contract in front of a notary and such notary shall-

- (a) attend to the signature of the ante-nuptial contract by the couple and two witnesses on every page thereof;
- (b) furnish each spouse with a copy of the ante-nuptial contract;
- (c) forward one copy of the ante-nuptial contract to the Ministry of Home Affairs to be filed together with the marriage certificate;
- (d) retain one copy of the ante-nuptial contract; and
- (e) forward the original ante-nuptial contract to the Registrar of Deeds for registration thereof.

### **Ante-nuptial notices**

A marriage officer shall, if the couple to be married has not concluded an ante-nuptial contract, explain the four standard property regimes to the couple prior to the marriage ceremony by reading to the couple the prescribed explanation and offering them a chance to ask questions about the differing regimes and to discuss the matter between themselves, and shall thereafter-

- (a) attend to the indication of the desired marital property regime on the marriage certificate by the couple, two witnesses and the marriage officer;
- (b) forward one original marriage certificate to the Registrar of Deeds for registration thereof;
- (c) forward one original marriage certificate to the Ministry of Home Affairs to be filed;
- (d) furnish each spouse with a copy of the marriage certificate; and
- (e) retain one copy of the marriage certificate.

The marriage officer is empowered only to supervise the conclusion of an ante-nuptial agreement which follows one of the four standard choices outlined by the statute as indicated on the marriage certificate, and not to conclude an actual ante-nuptial contract which departs from these standard choices. This approach is designed to allow greater ability to choose for couples for whom access to legal advice is not realistic. The standard forms and explanations to be used by the marriage officers will be prescribed by regulation. Effective implementation of this provision will require the manufacture of booklets of numbered marriage certificates and ante-nuptial agreements with automatic carbon copies.

### **Post-nuptial changes to marital property regimes**

Note: There was a split in the subcommittee on how best to approach this provision. One member of the subcommittee suggested that post-nuptial changes should require approval by the High Court if the total estate is in excess of a prescribed amount.

(1) A married couple, regardless of the marriage being civil or customary, may at any time during the marriage change or amend their marital property regime by concluding and registering a post-nuptial agreement, which may take the form of-

- (a) a post-nuptial contract; or
- (b) a post-nuptial notice of an intent to change from one of the four standard marital property regimes set forth in this law to another of the four standard marital property regimes set forth in this law, without any amendments or alterations to the statutory regime.

(2) A post-nuptial agreement in the form of either a post-nuptial contract or a post-nuptial notice may be concluded in the presence of a notary who shall attend to registration thereof at the Registrar of Deeds only if-

- (a) both spouses have during separate consultations with the notary indicated that the change is by mutual consent and that each spouse understands the effect of the proposed changes;



- (b) both spouses have submitted separate affidavits setting out the following-
  - (i) a list of all creditors together with proof that due notice of the proposed change was given to the said creditors;
  - (ii) that the proposed change is desired by the party signing the affidavit;
  - (iii) that, according to the knowledge of the party, no third party or child of the marriage will be prejudiced by the proposed change;
  - (iv) that there is no pending legal proceeding by or against either spouse which could have an effect on their marital property;
  - (v) in the case of a polygamous marriage, a list of all spouses of the husband together with proof that due notice of the proposed change was given to the said spouses; and
  - (vi) in the case of a change from a community regime to an out of community regime, a statement indicating that the spouses have agreed upon the division of the joint estate.
- (c) the proposed changes shall not prejudice the rights of the children of the marriage;
- (d) the agreement does not absolve a spouse from his or her duty to maintain the other spouse or any children of the marriage; and
- (e) the post-nuptial agreement is signed by the couple and two witnesses on every page thereof.

(3) A married couple may conclude a post-nuptial agreement in the form of a post-nuptial notice before a Magistrate, who shall forward notice of the desired change to the Registrar of Deeds only if-

- (a) both spouses have during separate consultations with the Magistrate indicated that the change is by mutual consent and that each spouse understands the effect of the proposed changes;
- (b) both spouses have submitted separate affidavits setting out the following-
  - (i) a list of all creditors together with proof that due notice of the proposed change was given to the said creditors;
  - (ii) that the proposed change is desired by the party signing the affidavit ;
  - (iii) that , according to the knowledge of the party, no third party or child of the marriage will be prejudiced by the proposed change;
  - (iv) that there is no pending legal proceeding by or against either spouse which could have an effect on their marital property; and



- (v) in the case of a polygamous marriage , a list of all spouses of the husband together with proof that due notice of the proposed change was given to the said spouses; and
  - (vi) in the case of a change from a community regime to an out of community regime , a statement indicating that the spouses have agreed upon the division of the joint estate.
- (c) the proposed change shall not prejudice the rights of the children of the marriage ; and
- (d) the post-nuptial agreement is signed by the couple and two witnesses on every page thereof.

(4) A married couple intending to alter their marital property regime by means of a post-nuptial contract or a post-nuptial notice must -

- (a) cause notice of the proposed change to be published in the Government Gazette;
- (b) cause notice of the proposed change to be published in at least one local newspaper ; and
- (c) in the case of a polygamous marriage, produce written agreement to the proposed change from every other spouse of the husband .

(5) The Registrar of Deeds shall register a post-nuptial agreement concluded in terms of subsection (2) or (3) only after he or she is satisfied that -

- (a) notice of the proposed change was published in the Government Gazette at least 60 days prior to the registration date;
- (b) notice of the proposed change was published in at least one local newspaper not later than 30 days prior to the registration date;
- (d) in the case of a polygamous marriage, all spouses of the husband in question have provided written agreement to the proposed change; and
- (e) no objections have been received from any creditors or other interested parties .

(6) If a post-nuptial agreement is registered in terms of subsection (3), the Registrar of Deeds shall-

- (a) furnish each spouse and the notary before whom the post-nuptial agreement was concluded with a copy of the post-nuptial agreement;
- (b) forward one copy of the post-nuptial agreement to the Ministry of Home Affairs to be filed together with the marriage certificate; and
- (c) retain the original post-nuptial agreement for registration thereof.

(7) A creditor, or any interested party, shall lodge his or her objection to the proposed post-nuptial agreement by lodging the objection in writing with the Registrar of Deeds within the prescribed time period.

(8) (a) In the event of an objection being lodged, the parties may approach the High Court on notice for the registration of the post-nuptial agreement after all interested parties are given an opportunity to be heard.

(9) If the post-nuptial agreement is approved by the High Court, the Registrar of the Court shall-

- (a) furnish each spouse and the notary before whom the post-nuptial agreement was concluded with a copy of the post-nuptial agreement;
- (b) forward one copy of the post-nuptial agreement to the Ministry of Home Affairs to be filed together with the marriage certificate; and
- (c) forward the original post-nuptial agreement to the Registrar of Deeds with a notice ordering the registration thereof.

The Magistrate is given limited power to supervise changes to the marital property regime in respect of the standard four prescribed choices (as the marriage officer can do for ante-nuptial agreements) to allow greater accessibility to this remedy for rural couples.

This Act contemplates the existence of two original marriage certificates: one for the public marriage registry at the Registrar of Deeds and one for the Ministry of Home Affairs, which has indicated in consultations that it would like to have a second original rather than a copy. The Marriage Act should be harmonised with this Part to ensure that marriage officers take responsibility for ensuring that there are two identical originals, which could perhaps be arranged by means of a marriage book with numbered carbon copies which qualify as multiple originals.

### **Invalidation of ante-nuptial or post-nuptial agreements**

(1) A creditor who was not notified of the proposed registration of a post-nuptial agreement shall not be bound by the terms thereof.

(2) An ante-nuptial or a post-nuptial agreement may be invalidated by the court if:

- (a) any one of the parties commence with divorce proceedings within one year after the registration of the ante-nuptial or post-nuptial agreement and one of the parties is prejudiced by the said agreement;
- (b) the parties failed to disclose that there is pending legal proceedings by or against either spouse which could have an effect on their choice of marital property regime ;
- (c) there is any evidence of fraud, misrepresentation or non-disclosure of information; or
- (d) strict enforcement of the agreement shall result in injustice to either spouse taking into consideration the contributions made by both spouses of both finances and labour.

(3) Failure of a notary, a Magistrate or the Registrar of Deeds to follow the steps prescribed in this section for registration of an ante-nuptial or post-nuptial agreement shall not on its own invalidate such agreement.

## PART 9 - MARRIAGE REGISTRY

### Public marriage registry

(1) The Registrar of Deeds shall keep a registry of all marriages, organized to be accessible by the surname of either spouse or the date of marriage.

(2) This marriage registry shall contain-

- (a) the names and birthdates of both spouses;
- (b) the date of the marriage;
- (c) the place of the marriage ;
- (d) a copy of the marriage certificate;
- (e) a record of the property regime recorded on the marriage certificate or in an ante-nuptial contract concluded prior to the marriage ;
- (f) a copy of any ante-nuptial contract concluded prior to the marriage;
- (g) a copy of the separate statement, if any, of the starting value of marital property for marriages in " out of community of property with profit sharing", in terms of section x (1)(b) [Proof of commencement value of estate];
- (h) a copy of any post-nuptial agreement concluded subsequent to the marriage;
- (i) a copy of any divorce order issued by any other competent authority in respect of the marriage.

(3) This marriage registry shall be accessible to the public during reasonable office hours.

(4) It shall be the duty of any conveyancer responsible for the transfer of immovable property to certify that he or she has checked the marriage registry and ascertained that there is no bar to the transaction in the original marital property regime of the seller or in any post-nuptial changes to such marital property regime.

This registry will be of great assistance to creditors, and will also help to prevent fraud and bigamy. The establishment of such a registry will make the spousal consent provisions contained regarding management of joint estates more realistic to enforce, without being detrimental to third parties. It will also assist with insolvency procedures.

Subsection (4) is designed to enhance enforcement of the rules on joint administration of joint estates by placing an obligation on conveyancers to cross-check the marriage registry before any immovable property is transferred. This is because such property often constitutes the main asset of a joint estate, and yet we understand there are still instances in which property transactions proceed without the requisite consent of the other spouse.

It should be noted that the Registrar of Deeds is recommended as the location for the registry for several reasons:

- \* It is already set up for public access.
- \* It already has appropriate security and fire protection to serve as an archive.
- \* It will make the registry readily accessible to conveyancers who will have an affirmative duty under this Act to check the registry in connection with the sale of immovable property.

However, this proposal should be discussed with the Registrar of Deeds before it is finalised.

## **PART 10 - MAINTENANCE OF SURVIVING SPOUSES UPON DISSOLUTION OF MARRIAGE BY DEATH**

This section has been copied almost verbatim from South Africa's *Maintenance of Surviving Spouses Act 27 of 1990*. These provisions should be discussed with the Master of the High Court before being finalized. The idea is to make claims for maintenance of a surviving spouse operate in a manner analogous to claims for maintenance of a dependent child.

### **Definitions applicable to this Part**

In this Part, unless the context otherwise indicates-

"executor" means an executor as defined in section 1 of the Administration of Estates Act, 1965, or any person who liquidates and distributes an estate on the instructions of the Master or is appointed as an executor by a Magistrate;

"Master" means a Master as defined in section 1 of the Administration of Estates Act, 1965;

"own means" includes any money or property or other financial benefit accruing to the surviving spouse in terms of the matrimonial property law or the law of succession or otherwise at the death of the deceased spouse;

"surviving spouse" includes all the surviving spouses in a polygamous marriage.

The South African law does not make explicit provision for surviving spouses of polygamous marriages. A definition of "surviving spouse" has been added here to cover this point.

## **Claim for maintenance against estate of deceased spouse**

(1) If a marriage is dissolved by death after the commencement of this Act the surviving spouse shall have a claim against the estate of the deceased spouse for the provision of his or her reasonable maintenance needs until his or her death or remarriage or such time when he or she begins to cohabit with a partner in the manner of husband and wife, in so far as such surviving spouse is not able to provide therefor from his or her own means and earnings.

(2) The surviving spouse shall, in respect of a claim for maintenance, not have a right of recourse against any person to whom money or property has been paid, delivered or transferred in terms of section 34 (11) or 35 (12) of the Administration of Estates Act, 1965 (Act 66 of 1965), or pursuant to an instruction of the Master in terms of section 18 (3) or 25 (1) (a) (ii) of that Act.

(3) (a) The proof and disposal of a claim for maintenance of the survivor shall, subject to paragraphs (b), (c) and (d), be dealt with in accordance with the provisions of the Administration of Estates Act, 1965 (Act No 66 of 1965).

(b) The claim for maintenance of the surviving spouse shall have the same order of preference in respect of other claims against the estate of the deceased spouse as a claim for maintenance of a dependent child of the deceased spouse has or would have against the estate if there were such a claim, and, if the claim of the surviving spouse and that of a dependent child compete with each other, those claims shall, if necessary, be reduced proportionately.

(c) In the event of a conflict between the interests of a surviving spouse in his or her capacity as a claimant against the estate of the deceased spouse and the interests in his or her capacity as guardian of a minor dependent child of the deceased spouse, the Master may defer the claim for maintenance until such time as the court has decided on the claim.

(d) The executor of the estate of a deceased spouse shall have the power to enter into an agreement with the surviving spouse and the heirs and legatees having an interest in the agreement, including the creation of a trust, and in terms of the agreement to transfer assets of the deceased estate, or a right in the assets, to the surviving spouse or the trust, or to impose an obligation on an heir or legatee, in settlement of the claim of the surviving spouse or in part thereof.

<p>The reference to cohabitation in subsection (1) is intended to avoid situations where a spouse is living in a relationship in the nature of marriage but failing to formalise it in order to continue receiving maintenance. This point does not appear in the South African law</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

## **Determination of reasonable maintenance needs**

In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account:

(a) the amount in the estate of the deceased spouse available for distribution to heirs and legatees;

(b) the existing and expected means, earning capacity, financial needs and obligations of the surviving spouse;

(c) the length of the marriage; and

(d) the reasonable standard of living of the surviving spouse during the subsistence of the marriage and his or her age at the death of the deceased spouse.

### **Maintenance of minor children to take priority over maintenance of surviving spouse**

If the estate of the deceased is insufficient for the maintenance of the minor children of the deceased as well as the maintenance of the surviving spouse, then maintenance of the minor children of the deceased shall take precedence over maintenance for the surviving spouse regardless of whether such minor children were born of the marriage.

This provision does not appear in the South African law. However, it seems clear that the needs of the minor children of the deceased should take precedence over the needs of the surviving spouse as the children are less likely to be able to take steps to support themselves.

### **Exemption of certain property from application to maintenance of surviving spouse**

Any traditional property acquired before or after the marriage which in terms of the relevant customary law must be held personally by the spouse in question, or held in trust by the spouse in question for the benefit of other members of the spouse's kin group, is exempt from being liquidated or otherwise applied to satisfy any claim for spousal maintenance under this Act.

## **PART 11 - JOINT BANK ACCOUNTS**

### **Joint bank accounts for married couples**

(1) All married couples, irrespective of whether the marriage is civil or customary, shall be entitled to have a joint bank account.

(2) Unless the account holders have specified that both signatories are required to operate the account, either spouse may instruct the bank to act in respect of the joint account.

(3) A banking institution shall have the right to, without prior notice, suspend the operation of the joint account if

- (a) there exists a dispute between the spouses;
- (b) one of the spouses gives notice to the bank of his/her intention to withdraw as accountholder.

(4) Section 11 of the Banking Institutions Act (Act No 2 of 1998) is amended by the insertion of the following subsection :

*(1) Before considering an application for an authorisation lodged with the Bank in terms of section 10, the Bank shall conduct such investigations, both in or outside Namibia, relating to the applicant or to the application as it may deem necessary in order to ascertain-*

\*\*\*

*(J) whether the applicant offers joint bank accounts to married couples in accordance with the provisions of section x [Joint bank accounts for married couples] of the Marital Property Reform Act x of 200x.*

(5) Any banking institution already approved in terms of the Banking Institutions Act (Act 2 of 1998) to operate in Namibia on the date when this Part comes into force shall have six months from such date to comply with the requirement to offer joint bank accounts to married couples and failure to comply with this requirement shall be grounds for cancellation of authorisation under section 15 of the Banking Institutions Act (Act No 2 of 1998).

Commercial banks in Namibia do not currently allow married couples to open joint accounts. The only options are separate accounts, or accounts held by one spouse with the other spouse as a signatory - which gives the main account-holder actual control of the account.

While joint bank accounts would certainly not be the best option for all married couples, they should be available as an option for those who wish to utilise them, with appropriate conditions attached to clarify the rights and duties of both spouses with respect to each other and to the bank. There appears to be no reason to limit joint accounts to couples married under any particular marital property regime, and they are made available to married couples in a range of other countries.

The subcommittee felt strongly that this option should not be left to the discretion of local banks, but that all banks which wish to do business in Namibia should be required to offer this option. New Zealand has a set of rules for joint accounts which could be drawn as a model for practical guidance.

It was noted by a representative of the Bankers Association of Namibia that the requirement that banks must offer joint accounts to married couples could take the form of a regulation by the Bank of Namibia rather than an amendment to the Banking Institutions Act. As no representative of the Bank of Namibia attended the consultative meeting, the draft has been left as it stands for the moment.

## **PART 12 - GENERAL**

### **Amendment of definition of spouse**

Regardless of any definitions given in the statutes in question, the terms "spouse", "husband", "wife" and "dependent" in the following statutes or statutory provisions shall be deemed to include a spouse in a customary marriage and a spouse in any marriage concluded under any generally-recognised system of religious law, and the terms "marriage" or "married" or any references to relation by "affinity" shall be deemed to include customary marriage and any marriage concluded under any generally-recognised system of religious law (except where the context clearly makes this extended meaning inappropriate).

- (a) Employee's Compensation Act 30 of 1941
- (b) Pension Funds Act 24 of 1956
- (c) Income Tax Act 24 of 1981
- (d) Namibian Citizenship Act 14 of 1990, with section 3(3) applicable with the necessary changes to any marriage purported to have been concluded under any generally-recognised system of religious law

- (e) Judges' Pensions Act 28 of 1990
- (f) Immigration Control Act 7 of 1993
- (g) Medical Aid Funds Act 23 of 1995
- (h) Arms and Ammunition Act 7 of 1992
- (i) section 16 of the Regional Councils Act 22 of 1992
- (j) section 19 of the Local Authorities Act 23 of 1992
- (k) Social Security Act 34 of 1994
- (l) War Veterans Subvention Act 16 of 1999
- (m) Communal Land Reform Act 5 of 2002
- (n) Maintenance Act 9 of 2003'
- (o) Former Presidents' Pension and Other Benefits Act 18 of 2004
- (p) Criminal Procedure Act 25 of 2004.

The technical drafters should examine this list for completeness and for any technical problems, particularly with respect to pre-independence statutes. This provision could alternatively be inserted in the Recognition of Customary Marriages Bill if that is considered more appropriate.

### **Regulations**

The Minister may make any regulations concerning forms relating to any matter covered by this Act, matters which must be prescribed in terms of this Act, or processes and procedures applicable to any matter covered by this Act.

### **Repeals**

This section should be added by the technical legal drafters. The provisions of the Native Administration Proclamation 15 of 1928 on marital property regimes should be repealed, with appropriate transitional provisions. The only provisions of the Native Administration Proclamation 15 of 1928 remaining to be addressed would be those relating to inheritance.

### **Short title and commencement**

(1) This Act is called the Marital Property Reform Act, 200x, and it comes into operation on a date to be fixed by the Minister of Justice by notice in the *Gazette*.

(2) For the purposes of subsection (1), different dates may be fixed for the coming into operation of different parts or sections of this Act.

Law reform which would provide for marriage officers and marriage certificates for customary marriages is underway. It would probably be necessary to delay the application of the proposed marital property systems to customary marriages until this accompanying law reform is enacted.



**FORM X- MARRIAGE CERTIFICATE WITH  
EXPLANATIONS OF STANDARD MARITAL PROPERTY REGIMES**

**MARRIAGE CERTIFICATE**

**Wife's** name & surname \_\_\_\_\_ ID or passport number \_\_\_\_\_

Citizenship \_\_\_\_\_ Date of birth \_\_\_\_\_

**Husband's** name & surname \_\_\_\_\_ ID or passport number \_\_\_\_\_

Citizenship \_\_\_\_\_ Date of birth \_\_\_\_\_

Date of marriage \_\_\_\_\_ Place \_\_\_\_\_ District \_\_\_\_\_

Name of marriage officer \_\_\_\_\_ Designation number \_\_\_\_\_

**MARITAL PROPERTY REGIME**

(1) SIMPLE COMMUNITY OF PROPERTY

We agree that each spouse may engage in cash transactions up to a maximum of N\$ \_\_\_\_\_ without the consent of the other spouse.

(2) EXTENDED COMMUNITY OF PROPERTY

We agree that each spouse may engage in cash transactions up to a maximum of N\$ \_\_\_\_\_ without the consent of the other spouse.

(3) OUT OF COMMUNITY OF PROPERTY WITH PROFIT SHARING

Estimated value of wife's money and property on date of marriage \_\_\_\_\_

Estimated value of husband's money and property on date of marriage \_\_\_\_\_

(4) STRICT OUT OF COMMUNITY OF PROPERTY

(5) ANTE-NUPTIAL CONTRACT ALREADY MADE IN FRONT OF NOTARY

We, the undersigned, have indicated on this certificate the marital property regime which will apply to our marriage. We have both chosen this marital property regime of our own free will. We understand that the property regime we have chosen will remain in force unless we both agree to a new property regime after the marriage takes place by following the rules and procedures in Marital Property Reform Act x of 200x.

THUS DONE, CONTRACTED AND AGREED UPON at (place) \_\_\_\_\_, on (date) \_\_\_\_\_, in the presence of the undersigned witnesses, and of the undersigned marriage officer:

AS WITNESSES:

1. \_\_\_\_\_ (HUSBAND)

2. \_\_\_\_\_ (WIFE)

\_\_\_\_\_  
(MARRIAGE OFFICER)

## REVERSE SIDE OF MARRIAGE CERTIFICATE

If you have not already made an ante-nuptial contract with the assistance of a notary, you may choose any one of the four basic marital property systems which are defined by the Marital Property Reform Act of 200x to apply to your marriage. This law contains the rules for each property regime. Below is a short summary of the key provisions of the law.

### (1) SIMPLE COMMUNITY OF PROPERTY

**Assets and debts are shared as from the date of the marriage.** All the money, property and other assets of husband and wife from *BEFORE* the marriage remain their separate property, and all the debts and other liabilities from *BEFORE* the marriage remain their separate debts. All the money, property and other assets gained *AFTER* the date of the marriage are put together into a "joint estate" (with a few exceptions such as inherited property). The debts of both husband and wife *AFTER* the date of the marriage become debts against the joint estate, as long as both spouses consented to the debt. Both spouses have separate control of their separate property, but they must consent to any major transaction involving the joint estate.

### (2) EXTENDED COMMUNITY OF PROPERTY

**All assets and debts are shared, including those from before the date of the marriage.** All the money, property and other assets of husband and wife from *BEFORE AND AFTER* the marriage are put together into a "joint estate" (with a few exceptions such as inherited property). The debts and other liabilities of both the husband and the wife from *BEFORE* the marriage become debts against the joint estate, as long as both spouses have been informed of these debts before the marriage takes place. The debts of both husband and wife *AFTER* the marriage become debts against their shared property, as long as both spouses consented to the debt. Both spouses must consent to any major transaction involving the joint estate.

### (3) OUT OF COMMUNITY OF PROPERTY WITH PROFIT SHARING

**Assets and debts stay separate during the marriage, but profits made by either spouse are shared equally when the marriage ends because of death or divorce.** All the money, property and other assets of husband and wife from *BEFORE AND AFTER* the marriage are kept separate. The debts and other liabilities of both the husband and the wife from *BEFORE AND AFTER* the marriage are kept separate. The husband and the wife each have control over their separate money and property. They do not need each other's consent for transactions. **BUT WHEN THE MARRIAGE ENDS BECAUSE OF DEATH OR DIVORCE**, husband and wife will share equally in the profits to their separate property since the marriage began. They will not share the debts, but the debts of each spouse are subtracted from the value of that spouse's separate property before the profit is calculated. In order to calculate the profit correctly, both spouses must indicate the value of their property and belongings as of the date of the marriage on the front of the marriage certificate. If either spouse has substantial property, that spouse must list the property and its approximate value on a separate page, which must be signed by both spouses, by two witnesses and by the marriage officer. If no value is listed, it will be assumed that both spouses started out with nothing.

### (4) STRICT OUT OF COMMUNITY OF PROPERTY

**Assets and debts stay separate. Nothing is shared.** All the money, property and other assets of husband and wife from *BEFORE AND AFTER* the marriage are kept separate. The debts and other liabilities of both husband and wife from *BEFORE AND AFTER* the marriage are kept separate. The husband and the wife each have control over their separate money, property and other assets. They do not need each other's consent for transactions.

**Matrimonial home:** No matter which marital property regime applies to the marriage, both spouses have a right to live in the matrimonial home and both need the other spouse's written consent for any transaction involving the home or its necessary and essential contents.

**Necessities for the joint household:** If the spouses are married in "simple or extended community of property", the costs of household necessities should come out of the joint estate. If they are married in "out of community of property with profit sharing" or "strict out of community of property", both spouses must contribute a fair share to the costs of household necessities in light of their respective financial positions.

**Joint estates or shared profits:** If the spouses have shared property or a future right to shared profits, then either spouse can go to court for help if the other spouse is acting in bad faith.