GUIDE TO THE
MARRIED PERSONS
EQUALITY ACT

Gender Research & Advocacy Project
LEGAL ASSISTANCE CENTRE
Namibia
2009
This guide contains a detailed explanation of the Married Persons Equality Act, No. 1 of 1996. It explains this law in simple language and gives examples to help you understand it.

There is also a shorter pamphlet on the new law which highlights only a few of the most important points.

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It is high time that men start to regard women as human beings equal to them.

This bill seeks to create a climate of equality and equal partnership.

The discrimination and oppression of women is a cancer in the flesh of humanity. Men are part of that humanity and therefore this deadly disease affects all of us, men and women.

Nations are made up of women and men. It is only logical that for right decisions to be taken, both women and men should play an equal role... One can hardly do much if half your body is paralysed.

The family which this Bill envisages would be a family based on partnership, mutual respect and consideration of the human worth of all its members.
1. Background

The purpose of the Married Persons Equality Act is to remove some forms of sex discrimination in marriage. This is necessary to bring Namibian law on marriage in line with the Namibian Constitution.

THE NAMIBIAN CONSTITUTION

The Namibian Constitution says that all persons must have equal rights under the law. It forbids discrimination on several grounds, including race and sex (Article 10). The Constitution also says that men and women must have equal rights in all aspects of marriage (Article 14).

The Constitution is Namibia’s Supreme Law. Every other law in the nation must follow the Constitution. This means that customary law (the traditional laws of different communities), common law (the legal rules which come from court cases decided over the years) and statute law (the laws passed by Parliament) must follow the Constitution. Any law which does not follow the Constitution can be changed by Parliament or ruled unconstitutional by a court.

RELEVANT PROVISIONS OF THE NAMIBIAN CONSTITUTION

Article 10 Equality and Freedom from Discrimination
(1) All persons shall be equal before the law.
(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Article 14 Family
(1) Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
(3) The marriage is the natural and fundamental group unit of society and is entitled to protection by the society and the State.

Article 19 Culture
Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

Article 66 Customary and Common Law
(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.
(2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.
INTERNATIONAL OBLIGATIONS

Namibia has pledged itself to similar rights of equality between men and women under the UN Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and the African Charter of Human and People’s Rights. This means that Namibia also has an international obligation to remove all forms of sex discrimination in its national laws.

RELEVANT PROVISIONS OF THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Namibia is a party to this agreement between nations and has pledged to honour all of its provisions. The following provisions are relevant to the Married Persons Equality Act.

Article 2(f)
States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: … to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

Article 5(a)
States Parties shall take all appropriate measures… to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Article 13(b)
States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular… the right to bank loans, mortgages and other forms of financial credit.
Article 14(1)
States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.

Article 15(1)-(2)
States Parties shall accord to women equality with men before the law. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

Article 16(1)
States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
(a) the same right to enter into marriage;
(b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent;
(c) the same rights and responsibilities during marriage and at its dissolution;
(d) the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children…
(e) the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children…
(g) the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
(h) the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

TWO KINDS OF MARRIAGE

To understand the Married Persons Equality Act, you need to understand the two kinds of marriage in Namibia.

Civil marriage is when a man and a woman are married by a marriage officer. All magistrates are marriage officers. Most pastors, priests and other church leaders are also marriage officers. Any person with a marriage certificate has a civil marriage. The law on civil marriages is the same in every part of Namibia.

Customary marriage is when a man and a woman are married according to the traditions of their community, but without a marriage officer. The law on customary marriages is different in different communities. Customary marriages are not registered. People who enter into customary marriages do not get a marriage certificate. (Laws to change this situation are being considered. In future, there may be a procedure for registering customary marriages.)

Some parts of the Married Persons Equality Act apply only to civil marriages. Some parts apply to civil and customary marriages.

The two forms of marriage are not always kept strictly separate. A couple may observe some of the customs of their community, such as the exchange of gifts or bridewealth. They may follow
some of the traditional ceremonies. But they may also have a marriage ceremony in a church or in a magistrate’s court. Such a couple may follow different sets of laws and rules in their marriage, depending on the situation at hand. The Married Persons Equality Act applies to these “hybrid marriages”.

THE PROBLEM

Namibia inherited Roman-Dutch common law from South Africa at Independence. This is the law which the courts have developed over many years, case by case. This form of law was first brought to Africa by the European colonisers. Some aspects of this law discriminate against women in civil marriages.

There are also some aspects of Namibian customary law which discriminate against women in customary marriages. Customary law means the rules and customs which have developed in different communities. It changes over time to meet the changing conditions of life.

THE MARRIED PERSONS EQUALITY ACT

The Namibian Constitution respects both common law and customary law. But any parts of either law which conflict with the rights guaranteed by the Constitution will not be valid (Article 66). The Married Persons Equality Act brings many aspects of common law and customary law on marriage in line with the Constitution. In this way, the Married Persons Equality Act helps turn the promises of the Constitution into practical realities.

The Married Persons Equality Act applies to all civil marriages, past and future. Parts of the Married Persons Equality Act apply to all customary marriages, past and future.

There is one exception. The Roman-Dutch common law inherited by Namibia at Independence says that the personal and property consequences of a marriage follow the law of the country where the husband was domiciled at the time the marriage took place. (The country of domicile is usually the country where a person lives and intends to stay.) This rule was not changed by the Married Persons Equality Act. This means that a Namibian woman who marries a foreign spouse may have to follow the laws about marriage which apply in the husband’s country of origin.
2. **Civil Marriages**

*Parts 1, 2 and 4 of the Act apply only to civil marriages.*

To understand the parts of the Married Persons Equality Act which apply to civil marriages, it is first necessary to understand the legal concept of “marital power”. It is also necessary to understand the different property regimes which can apply to civil marriages. These are different sets of rules which govern the property of husband and wife.

**MARITAL POWER**

“Marital power” was a husband’s legal power over his wife and her property in a civil marriage. This power came from Roman-Dutch common law.

Marital power meant that a wife was treated like a child in the eyes of the law. It meant that she could not do many things without her husband’s permission. She could not bring a case to court. She could not buy and sell property. She could not sign a contract. She could not take out a loan. She could not be the director of a company or the trustee of a trust. But a husband could do all of these things without permission from his wife.

Marital power also meant that the husband controlled all of the property of the marriage, whether it was property that the couple owned jointly or the separate property of the husband or the wife.

Before the Married Persons Equality Act, the only way to get rid of marital power was for the couple to make an agreement that marital power would not apply, before the marriage took place. These agreements, which are called antenuptial contracts, require the help of a lawyer. Most couples in Namibia do not make them. This meant that marital power applied to most civil marriages in Namibia.

**IN COMMUNITY OF PROPERTY**

Marriage in community of property means that all the belongings and the debts of the husband and the wife are put together into what is called a “joint estate”. They each own half of everything in the joint estate.

Everything that belonged to the husband before the marriage, and everything that belonged to the wife before the marriage, becomes part of the joint estate. Any money earned by either of them during the marriage becomes part of the joint estate. Everything they buy during the marriage also goes into the joint estate, no matter who actually paid for the thing. The money and property in the joint estate can be used to pay loans or debts, no matter which spouse is responsible for them. If the marriage comes to an end, the joint estate is divided equally between husband and wife.

Before the Married Persons Equality Act, marital power gave the husband the right to control the joint estate. Even though half of everything in the joint estate belonged to the wife, the husband
did not have to ask her when he bought or sold something. But the wife could not buy or sell most kinds of property without the husband’s permission.

The Married Person’s Equality Act says that a husband and wife married in community of property must now agree to sell, give away or borrow against important joint assets – such as the house, household furniture or livestock. They must also agree before taking out a loan which is secured by joint property. Neither of them has the right to do these things independently.

**OUT OF COMMUNITY OF PROPERTY**

Marriage out of community of property means that the husband and the wife each have their separate belongings and debts.

Everything that belonged to the husband before the marriage remains his, and everything that belonged to the wife before the marriage remains hers. They each keep their own earnings. Everything the husband buys during the marriage is his only, and everything the wife buys during the marriage is hers only. The husband and the wife are each responsible for their own loans and debts. If the marriage comes to an end, the husband and the wife each keep their own separate belongings.

Before the Married Persons Equality Act, marital power gave the husband the right to control the wife’s separate property during the marriage, as well as his own property, unless the couple made an agreement before the marriage saying that marital power would not apply.

The Married Person’s Equality Act says that a husband and wife married out of community of property will each control their own belongings. They can each buy or sell their own belongings without asking each other. They can each take out loans on their own.

**WHICH SYSTEM OF MARITAL PROPERTY APPLIES?**

Old apartheid laws which are still in force in the year 2008 determine which marital property system will apply automatically, if a couple who are getting married do not make any special agreement about how their property will be managed.

All civil marriages between blacks north of the old “Police Zone” on or after 1 August 1950 are automatically out of community of property, unless another arrangement was made with the marriage officer before the marriage took place.
All other civil marriages are automatically in community of property, unless the couple signed an ante-nuptial contract before the marriage took place.

As noted above, there is an exception. The property system which applies to a marriage between a Namibian woman and a foreign spouse may follow the laws about marriage in the husband’s country of origin. The rules about marital property for these marriages might be different.

Marriages between black Namibians on or after 1 August 1950 were automatically out of community of property. Marriages between others automatically in community of property.

Down here, all marriages automatically in community of property.

The colonial administrators thought that these rules would help to protect women in polygamous marriages, which were more common in the north. The rules were supposed to help protect women in a customary marriage if their husbands made a civil marriage with another woman later on. But it is against the Constitution to have different laws for different races. The rules on marital property regimes will probably be changed very soon.

**ABOLITION OF MARITAL POWER**

The Act repeals marital power. There is no longer any such thing in Namibia, in marriages which have already taken place, or in marriages which take place in the future.

Because the idea of “marital power” applied only to civil marriages, this repeal applies only to civil marriages. Inequalities between husbands and wives in customary marriage come from different sources.
The repeal of marital power means that husbands and wives will from now on have equal power to do the following things:

- enter into contracts
- bring or defend court cases
- register land in their own names
- administer the money and property of a deceased person
- administer the money and property of someone who has been declared bankrupt
- be the director of a company
- pledge property to guarantee someone else’s debts.

REPEAL OF LEGAL POSITION OF HUSBAND AS HEAD OF HOUSEHOLD

The Act says that the law will no longer recognise the husband as the head of the household.

Before the Married Persons Equality Act, the legal position was that the husband had the final say on all important family decisions, such as where and how the couple would live. If the husband and wife had a dispute, the law said that the husband would be the winner because he was the legal “head of household”.

The Act repealed this legal rule. This means that families are now free to decide amongst themselves how they will handle family decision-making, but the law will not automatically support the opinion of the husband over the opinion of the wife. If the family wants to treat the husband or the wife as the head of the household, or to make decisions by consensus, this is their own private business. Couples can still turn to religion, tradition or other values for guidance on the roles of husband and wife. But the law no longer favours the husband.

NEW RULES FOR MARRIAGES IN COMMUNITY OF PROPERTY

It is easy to apply equal rights to marriages out of community of property. Husbands and wives will in future have full power to control their own money and property, but neither of them will have any power over the money or property of the other.
But marriages in community of property are in some ways like business partnerships. All the property and debts of a marriage in community of property are part of the joint estate, and each spouse has a half share of that estate. So the ideal approach is for all major decisions about property and debts to be made jointly. Husband and wife should consult each other on all major financial decisions.

Financial decisions which should be made jointly

In general, the Married Persons Equality Act gives both husband and wife equal powers to sell joint assets, contract debts and administer the couple’s joint property. But a husband and a wife in a marriage in community of property should do the following things jointly:

- sell, borrow against or otherwise enter into obligations affecting land which is part of the joint estate
- sell, give away or promise any company shares, insurance policies or other investments which are part of the joint estate
- sell or promise any jewellery, coins, stamps, paintings, livestock or other property which is held mainly as an investment for the future
- sell, promise or borrow against any furniture or other property which is used in the couple’s common household
- enter into a hire-purchase agreement or a leasing agreement for any items, such as furniture or a motor car
- enter into a contract for the purchase or sale of land, where the purchase price is to be paid in more than two instalments which stretch out over a period of a year or more
- make a written guarantee to pay someone else's debt if they cannot pay it
- receive any salary, wages or other income due to the other spouse from that other spouse’s employment or business
- receive any compensation for loss of income due to the other spouse in connection with that other spouse’s employment or business
- receive any inheritance, donation, bursary or prize due to the other spouse;
- receive any income from the separate property of the other spouse (for example, rent paid on a piece of land belonging to the other spouse which is not part of the joint estate)
- receive dividends or interest on company shares or investments which are in the name of the other spouse
- receive the proceeds of any insurance policy or annuity which is supposed to go to the other spouse
- give away property which is part of the joint estate, if the gift might have an effect on the other spouse’s interest in the joint property (meaning that small gifts such as birthday presents of a reasonable value will not require the other spouse’s consent).

There are three exceptions to the general rules listed above. The consent of the other spouse is not necessary if one spouse wants to:

- sell or trade shares on a registered stock exchange
- deal with bank deposits or building society shares held in his or her own name
- perform any of the listed transactions which are part of his or her own normal profession or business.
Consent from the other spouse

Consent can be given either orally or in writing for most of the things on the list of decisions which should be made jointly.

But consent to any actions which involve deeds to land or any other documents which must be registered at a deeds office must be in writing.

Consent for most of the items on the list can be given within a reasonable time after the transaction has actually taken place.

The only exception to this rule is transactions involving land – written consent must be obtained from the other spouse in advance for these transactions.
What if one spouse acts without the other’s consent?

What happens if one of the listed financial transactions takes place without the other spouse’s consent?

If the third party to the transaction (such as the bank, or a person who buys furniture from one of the spouses) does not know that there is no consent from the other spouse – and cannot reasonably be expected to know that there is no consent – then the transaction will be treated as though there was consent from the other spouse. In other words, the transaction will not be reversed unless the third party knew or should have suspected that there was no consent from the other spouse. This provision is intended to protect the rights of innocent third parties.

But if the spouse who did the transaction should reasonably have known that the other spouse was not likely to give consent after the fact – and the joint estate suffers a loss because of this transaction – then the other spouse can ask for an adjustment of the joint estate. There are two ways to do this.

1. The wronged spouse can request an adjustment from the High Court when the joint estate is divided, at the time when the marriage comes to an end because of divorce or death. This means that, instead of dividing the joint estate exactly in half, some amount will be deducted from the half share of the spouse who acted wrongly and credited to the wronged spouse. If the asset involved was the personal property of the wronged spouse, then the full amount will be deducted. An additional amount can be deducted and paid over to the wronged spouse if the asset involved had special sentimental value to that spouse.

   For example, suppose that a husband sells furniture belonging to the common household for N$5000 without his wife’s consent and then gambles away the money. If the two parties later get divorced, the wife could request that N$2500 from the husband’s half of the joint estate be given to her, to make up for her share of the loss his actions caused.

   Suppose he sold the ring she inherited from her grandmother for N$1000 and gambled away the money. Then at the time of the divorce, she could request that the entire amount of N$1000 be credited to her from his half of the estate, along with another N$1000 in respect of the sentimental value of the ring.

2. The wronged spouse can go the High Court to request an adjustment while the marriage is still in force. This can be useful if the spouse who acted without proper consent has some separate property which is not part of the joint estate – if this is the case, then the loss to the joint estate can be made up from that separate property.

   If there is no separate property, then the loss to the wronged spouse can be paid out of the couple’s joint property, and an adjustment for this will be made when the marriage comes to an end and the joint property is divided.

   For example, sometimes a couple will get married in community of property, but with an agreement which says that certain types of property such as inheritances will be kept separate from the joint estate. Suppose that the husband owns a piece of farmland which was by agreement kept out of the joint estate. Then suppose that he sells the couple’s
house in town without his wife’s consent and makes a bad bargain which causes a loss of N$50 000 to the joint estate. The wife can ask the High Court to order that the husband sell the land and give her N$25 000 of the proceeds to make up for her share of the loss his actions caused.

If the husband has no separate property, the wife can ask the High Court to order that N$25 000 be paid to her out of the couple’s joint bank account for her share of the loss, to be her own separate property. Then, when the joint estate is divided later on at the time of death or divorce, that N$25 000 must be subtracted from the husband’s half share in the estate.

Whenever there is a court case about a failure to get consent, the court will assume that the spouse who failed to get consent should have known that the other spouse would probably NOT agree to the transaction in question. It will be up to the spouse who acted alone to prove otherwise. This starting point favours the spouse who was not consulted.

What happens if one spouse cannot get the other spouse’s consent?

The High Court or a Magistrate’s Court can give permission for one spouse to do a certain transaction without the consent of the other spouse if (a) the court finds that the other spouse is withholding consent unreasonably; or (b) there is some other good reason (such as a spouse who cannot be located or is unconscious for a long period of time).
Other legal remedies

Suppose that one spouse is repeatedly entering into transactions without the required consent of the other spouse, or is recklessly squandering the joint estate. The other spouse can go to the High Court and request:

(a) a general suspension of the irresponsible spouse’s power to deal with the joint estate or
(b) an order forbidding the irresponsible spouse to engage in specific transactions.

Legal proceedings

Spouses who are married in community of property generally need each other’s consent to bring or defend a court case. There are three exceptions:

- a court case which involves only a spouse’s separate property
- a court case for damages resulting from injury to one spouse
- a court case relating to the employment or business of one spouse.

In these situations, one spouse can be a party to a court case without the other’s consent.

Court cases concerning the entire joint estate must normally involve both spouses. In general, a creditor who is trying to recover money from the joint estate for a bad debt can (a) sue both spouses jointly or (b) sue the spouse who got into debt. But, if the debt was in respect of household necessities such as food, clothing or furniture, the creditor can (a) sue both spouses jointly, or (b) sue either spouse individually. This is because both spouses would normally benefit from expenditures on household necessities, and both spouses have a duty to contribute to each other’s basic support.
Practical examples

The rules contained in the Act become clearer if we consider some practical examples.

- **Can a spouse buy a house without the consent of the other spouse?**

  Yes, as long as no common household property, investment property or other land which is part of the joint estate is put up as security for a loan for the house. Consent is also required if the house is to be paid for in more than two instalments which will stretch over a period of at least one year. **BUT if the land in question is part of the joint estate, it MUST be registered in the names of both spouses.** The requirement of registration in the name of both spouses is not stated in the Married Persons Equality Act itself. But it is required by the Deeds Registries Amendment Act, No. 2 of 1996 and the Registration of Deeds in Rehoboth Act, No. 8 of 1996.

- **Can a spouse sell a house without the consent of the other spouse?**

  No, the consent of both spouses is required. It would be hard for a spouse to sell land without getting the required consent, because **written consent must be given in advance** for any sale of land which is part of a couple’s joint property.

- **What if the deed to the land was registered before the Married Persons Equality Act came into force?**

  Even if the land is registered in the name of only one spouse, it is unlikely that this spouse would be able to sell it without the required consent. This is because land transactions are checked very carefully. A spouse who is concerned that the other spouse will try to sell land dishonestly, without the necessary consent, can have his or her name added to the deed. This can be done directly by the spouse if the deeds are registered in Rehoboth. All deeds to land in other parts of the country are registered in Windhoek and can be changed only with the help of a legal practitioner.

- **What can one spouse do if the other spouse spitefully threatens to sell or give away all the furniture in the house over the first spouse’s objections?**

  Suppose for the sake of example that it is the husband who is making the threat. (1) If the wife knows the potential buyer, she can put the buyer on notice that she has not given consent. (2) The wife can go to the High Court to get an order depriving her husband of his powers to deal with the couple’s joint property, or an order specifically forbidding him to do anything with the furniture – but she will probably need to get a legal practitioner to help her with this. (3) The wife could make a note of the value of the furniture and what happened to it, and then ask
the High Court for an adjustment of the joint estate. She could do this as soon as she learns of the transaction, or later on when the marriage comes to an end because of death or divorce – but this remedy is only available if the joint estate has suffered some loss. For example, if the money from the sale of the furniture was used to buy new furniture of a similar type for the household, then no financial loss has been suffered. But if the furniture was given away to the husband’s new girlfriend, then there has been a loss.

- **What can one spouse do if the other spouse is planning to enter into a hire-purchase agreement on property such as furniture or a motor car without the first spouse’s consent?**

Suppose for the sake of example that it is the wife who is planning to enter the contract. The easiest course of action would be for the husband to put the dealer on notice that he has not given consent to the contract, if he knows which dealer is involved. The other remedies described in the example above are also available to the husband in this case.

- **What if one spouse takes away or destroys some of the couple’s joint property?**

The Married Persons Equality Act is silent on this point, but the wronged spouse has some legal remedies. The person who is removing or destroying joint property can be charged with theft or malicious damage to property. That spouse’s partial interest in the property is no protection against a criminal charge. There may also be other legal remedies available to the wronged spouse, depending on the exact circumstances of the case. It would be best to consult a legal practitioner to discuss the possibilities.

- **How does the Married Persons Equality Act affect the rules on divorce?**

When a couple is married in community of property, the joint estate is usually divided in half when they divorce. Where one spouse takes custody of the children, the other spouse may have to pay maintenance for the children. One spouse may also have to pay maintenance for the other spouse, depending on the relative financial position of the two spouses. The Married Persons Equality Act will not affect responsibility for maintenance, but it may affect the division of the joint estate. If one spouse has entered into a transaction which requires mutual consent without the consent of the other spouse and this transaction has caused a loss to the joint estate, then the division of the joint estate can take this loss into account. Instead of dividing the joint estate in half, some amount from the half share of the spouse who acted illegally will go to the wronged spouse to make up for the loss to that spouse.
How does the Married Persons Equality Act affect the rules on inheritance?

When a couple is married in community of property, the joint estate is divided in half when one of them dies. If the deceased left a will, the property in the deceased's half of the estate is distributed amongst the people named in the will. If there was no will, the property in the deceased's estate will be shared amongst the surviving spouse and the children, in accordance with the statutory rules on inheritance. If the deceased spouse has entered into a transaction which requires mutual consent without the consent of the other spouse and this transaction has caused a loss to the joint estate, then the division of the joint estate at the time of death can take this loss into account. Instead of dividing the joint estate in half, some amount from the deceased's half share will be given to the surviving spouse to make up for the loss. This adjustment will be made before anything from the deceased's portion of the joint estate can go to the heirs.

NEW RULES FOR MARRIAGES OUT OF COMMUNITY OF PROPERTY

Spouses have a mutual duty to support and maintain each other. This is not usually complicated if the marriage is in community of property, where the assets are pooled and shared. But if the marriage is out of community of property, then either spouse may be liable to pay for certain household necessities out of his or her own separate property.

Under the old law, wives had the right to run up accounts for household necessities (such as rent or groceries) which their husbands were then liable to pay. Under the new law, either spouse can enter into debt for household necessities which the other spouse is then liable to pay. The person who is owed money can sue to get it back from either spouse, or from both, if necessary.

The cost of household necessities is supposed to be shared between the spouses according to their respective means. If one spouse contributes more than his or her fair share, that spouse can bring a court action against the other spouse to recover the difference. That spouse can also ask for an adjustment at the time the marriage comes to an end.
3. Civil Marriages and Customary Marriages

Part 3 of the Act applies to both civil marriages and customary marriages.

DOMICILE

Domicile is a legal concept. Courts look at domicile to decide which country’s laws to apply in cases involving citizens of different countries or people who have spent time in different countries.

The rules about domicile are not important for most marriages in Namibia. If both husband and wife are Namibian citizens who live in Namibia, then Namibian law obviously applies to both of them. Questions about domicile are important only in unusual cases where marriages involve citizens of different countries, or sometimes in cases where husband and wife live in different countries for some period of time. The question of domicile may arise, for example, in a situation when one spouse seeks a divorce because the other spouse has abandoned the marriage and gone to live in another country.

Adults who are not married have the domicile of the place where they normally live. But before the Married Persons Equality Act, wives who were married in a civil marriage had the domicile of their husbands, no matter where they themselves lived. The children of a civil marriage also had the domicile of their father, no matter where the children actually lived. Under customary marriage, the
domicile of the wife and children would depend on the customs of the community. This means that the rules on domicile could be different in different communities.

OLD LAW: Suppose that a woman’s husband in a civil marriage left her and her children and went to live permanently in Sweden. The wife and children were still living in Namibia, but under the old law they would have the domicile of Sweden. This means that Swedish law might have applied to some aspects of the marriage and the children of the marriage.

The Married Persons Equality Act gives an independent domicile to all persons, adult and children. In terms of the Act, everyone’s domicile is the place where he or she normally lives. No one’s domicile depends on the domicile of husband or wife, mother or father.

Under the Act, the domicile of a child will be the place the child is most closely connected to. If the child is living with both parents, or with one parent, a court will assume that this place is the child’s domicile – unless it is proved that the child actually has a different domicile. If the child spends time in more than one place, then the court will have to consider all the facts and decide which place should be treated as the child’s domicile.

Neither parent has the right to decide on the child’s domicile, although the custodial parent usually has the right to decide where the child will live if the parents are divorced. But domicile is a question of fact for the court to decide.

NEW LAW: Suppose that a child is living with his or her grandparents in Namibia. The child’s parents leave Namibia and go to live permanently in Botswana. Under the old law, the child’s domicile would be Botswana – even though the child has never set foot there. But under the Married Persons Equality Act, the child’s domicile is Namibia, and Namibian law will still apply.

Contrary to rumour, the Act does not contain anything which could encourage husbands and wives to live apart. It simply says that men and women must be treated equally if there is some unusual situation where husbands and wives live in different countries, or where one spouse has abandoned the marriage and moved to another country. The changes to the rules on domicile will have no effect on either spouse’s right to Namibian citizenship, or to live in Namibia.

GUARDIANSHIP OF CHILDREN

Guardianship is the power to make important legal decisions on behalf of a child. For example, guardianship includes the power to sign a contract or to bring a court case on behalf of a child.

There are three possible kinds of guardianship: (1) Sole guardianship means that only one person has guardianship over a child. (2) Joint guardianship means that the mother and the father both have guardianship powers, but they must act together. They must consult each other. (3) Equal guardianship means that the mother and the father both have guardianship powers, but they can act independently of each other. They may consult each other, but the law does not require them to do this.

Before the Married Persons Equality Act, the father was the sole guardian of children in a civil marriage. He usually remained the guardian of the children, even if there was a divorce and
custody of the children went to the mother. Under customary marriage, guardianship depended on the customs of the community.

The Married Persons Equality Act gives equal guardianship to mothers and fathers, in both civil and customary marriages. This means that mothers and fathers have equal powers to make legal decisions on behalf of their children independently, although it is likely that most parents will consult with each other in practice.

The school says that this paper must be signed by the child’s guardian. But I do not know how to contact my husband. He is away working on a fishing boat.

You and your husband have equal guardianship over the children of your marriage. You can sign the paper on your own.

The Act contains some exceptions to the rule of equal guardianship. Some decisions about children are so important that they require the consent of both husband and wife:

- consenting to the marriage of a child
- putting a child up for adoption
- removing a child from Namibia
- applying to add a child’s name to either parent’s passport
- selling land belonging to the minor child, or doing anything which affects the child’s right to that land.

The High Court can give an order allowing one spouse to act on the listed matters without the other’s consent if there is a good reason. Otherwise, husband and wife must both consent to these matters.

It is important to remember that guardianship is not the same as custody. For example, if the parents divorce, they will both continue to have equal guardianship over the child (unless the court makes an order giving one of them sole guardianship). But the parent with custody over the child will have the sole power to make day-to-day decisions, such as where the child will live and what school or church the child will attend. The guardianship powers will apply only to legal matters, such as signing a contract on the child’s behalf or administering property which belongs to the child. Both parents will continue to have equal and independent power for these kinds of decisions.
APPLYING THE SECTION ON EQUAL GUARDIANSHIP TO CUSTOMARY MARRIAGES

Section 14 of the Married Persons Equality Act on joint guardianship may be difficult to apply to customary marriages. Section 14 says that “the father and the mother shall have equal guardianship” of a minor child of a marriage. It also says that “with respect to rights, powers and duties”, this equal guardianship will be equal to the guardianship which every guardian had under the common law before the Married Persons Equality Act came into force.

Section 16 of the Act says that some parts of the Act do NOT apply to customary marriage. The section on joint guardianship is not listed here, which seems to mean that that it is supposed to apply to customary marriages.

What makes this somewhat uncertain is that the “common law” on guardianship means the guardianship rights, powers and duties which fathers in CIVIL marriages had in the past. These are not exactly the same powers, rights and duties which fathers or mothers or other relatives have had in the past in CUSTOMARY marriages. So applying the provision on equal guardianship to customary marriages may introduce a new approach to guardianship in some communities, instead of just making the rights of fathers and mothers equal.

There are not yet any court cases interpreting this section of the Married Persons Equality Act to give further guidance on how the rules on equal guardianship will work in customary marriages.

AGE OF MARRIAGE AND CONSENT TO MARRIAGE BY A MINOR

Civil marriage

The Married Persons Equality Act equalises the age at which boys and girls can enter into a civil marriage without state consent, at age 18. Under the old law, boys could get married in a civil marriage at age 18 and girls at age 15. Younger boys and girls had to get consent from the government to enter into a civil marriage. Under the new law, both boys and girls can get married in a civil marriage at age 18. Younger children need government permission.

All children under the age of 21 still need parental consent for a civil marriage. Under the new law, consent to civil marriage for children under age 21 must be given by both mother and father.

Customary marriage

The law does not set any minimum age for customary marriage for boys or girls. This depends on the customs of the community.
The Act says that minors need the consent of both their mother and their father to “contract a marriage”. (In 2008 the age of minority is 21, although this may change in the future.) Does this mean that children under the age of 21 need the consent of both parents to enter into a customary marriage? The answer is not entirely clear, because the Married Persons Equality Act does not define the terms “marriage” or “contracting a marriage”. The section in question appears to apply to parents who are married under either civil and customary marriage, but does the rule apply to marriages by children under both civil and customary law? The answer depends on whether or not the phrase “contracting a marriage” can be understood to apply to a customary marriage. This question cannot be resolved for certain until Parliament clarifies the section in question, or until a court interprets it.

**Summary**

The current position (as of 2008) can be summarised as follows:

1. If a child under the age of 21 wants to enter into a CIVIL marriage, that child needs the consent of both mother and father. It does not seem to matter what kind of marriage the parents have – the consent of both of them is still required, unless a court gives permission for the marriage to take place without this consent. A court would be likely to allow this in a case where one or both of the parents were being unreasonable in refusing consent, or whether one or both of the parents could not be located.

2. If a child under the age of 21 wants to enter into a CUSTOMARY marriage, then it is not entirely clear whether or not the consent of both parents is required if this is not the custom of the community. The safest course of action in this situation would be to get the consent of both parents, since the law may be interpreted to require this.

**REMAINING INEQUALITIES IN CUSTOMARY MARRIAGE**

Some inequalities in customary marriage remain in place. At the time the Married Persons Equality Act was being considered, the government felt that more research on customary marriage was needed to understand the sources of inequality. As of the year 2008, matters such as inheritance and the rights of husband and wives over property in customary marriage still need to be brought in line with the Namibian Constitution.
The Work of making men and women equal under customary law is not yet finished
4. Debates Around the Married Persons Equality Act

The Married Persons Equality Act was hotly debated in the National Assembly and the National Council. Here are some quotes taken from those debates. The different comments may stimulate thought and debate about the law in your family or your community.

- When God created the universe, He first created man as a first creature before the existence of a woman, and I quote Genesis 2:24: But for Adam no suitable helper was found. So the Lord God caused the man to fall into a deep sleep and while he was sleeping, he took one of the man’s ribs and closed up the place with flesh. Then the Lord made a woman from the rib he had taken out of the man, and he brought her to the man. The man said: ‘This is now bone of my bones and flesh of my flesh: she shall be called ‘woman’ for she was taken out of man.’ The second quote is from the same chapter, verse 16: To the woman he said: ‘I will greatly increase your pains in childbearing; with pain you will give birth to children. Your desire will be for your husband and he will rule over you.’

- We find… two creation stories in the Book of Genesis. Men, when they quote from the Bible, ignore the first creation story for obvious reasons. This story, indeed, gives marital, social, economic and political power to both men and women. I quote from Genesis 1:26-27…: Then God said, ‘And now we will make human beings. They will be like us. They will have power over the fish, the birds and all animals, domestic, wild, large and small. They will have power.’ So God created human beings, making them to be like Himself. He created them, male and female.

- Man is the image of god and we pray Our Father in Heaven but not Our mother in heaven. That means that man is more powerful than women.

- The Bible does not in any way support discrimination and suppression of human beings by human beings.

- There is another creation story from the Namibian soil which I heard as a child: When God opened the tree – the Omumborombonga tree – the first person to come out of the tree was a woman. It was not the man who came out of the Omumborombonga, it was a woman. This simply means that the woman, according to the Herero story, was created first… She saw first the rising of the sun and ate the fruits from the fruit tree and drank the milk from the cow and then invited and called the man out of the tree. She called the man out of the tree and showed him the beautiful world around them, offered him the milk and the fruit, she was indeed in command according to the Herero story.
- It is high time that men start to regard women as human beings equal to them.
- A hen cannot become a cock and it remains so.
- This bill will never turn biological men into women and vice versa, but that is not what the bill is all about.
- An example of the leadership of the husband is seen in Noah, Abraham, Jacob and Lot and even in the animals.
- Nations are made up of women and men. It is only logical that for right decisions to be taken, both women and men should play an equal role… One can hardly do much if half your body is paralysed.
- I am sure that the leadership of the man in the family is natural, just as it is natural for a woman to give birth to a child.
- I intend to get married one day, but I would not want my wife to be treated as a minor, but as an adult who can make her own decisions, who can agree and disagree.
- Even with a game of cards, the king counts more than the queen.
- The discrimination and oppression of women is a cancer in the flesh of humanity. Men are part of that humanity and therefore this deadly disease affects all of us, men and women.
- You have one Prime Minister, you have one President, so you also have one head of the family.
- I think the leadership of the family should be left open to individual couples to decide.
- This bill seeks to create a climate of equality and equal partnership…
- If we do not handle this bill carefully, we will find… that one day it will be the man’s duty to cook and wash.
- Tradition, culture, civilization and religion dictate that there should be a senior manager in a well-structured family.
- Sometimes people adhere to outdated notions even though the real lives they live have changed. Some people also call in the aid of customary law when it suits then, well aware that such laws are flexible, unwritten and can be manipulated by those who have the power and authority… I am afraid that culture and religion are conveniently used as instruments by those who want to subject women to all forms of inequality…
- The family which this Bill envisages would be a family based on partnership, mutual respect and consideration of the human worth of all its members.
- In many black communities in Namibia, if not in the whole of Africa, men must pay lobola in different forms to the family of his wife. Why do women not do the same if they are equal?
• To the traditional argument that the husband ought to be the head according to culture, my question is “which culture?”

• I strongly feel that the husband should remain the head of the family… This is natural and we cannot fight and change nature.

• Societal and religious norms are definitely different from the legal status. I should argue that the head of the family should be an internal arrangement.

• If you listen to the members of our communities, you will realise that this Bill is supported mostly by single women, by women who have problems in their families and by those who know that they are not going to marry.

• Until such a time that marriage is regarded as a contract with rights and duties and mutual caring and love, we will continue to bury wives and girlfriends murdered by their so-called lovers.

• Article 14 of our Constitution… explicitly decrees that the parties ‘shall be entitled to equal rights as to marriage, during marriage and at its dissolution.’ Any law, any statutory law, any common law rule, any customary law rule which violates this principle of equality in a marriage is violating our Constitution and cannot be enforced… It couldn’t be clearer, those provisions in the Constitution.

• We fought side by side to liberate this country with the hope to share the fruits of such liberation. Now that Independence is here, you colleagues want to turn around and indirectly take over the role of the colonialists by oppressing and discriminating against women. If oppression and discrimination was the so sweet, what was the struggle for then, or was it only for you?

• The effective participation of men and women as couples will increase the wealth of this country.

• I believe giving equal rights to spouses in marriage is laying the ground for bringing up children in a democratical way, thus creating democratic members of society from the very word go.
5. Is the Married Persons Equality Act Working?

The Married Persons Equality Act has been very effective in advancing equality in ownership of land by married couples because the rules here are very strict and very clear.

It is difficult to be sure about the impact of the new law in other areas. As of the year 2008, there has only been one court cases to show how the Act is working in practice. Some people have argued that the Act does not give enough practical help to people in cases where one spouse is taking advantage of the other.

On the other hand, the Married Persons Equality Act has strong symbolic value. It has been an announcement from Parliament that equality within marriage is a serious matter which cannot be ignored. Even some people who do not fully understand the law know that it means that husbands and wives are supposed to be equal.

The Legal Assistance Centre hopes that this booklet will help you to understand your rights more clearly, so that you can put the Act to work for you if you need it.
Do you have questions or comments about the Married Persons Equality Act?

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