

7 REASONS WHY FORFEITURE OF PATRIMONIAL BENEFITS HAS BEEN REMOVED FROM THE DIVORCE BILL

What is forfeiture of patrimonial benefits? During divorce proceedings, under the current law a spouse can ask the Court to grant an order for forfeiture of patrimonial benefits. The Court will consider factors such as the duration of the marriage, the circumstances leading up to the breakdown and any substantial misconduct on the part of either of the spouses. The Court will grant an order for forfeiture of matrimonial benefits if it finds that a spouse has unduly benefitted in light of these considerations.

Key problems: (1) Forfeiture of patrimonial benefits applies only to marriages in community of property. (2) Only the spouse who has contributed *less* to the joint estate has any benefits to forfeit. It is not possible to get this kind of order against the financially-stronger spouse. (3) The purpose of the Divorce Bill is to move away from the current fault-based system to a no-fault system. Since forfeiture of patrimonial benefits is based on spousal misconduct, it undermines the idea of a no-fault system.

Current Divorce Bill: The provision on forfeiture of patrimonial benefits which appeared in an earlier draft of the Bill has been removed, and the Divorce Bill now also repeals the common law provision on forfeiture of patrimonial benefits. Instead, the Bill includes a better system applicable to *all* civil marriages whereby the Court has discretion to consider the parties' respective economic circumstances and make any adjustment which is fair, using factors listed in the law as a guide.

Reason 1: It is usually impossible to assign “fault” to one spouse or the other. Marital wrongs are sometimes not the cause of a divorce, but rather the effect of a broken marriage. No-fault divorce recognizes that marriages are complex relationships and that most marriages break down for a number of reasons. The benefits that come with a no-fault system will be undermined if fault “comes in through the back door” in connection with property division. Arguments about fault can be particularly detrimental to the children involved.

Reason 2: Gender stereotypes often work against women in respect of “misconduct”. A survey of recent case law in South Africa indicates that judicial attitudes about moral guilt in marriage are colored by “sexist attitudes about domestic violence, patriarchal double standards about sexual infidelity, and gendered norms about the behavior of wives and husbands”. This could also be the case in Namibia.

Reason 3: Forfeiture can be ordered only against the spouse who contributed less, who will often be the woman. Only the spouse who brought less into the marriage is entitled to benefits from the spouse who brought in more - so only the “poorer spouse” (usually the woman) has benefits to forfeit. The “richer spouse” who brought more into the marriage (usually the man) has no potential benefits to forfeit.



Joint estate



She contributes less. In a normal 50-50 division, she would get a portion of her husband's contributions. **She is getting benefit from him. If she is at fault, she can be ordered to forfeit that benefit.**

He contributes more. In a normal 50-50 division, his wife would get a portion of his contributions. **He does not get any benefits from her. This means that he has nothing to forfeit (even if he is at fault).**

Reason 4: Non-monetary contributions might be undervalued in practice. The principle of forfeiture of benefits depends on the calculation of each spouse's contribution to the estate. Court cases have been inconsistent on how to treat non-monetary contributions such as child care and housework, which are usually provided by women. As such non-monetary contributions are often still seen as the "natural" role of women, there is a strong chance that courts will not take them into account, or value them insufficiently.

Reason 5: The concept of forfeiture of benefits might be unconstitutional. In South Africa, a 2016 High Court case stated that the similar South African provision on forfeiture of benefits might infringe the right to equality, although this question was not finally decided. Forfeiture may be unconstitutional discrimination on the basis of socio-economic status, as well as an infringement of the right to dignity, since it works only against the poorer spouse. It may also be a violation of gender equality, since it works mostly against women.

Reason 6: Forfeiture is applicable only to marriages in community of property. It should be possible for courts to act to prevent unfairness in *any* marriage, in order to provide appropriate protection for economically vulnerable spouses (especially women). Providing for adjustments based on fairness only for in marriages in community of property might also be seen as a violation of the constitutional principle that all persons are equal under the law.

Reason 7: The principle of forfeiture of benefits is NOT based on the principle of economic fairness. The Court should have some discretion to make adjustments to achieve fairness in *any* divorce - taking the property regime into account along with other relevant factors. A general judicial discretion, as opposed to the narrower concept of forfeiture of patrimonial benefits, is consistent with the trend now being followed in many other countries. This approach is more equitable than the outdated concept of forfeiture of patrimonial benefits.