NEW LAW REFORM PROPOSALS ON DIVORCE

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The Law Reform and Development Commission (LRDC) recently released proposals for law reform on divorce from civil marriage. Dianne Hubbard participated in the LRDC subcommittee that worked on this bill. Here, writing on behalf of the Legal Assistance Centre, she presents a summary of the key proposals.

Note that this set of proposals deals only with civil marriages (marriages which take place in a church or in front of a magistrate). Customary marriages and customary divorces will be dealt with in a different law, which will be described in a forthcoming news article.

The current law on divorce

Namibia's current divorce law is an outdated system inherited from South Africa at independence. The current law is based on fault. This means that one spouse must prove that the other spouse did something wrong – usually some form of desertion or adultery. This approach does not fit well with reality, because the break-down of relationships is usually much too complicated to assign all the blame to one person.

Another problem with the current law on divorce is that it is almost impossible for couples to get divorced without the help of lawyers, even if they are both in agreement about how to divide the property and take care of the children. This makes divorces expensive.

An additional problem is that divorce cases are heard only by the High Court in Windhoek. Even though divorce cases are almost always settled without a trial, it is still necessary for at least one of the spouses to appear in person in Windhoek. This can also add expense, especially for people who live outside of Windhoek.

An overview of the proposed law reform

The proposed bill would eliminate the fault-based system of divorce. The new basis for divorce would be "irretrievable breakdown" – an assertion that the marriage has broken down beyond repair.

The new law would give the court stronger powers to divide the property of the marriage, even if this meant not following the marital property regime strictly. The court would also have new powers to make sure that the arrangements made for the children of the marriage will protect the best interests of the child.

The new law would also simplify the divorce procedure in cases where the spouses have no real dispute about their divorce or the terms of the divorce. Divorce cases would still be dealt with by the High Court. But the court would be able to finalise divorces without seeing either spouse in person if there were no concerns about the fair division of property or the well-being of any children involved.

We can now examine these proposed changes in more detail.

Reducing conflict between divorcing spouses

Under the current law, one spouse must accuse the other spouse of some wrongdoing – such as having an affair, leaving the family home, or making life so unbearable that it is no longer possible to live in the same house. Accusations like this can lead to increased conflict, which is not good for any children involved. Even if both spouses want the divorce, one of them will still have to go through the motions of accusing the other spouse of wrongdoing. So, the court papers are often less than truly honest.

The proposed law will fit better with real life. In cases where both spouses want the divorce, they can make a *joint* application for the divorce. Or it may be that one spouse will make the divorce application, and the other spouse will then agree that the marriage is over. In either of these cases, the couple will not be required to give the court any information about why the marriage has failed. If both spouses agree that the marriage has broken down beyond repair, then the reasons for the breakdown become irrelevant to the court process. Neither spouse has to explain why the marriage has fallen apart – it is enough for them to agree that the marriage can no longer work.

This approach will help remove unnecessary conflict. Then attention can be focused on the more important questions of property division and arrangements for the children.

If one spouse wants a divorce and the other spouse wants to save the marriage, there would be two options: (1) The spouse who wants the divorce can explain to the court why he or she thinks that the marriage has failed. If the reasons are serious enough, then the court can grant a divorce immediately. An example would be a situation where there is adultery or domestic violence, or where the spouses have already been living apart for one year, or where one spouse has been sentenced to prison for a period of at least 5 years. (2) The court can postpone the case for up to 6 weeks to allow for the possibility of reconciliation. If there is no reconciliation, then the divorce will be granted – even if one spouse still wants to save the marriage.

The thinking behind this approach is that the law cannot force a marriage to work. If one of the spouses is totally opposed to remaining married, then the marriage simply cannot work in practice. Forcing a couple to stay married in such a situation is a recipe for continued unhappiness, and may lead to problems such as extramarital affairs or domestic violence. Such a marriage would be nothing but a dead shell.

There is also a Constitutional issue involved. In terms of Article 21, freedom of association is one of the fundamental rights and freedoms of all persons in Namibia. This includes the right to decide to be with other people or not to be with other people, as long as no unconstitutional discrimination is involved – and so it includes the right to enter into marriage and to withdraw from a marriage.

Splitting the property

In most divorce cases, the husband and wife will eventually come to an agreement about issues such as dividing their property, making arrangements for custody and access to the children, and maintenance for the children and possibly for the financially weaker spouse.

In future, a court will accept such an agreement between the spouses only if it is sure that both spouses entered into the agreement freely, that the agreement is not obviously unfair to either of them, and that any arrangements for children are in the best interests of the child.

If the spouses cannot agree on how to divide their property, then the court will decide. There is no hard and fast rule about how to divide the property. The court will look at all the circumstances to see what will be fair to everyone.

In terms of the proposed law, the court will have increased powers to depart from the agreed-upon property regime or the antenuptial agreement if this would be more fair to the parties. The theory here is that contracts between people who are about to be married are not the same as business contracts. Agreements between a bride and a groom can hardly be dispassionate negotiations, and in the current climate of discrimination against women, they are not likely to be agreements between people with equal bargaining power.

Another problem is that people who get married may not really understand the various marital property regimes and their consequences. This means that they may have agreed to things that they did not really intend. Therefore, it makes no sense for the courts to be required to follow the chosen marital property regimes rigidly.

The new law proposes that the one thing that the courts must NOT consider in dividing up the property is who is at fault for the breakdown of the marriage. The court will look at financial issues when deciding how to divide the property; it will not look at emotional issues.

Another proposed innovation is that the divorce order must include a *detailed* explanation of how property will be divided – whether this is a result of an agreement between the spouses or a decision of the court. In the past, the orders for division of property would often be very vague – they might simply say that the couple's property must be divided half and half. This leaves open the possibility that disputes about exactly *how* to divide the property will arise after the divorce is final. The new law would require more detail on property division, to prevent further conflict.

The best interests of the children

No divorce can become final unless the arrangements for custody and access to the children are in the best interests of the children. Even if the parties have made an agreement about these issues, the court will not approve it unless the court is sure that the arrangement is good for the children.

If the spouses cannot agree on arrangements for the children, then the court will decide. Under the proposed law, the court will consider 3 main factors in deciding on custody: (1) which parent has been the child's primary caretaker; (2) the child's wishes (if the child is mature enough to express an opinion); and (3) the need to protect the child against domestic violence.

In the past, mothers were often favoured for custody, especially in the case of young children. This is because mothers are in practice often more involved in the daily care of children. But the new law will not favour mothers over fathers, or fathers over mothers. It will look at the facts to see which parent is the primary caretaker. The primary caretaker will usually be favoured over the other parent for custody, unless there are good reasons to decide otherwise, because this will usually be the best way to provide continuity and security for the children.

Joint custody will be a possibility in some cases. Joint custody means that both parents take turns looking after the children on an everyday basis. It usually means that the children must move back and forth between the homes of their mother and father on a regular basis.

Joint custody can be useful in encouraging greater ongoing involvement by both parents. However, it must be approached with caution because of the potential for conflict in this type of arrangement. Sometimes a parent may request joint custody as a way to avoid paying maintenance. In some cases, joint custody can mean that one parent does all the real caretaking, instead of being a true joint effort.

The court will consider joint custody if both parents are fit to care for the child, if both are committed to the arrangement, and if both are prepared to be cooperative in promoting the child's best interests. As a practical matter, the parents must live in reasonably close proximity to each other, so that joint custody will not be a burden for the children. A history of domestic violence on the part of either parent will be a very strong argument AGAINST joint custody.

The parent without custody is almost always given some right of access to the child – such as visits on weekends and during school holidays. This will not change in the new law.

Even a parent with a history of domestic violence may get a right of access. But in such a situation the court will be expected to put in place special safety measures to protect the child and the custodial parent. For example, access might be allowed only at certain places or under the supervision of certain people.

The new law will also make it possible for the divorce order to include directions for access by other persons, such as extended family members or other people who play a large role in the child's life. The idea is that the parent with custody should not be allowed to abuse this power to stop relationships that are important to the child.

Maintenance

If the spouses make an agreement on maintenance, then the court will check it to see if it is fair and in the best interests of the children. If the spouses cannot agree on arrangements for maintenance, then the court will decide.

The basic principles on child maintenance will not change. As in the past, maintenance orders which are made in divorce cases can be enforced or changed at maintenance courts.

Spousal maintenance is given in some cases, to help an ex-spouse who is financially weaker to get on his or her feet, in light of the sacrifices that he or she might have made during marriage. For example, perhaps one spouse stayed at home to look after the children while the other spouse went out to work – the working spouse might be expected to provide maintenance for the spouse who has been at home.

The new law will contain a list of factors that the court should consider on the question of spousal maintenance, such as the length of the marriage and the age of the spouses, the financial position of each spouse at the time of the divorce and the different kinds of contributions the spouse made to help each other and to maintain the family and the household.

The goal will be to promote economic self-sufficiency for each spouse within a reasonable time period. One ex-spouse should not be permanently dependent on the other if it is possible for both of them to support themselves eventually.

But once again, the court will NOT consider who is at fault for the breakdown of the marriage when deciding on maintenance. As in the case of property division, it is the financial issues and not the emotional issues which are relevant.

Which court should handle divorce cases?

Under the current law, all divorces must take place in the High Court in Windhoek. This can create hardship for the spouses, who must sometimes travel long distances to appear in court. And in most cases, the questioning in court is very brief.

The possibility of moving divorces to magistrates' courts was considered. There were two main arguments against this idea: (1) At present, the magistrates' courts are already over-burdened. Giving them new responsibilities is likely to lead to further problems with over-work and delay. (2) Divorce is a procedure which changes the status of the spouses. It can have a profound impact on their lives and the lives of their children. These kinds of matters are usually heard in higher-level courts which have more expertise with this kind of case.

The Law Reform and Development Commission has recommended that divorce cases should continue to be decided by the High Court. But there are also proposals which will help remove some of the hardships of this system:

(1) Because many divorces are decided without any real dispute between the couple, it is not always necessary to have the husband or the wife come to court in person. The proposed law would allow the court to make decisions in divorce cases on

the basis of the statements which are put on paper about the divorce application and the arrangements for property, children and maintenance.

The court would always have the power to call in one or both spouses if there were any issues of concern. For example, even if the parties are in agreement about arrangements for the children, the court may want to ask them some questions before it can be sure that the arrangements are really in the best interests of the children. But in many cases it would no longer be necessary for either of the spouses to appear in court.

(2) The Ministry of Justice is already busy with steps to make the High Court more accessible to people outside Windhoek, by providing for more court sessions in other locations. This means that it is possible that divorce cases could be heard by the High Court in places other than Windhoek in future, which would be more convenient for many people.

Family Advisers

To help protect children, there is a proposal for a new official called a Family Adviser. The Minister of Justice would appoint one or more legal practitioners to serve as Family Advisers. The Family Adviser will advise the court on questions about children in divorce cases. The Family Advisor may decide to get a report on the family situation from a social worker or some other expert.

It is important for there to be an independent person who looks after the interests of the children, because the spouses may be more interested in their own objectives.

The court will always ask for an investigation and report by the Family Adviser in cases involving certain unusual circumstances -- such as a proposal to separate brothers and sisters, a request for joint custody or an allegation of child abuse. In other cases, an investigation could be requested by either parent or by the judge.

Privacy

It can be a matter of public interest for members of the public to be aware that a divorce has taken place. For example, people who have loaned money to one of the spouses might have an interest in knowing about the divorce.

But the details are not really anyone else's business. At present, people are often very embarrassed by newspaper reports that give intimate details about their personal lives.

The new law would make it a crime to publish details about divorce cases. The only information that can be published in future is the names of the spouses, the fact that a divorce application is underway, and the fact that the divorce has been granted – unless *both* spouses give written permission for the publication of further details.

The impact of the proposed changes

Will the proposed new law encourage divorces by making it too easy for couples to get divorced? This is not likely. The real success or failure of marriages is not determined by the legal framework.

Namibia has one of the lowest divorce rates in the world. The 2001 census data suggests that about one out of every 12 or 13 marriages in Namibia ends in separation or divorce. This is an even lower rate than the one which can be derived from the 1991 census, where about 1 out of every 11 marriages ended in separation or divorce. Both of these statistics include civil and customary marriages. Customary divorce is accomplished in most communities by means of a very simple procedure, and informal separation requires no legal procedure at all. Clearly there are factors other than the law at work in keeping husbands and wives together.

Many studies in other countries show that there is no clear and simple relationship between divorce law and the stability of marriages. Laws certainly have some effect on the way people think, feel and act -- but when it comes to family life, people tend to find some way to do what suits them.

For example, divorce was completely illegal in the mostly Catholic country of Ireland until 1997. The government estimated that there were at that stage about 80 000 people who were separated from their spouses but still legally married.

Similarly, in Italy, when divorce became legal in 1958, it was estimated that about 600 000 couples were still technically married even though the marriage had in reality ended. About 1 million men and women were living with someone other than their spouses even though they were still legally married.

A strict divorce law in Namibia might similarly encourage informal separations which fail to settle the economic affairs of the spouses or to protect the best interests of the children of the marriage. That situation would leave the economically weaker parties – usually the women and children – unprotected.

As one South African lawyer has said, "while there is a social interest in the preservation of marriage, there is also a social interest in not insisting on the continuance of a marriage which has hopelessly broken down". One person interviewed during field research into divorce by the Legal Assistance Centre said, "Couples staying together despite the fact that they have lost interest in one another just end up more unhappy with life and themselves…".

Divorce laws should not be judged on whether they make divorce "difficult" or "easy", but on whether they suit the realities of life in the society.

The Legal Assistance Centre supports the proposed law. We encourage you to make your opinions on the proposals known, to assist the Minister of Justice and Parliament to enact the best possible law on divorce.

For more information about the proposed law reforms, see Report on Divorce by the Law Reform and Development Commission (Project 8, LRDC 13).