

SUMMARY OF PROPOSALS FOR DIVORCE LAW REFORM IN NAMIBIA

Legal Assistance Centre
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This report recommends reforms to the law on divorce in Namibia. Namibia's existing law, which is based primarily on the Roman-Dutch common law inherited from South Africa at independence, provides for divorce on the basis of fault. This means that, to obtain a divorce, one spouse must prove that the other spouse did something wrong – usually some form of malicious desertion or adultery. Most countries today, including South Africa, instead allow divorce on the ground of the irretrievable breakdown of the marriage, in recognition of the fact that the real reason for most divorces is not that one party has committed some wrong, but rather that the marriage has broken down beyond repair.

In addition, the existing divorce process is formal and complicated, and as a result almost impossible for individuals to navigate without the assistance of a legal practitioner. The process is made even more difficult and costly for most Namibians by the fact that currently divorce cases are heard only by the High Court in Windhoek. The inaccessibility of the current system means that some couples opt, and so lose the protections the law provides for the spouses and their children.

In preparing this report, the Legal Assistance Centre analysed Namibia's divorce law and practice. This included reviewing a large sample of High Court divorce cases over a five-year period. The Legal Assistance Centre also conducted focus group discussions and interviews on divorce in various communities throughout Namibia, interviewed members of the legal profession and studied the laws and experiences of at least a dozen other countries.

As a general matter, the report recommends the consolidation of Namibia's divorce law into a single new statute. It proposes eliminating the fault-based grounds for divorce and simplifying divorce procedure, particularly in cases where the parties have no real dispute about their divorce or the terms of the divorce. It further proposes that courts be given a discretionary power to distribute marital property fairly, to eliminate injustices that can occur from the strict application of the existing marital property regimes. It also recommends that certain matters relating to the custody of children be clarified, and that additional protections be put in place to ensure that children's best interests are being met.

The report's specific recommendations include the following:

- *Divorce jurisdiction should remain in the High Court, but with an option that such cases be heard when the court it is on circuit throughout the country.* This is intended to reduce the hardship caused by the fact that divorces currently are only heard in Windhoek. Magistrates' courts jurisdiction should only be considered, if at all, only for cases where both parties are seeking the divorce and there is no disagreement as to the terms. The simplifications of procedure which are recommended should eliminate personal court experiences in many cases, thus making divorces more accessible to all persons in Namibia.

- *All divorces should be dealt with primarily on the basis of affidavit evidence, with the parties summoned to appear before a judge in chambers or in court only when there are potential problems or a need for further evidence.* This would reduce the costs and the trauma of divorce, and take pressure off court rolls.
- *In the case of an unopposed divorce, spouses should be able to apply jointly for the divorce.* This would eliminate the necessity for the parties to take on the adversarial roles of plaintiff and defendant where both have agreed to the divorce and on the terms of the divorce.
- *The procedure for obtaining a divorce should be simplified.* For example, summonses should be worded in clear and simple language. Standard forms for affidavits should be supplied at all magistrates' courts, where clerks could be trained to assist persons in completing them. Simplification of the procedure would make it possible for parties to represent themselves, and would thus reduce the demands on the state legal aid system.
- *Namibia's current fault-based grounds for divorce should be replaced with the ground of the irretrievable breakdown of the marriage.* This change recognises that most divorces are not sought because of one party's fault, and that requiring one party to prove the other guilty may lead to collusion, the giving of false testimony, or increased acrimony between the parties. In addition, this change would bring Namibia's law into line with the international trend.
- *If both of the parties to the marriage are agreed (in the absence of coercion) that the marriage has irretrievably broken down, the court should not enquire into the details of the breakdown.* It serves no legitimate social purpose for a court to try to force parties to maintain a dead marriage, and such an enquiry unnecessarily forces parties to reveal intimate details of their lives. Either evidence of the breakdown of the marriage or a brief waiting period to allow for possible reconciliation should be required only in circumstances where one spouse wants to dissolve the marriage and the other wants to continue it.
- *The current requirement that a divorce cannot in most cases be granted unless the plaintiff first obtains a "restitution order," ordering the defendant to resume marital relations within a certain time period, should be abolished.* This change is intended to eliminate the delay and additional cost that results from the restitution order requirement, as well as to reflect the reality that such an order is usually an exercise in futility. Indeed, the case files and statistics analysed by the LAC revealed that reconciliation actually occurred during the divorce process in only a tiny proportion of cases.
- *In addition to irretrievable breakdown, a second ground for divorce should be the mental illness or continuous unconsciousness of one of the spouses.* Special procedural safeguards are proposed for such cases, for the protection of the incapacitated spouse. In addition, in cases where a spouse is mentally ill or continuously unconscious within the meaning of the proposed statute, the other spouse may seek a divorce only on those grounds, and not on the ground of irretrievable breakdown (to ensure that the procedural safeguards cannot be side-stepped).
- *The court should be authorised to intervene in the division of marital property to ensure that it is equitably distributed.* The proposed law would allow the court three options with respect to the division of property. First, the court may approve an agreement between the parties, provided that there has been no coercion of either spouse and that the agreement is not manifestly unfair. Second, the court may order the division of joint property either in 50/50 shares (where there are no minor children) or in 60/40 shares with the larger share going to the custodial parent. Third,

the court may exercise its discretion, on the basis of specified factors, to order a just and equitable disposition of the assets and liabilities of the parties, regardless of their marital property regime. This discretion could be exercised to make sure that the division of property takes into account each spouse's needs and contributions, including contributions of domestic duties and child care.

- *No divorce decree should be issued until the court is satisfied that all arrangements in respect of minor or dependent children are in their best interests.* The court should retain its existing power to overrule agreements between the parties concerning arrangements for the children if necessary.
- *While the various common law factors may continue to be relevant to the determination of a child's best interests, three key factors should be given particular attention: (1) which parent has been the child's primary caretaker, (2) the child's preference (to the extent that this is ascertainable and in light of the child's age and understanding), and (3) the need to protect the child against domestic violence. This approach is intended to give concrete guidance to the concept of the child's best interests and to provide more certainty on custody issues.*
- *Joint custody should be available as an option, and the criteria for awarding joint custody should be specified to eliminate uncertainty and to achieve uniformity.* Joint physical custody should be accompanied by equal powers of legal custody, to ensure that the less-involved parent does not have manipulative power over the other parent.
- *There should be a rebuttable presumption that custody will not be given to perpetrators of domestic violence (even if they are primary caretakers), regardless of whether the violence has been directed at the child or another person in the family.* Access by a parent who has been abusive to anyone in the family should be considered very carefully, and special access arrangements should be considered to ensure the safety of the custodial parent and the child. Joint custody should be approached with extreme caution, or ruled out altogether, if there is a history of domestic violence.
- *A Family Advocate should investigate what will be in the child's best interests in cases where specified circumstances exist, or where the court has a special concern as to what custody and access arrangements will be in the best interests of the child.* By requiring the involvement of a Family Advocate only in cases which are likely to be problematic, this service can be a cost-effective one. Either the Family Advocate or the court should have the power to request a social worker report, and the court should receive this report within one month of making the request, or at least receive a progress report which explains any obstacles to meeting this deadline.
- *A new Maintenance Act with more effective enforcement procedures should be enacted in advance of, or alongside, divorce law reform.* This new law should follow international trends by including tables which could serve as guidelines for orders of child maintenance.
- *Spousal maintenance should be based on need, rather than on fault.* Specific factors are recommended to guide the court in determining whether spousal maintenance is warranted.
- *The new law should facilitate the possibility of voluntary divorce mediation on the issues of property division, child custody and access, and maintenance, by providing that divorcing parties may request a postponement of their case to attempt mediation, without the necessity of filing pleadings, where both parties are willing to exercise this option.*

- *Rule 43 of the High Court Rules, which currently provides for interim applications for custody, access, maintenance and contributions to costs, should be expanded to cover two other common interim problems – threats of domestic violence and prevention of unfair dealing in marital property while the divorce is pending. The Rule 43 procedure should also be simplified, to allow interim applications to be based on affidavit evidence unless the court requests a hearing.*
- *The publication of personal details concerning divorce actions – other than the names of the parties, the court’s judgement or order, or the fact that a divorce is pending – should be restricted insofar as this is consistent with the Namibian Constitution. There should be limited exceptions for publication for administrative or research purposes, and for publication which is authorised by both spouses. The public should not have access to divorce proceedings in court or to court records concerning divorces.*
- *Regulations under the new divorce law should specify a clear procedure for cases where the original marriage certificate or children’s birth certificates cannot be located, as in the case of voter registration. This would remove a source of worry and inconvenience.*

The report also considers the difficult question of *how to treat divorces of customary marriages*. Several options exist:

- (a) Applying civil divorce grounds and procedures to the dissolution of customary marriages as well as civil marriages.
- (b) Applying civil rules regarding grounds and consequences to both types of marriages, but allowing traditional forums (or the forthcoming community courts) to dissolve customary marriages.
- (c) Continuing existing informal procedures for divorces in respect of customary marriages, but requiring that customary divorces be registered (alongside the registration of customary marriages).

However, the report concludes that additional community consultation is required before a confident recommendation can be made on this point. In the meantime, it is recommended that the registration of customary marriages should be accompanied by the registration of divorce under customary law, or much of the purpose of having a register will be defeated.