

PROPOSALS FOR DIVORCE LAW REFORM IN NAMIBIA



Legal Assistance Centre

2000

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CANADA

- Divorce Act, 1986, as amended*

SOUTH AFRICA

- Divorce Act 70 of 1979*
- Mediation of Certain Divorce Matters act 24 of 1987*

ZIMBABWE

- Matrimonial Causes Act*
- Guardianship of Minors Act*

SAMPLE SIMPLIFIED NOTICE AND AFFIDAVIT FORMS

- Examples from Colorado, USA*

CHAPTER 1

INTRODUCTION

1. BACKGROUND

It has been observed that “there has never been a society where divorce, or some functional equivalent, did not exist.”¹ Marriages are meant to last forever, but divorce is a social reality.

In recent years, the Legal Assistance Centre has been approached by an increasing number of people, mainly women, seeking advice about how divorces work. Many of those who approach the LAC for this kind of advice have experienced domestic violence at the hands of their spouses, sometimes for years and years. Members of the public are mystified by the archaic and limited grounds for divorce and by a legal procedure which is, to a layperson, complex and intimidating. Many do not qualify for legal aid, and yet feel that they cannot afford a lawyer --- but self-representation in the current system is a daunting task. Some people want more information about divorce because they have a legal representative, but still cannot understand what is happening and so do not know if they are being treated fairly or not. People who are already despondent over the break-up of their marriages find themselves bewildered by the legal process. Some are horrified when the meaning of “restoration of conjugal rights” is explained, especially where there is a history of violence, and cannot understand why they have to go through the motions of pretending to want to save the marriage. It is impossible not to form an impression that a great many members of the public are not being well-served by the existing divorce law.

The last major law reform in the area of divorce took place almost half a century ago. To say that the law on divorce is outdated is an understatement. The purpose of this paper is to present information which can be useful in considering law reform proposals for Namibia in the area of divorce.

2. AN OVERVIEW OF THE REPORT

The following chapter presents information about civil and customary divorce in Namibia, both historically and at present. It compiles statistics on marriage and divorce and looks at Namibia’s divorce rate. It looks at the historical treatment of civil divorce, as well as the current law, both on paper and in practice. This chapter also presents an overview of existing data on divorce in terms of customary law. It presents the results of an examination of a sample of divorce files over a five-year period, to produce a profile of civil divorce in the High Court. It also examines public attitudes about divorce on the basis of information drawn from personal interviews and focus group discussions.

The third chapter looks at divorce law reform in other countries for comparative purposes. It first looks at law reform models in Western Europe and the United States, and then presents a more detailed examination of the position in Canada, South Africa and Zimbabwe. It concludes with a brief look at a few other countries, to give a broader sense of worldwide trends in reform.

¹ Mary Ann Glendon, *The Transformation of Family Law* (1989) (hereinafter “Glendon, *Transformation*”) at 148.

The fourth chapter examines the issue of divorce mediation, by looking at the theory behind mediation and the use of mediation in some other countries. This chapter also presents the findings of personal interviews and a consultative conference with interested parties on the possibility of introducing family law mediation in Namibia.

The fifth chapter presents some of the options for law reform, and summarises some of the pros and cons of various approaches, then motivates recommendations on specific points.

A draft Divorce Act is appended to the report. This draft act is intended to facilitate further discussion of divorce law reforms, by putting a proposal on the table for consideration.

Key portions of the divorce laws of South Africa, Zimbabwe, England and Canada are also appended to the report to serve as points of comparison.

3. ACKNOWLEDGEMENTS

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- Laura Tjihero collected information from the divorce case files. This data was analysed by Christa Schier.
- Interviews and focus group discussions were conducted by Abel Augustinio, Ben Ausiku, Trudi Bock, Elizabeth Cassidy, Ruth Hikandjo, Dianne Hubbard, Mberipo Kamaheke, Aloysius Katzao, Maria Kavanze, George Mahoney, Ambrosius Makongwa, Uutoni Napoleon, Monica Nganjone, Willem Odendaal, Tanya Pietersen and Laura Tjihero. We also wish to thank the various people who translated and transcribed these interviews and discussions.
- The chapter on mediation is based on a background paper prepared by John Ford, who also carried out consultations on mediation and convened a workshop in 1999 to discuss mediation options for Namibia.
- Various sections of the final report were drafted by Elizabeth Cassidy, Willem Odendaal and Dianne Hubbard.
- The final report was edited by Dianne Hubbard.
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We hope that this report may be useful to the members of the Law Reform and Development Commission in their consideration of possible divorce law reforms.

CHAPTER 2

DIVORCE IN NAMIBIA

1. INTRODUCTION

There are two basic types of marriage in Namibia – civil marriage and customary marriage. A civil marriage is one that is solemnised by a state-recognised marriage officer (usually a magistrate or a religious leader such as a minister or a priest) in terms of the Marriage Act 25 of 1961, and registered in terms of the Births, Marriages and Deaths Registration Act 81 of 1963.¹

A customary marriage is one that is entered into in terms of the customs and traditions of the couple's community. These customs differ in different Namibian communities. There is as yet no formal legal recognition of customary marriages, although they are recognised in various statutes for specific purposes.² In other words, there is no provision in Namibia law whereby customary-law spouses can register their marriages and obtain a marriage certificate, and no way in which they can ensure that the marriage will be recognised as a marriage for all legal purposes.

In practice, these two types of marriage do not remain strictly separate. Couples combine elements of both systems, either simultaneously or over time, to produce "hybrid marriages" which are ruled by the norms of either civil marriage or customary marriage, depending on the situation at hand.³

Because of the existence of two different systems of marriage, two different systems of divorce law also exist in Namibia. Civil marriages can be dissolved only in terms of Namibia's general law on divorce, which is discussed in detail below. Customary marriages are dissolved in terms of the customs of the relevant community, which again differ from place to place. The customary law of divorce in Namibia is not well documented or understood, and an empirical investigation into its specifics is beyond the scope of this project. A brief summary of information gleaned from existing literature on customary divorce will be presented below.

Hybrid marriages are sometimes dissolved by separations which take place according to custom, even though this still leaves the civil marriage legally intact. This uncomfortable co-existence of overlapping systems of marriage and divorce results in some confusion, with people reporting that they are "divorced" when this is not a legally correct description of their marital status.

¹ Civil marriages also include marriages contracted by Namibians in exile pursuant to the SWAPO Family Act, 1977 and recognised in terms of the Recognition of Certain Marriages Act 18 of 1991.

² See Legal Assistance Centre, *Proposals for Law Reform on the Recognition of Customary Marriages*, 1998. This topic is at the time of writing under consideration by a subcommittee of the law Reform and Development Commission which is in the process of preparing a draft law on the subject.

³ Not only do people marry in terms of one or the other system; in some of Namibia's regions, "the majority of people marry the same partner in terms of both legal systems." H Becker and MO Hinz, *Marriage and Customary Law in Namibia*, Centre for Applied Social Sciences, 1995, (hereinafter "Becker/Hinz") at 6.

2. THE INCIDENCE OF DIVORCE IN NAMIBIA

Extensive background information on the incidence of civil and customary marriage in Namibia has been compiled in a previous LAC report entitled “Proposals for Law Reform on the Recognition of Customary Marriages” (1998). This chapter will not repeat all of the information on marriage, but will rather highlight the data pertaining specifically to divorce.

The 1991 Population and Housing Census provides data about the marital status of persons 15 years old and above. Only 3% of the population in this age group reported that they were divorced or separated. Half reported that they had never married, while 30% were married (with the census making no distinction between civil and customary marriage) and 12% were living together with a partner informally. It is possible to separate the statistics on “divorce” and “separation”, but these percentages must be viewed with caution as public understanding of the difference between the two terms may not be reliable.⁴

Table 1: Marital status of individuals from the 1991 Population and Housing Census

Marital Status	Percentage
Never married	50%
Married	30%
Living together	12%
Divorced/Separated divorced (2%) separated (1%)	3%
Widowed	4%

Adapted from Central Statistics Office, *1991 Population and Housing Census: Basic Analysis with Highlights* at 10.

The gender-disaggregated statistics on marital status of both heads of households (Table 2) and individuals (Table 3) show that a far greater number of women than men are divorced or separated -- almost *three times* as many women as men fall into these two categories. The difference is not necessarily significant in the cases of heads of households, since the fact of

⁴ The terms used in the census were as follows:

- (i) Never Married referred to persons who never married before in their lifetime.
- (ii) Married legally or customarily referred to persons who during the reference period were married under the legal systems of the country or the customs of the local area.
- (iii) Living together referred to persons who were living together as husband and wife without the legal or customary ceremony.
- (iv) Separated referred to married persons who were not living together as husband and wife without the performance of any legal or customary ceremony.
- (v) Divorced referred to persons whose marriage had been cancelled legally or customarily and had not remarried.
- (vi) Widowed referred to persons whose spouses were dead and were not remarried at the time of the census.

Central Statistics Office, *1991 Population and Housing Census: Basic Analysis with Highlights* at Appendix A, page 3.

the divorce or separation may be the reason why the women was identified as the head of household. (If the marriage were still in place, the husband would probably have been identified as the head of household. ⁵) However, the greater number of divorced/separated women is clearly significant in respect of individuals.

Table 2: Divorced and separated heads of households from the 1991 Population and Housing Census

	Male	Female	Total
Divorced	2,850 (0.45%)	7,421 (1.08%)	10,271 (1.53%)
Separated	1,694 (0.27%)	4,167 (0.61%)	5,861 (0.88%)
Total	633,742 (100%)	685,193 (100%)	1,318,935 (100%)

Adapted from the 1991 Population and housing Census: Report A, Statistical Tables, Volume I.

Note: Out of the total household population of 1,318,935 (100%) 48.0% are males and 52.0% are females.

Table 3: Divorced and separated individuals over the age of 15 years from the 1991 Population and Housing Census

	Male	Female	Total
Divorced	4,920 (1.3%)	12,558 (2.9%)	17,478 (2.1%)
Separated	2,994 (0.8%)	7,448 (1.7%)	10,442 (1.2%)
Total	393,518 (100%)	428,015 (100%)	821,533 (100%)

Adapted from the 1991 Population and housing Census: Report A, Statistical Tables, Volume I & II.

The following table (Table 4) shows the regional variations. Caprivi shows the highest percentage of divorces and separations. One possible explanation may be because Caprivi is the only region where customary marriage tends to take place on its own, without an accompanying church or civil ceremony, meaning that customary law divorces, which are far more simple and accessible than civil law divorces, are more common.

Table 4: Marital status of individuals 15 years and above by region from the 1991 Population and Housing Census

REGION:	Never married	Married	Living together	Divorced/Separated	Widowed
Caprivi	39%	44%	4%	7%	5%
Erongo	50%	28%	16%	2%	4%
Hardap	49%	32%	12%	2%	5%
Karas	48%	39%	7%	2%	4%
Khomas	54%	30%	11%	2%	3%
Kunene	45%	27%	20%	3%	4%
Ohangwena	53%	24%	11%	5%	6%
Okavango	30%	45%	13%	5%	6%
Omaheke	50%	25%	18%	2%	4%
Omusati	54%	26%	10%	4%	6%
Oshana	59%	22%	12%	3%	4%
Oshikoto	54%	27%	12%	3%	4%
Otjozondjupa	47%	25%	21%	2%	3%
TOTAL	50%	30%	12%	3%	4%

Adapted from 1991 Population and Housing Census: Basic Analysis with Highlights at 11-23.

⁵ The 1991 Population and Housing Census defined “head of household” in gender-neutral terms as “the person, male or female, who is recognised as such by the household members”. However, it is likely that husbands rather than wives would have been identified as the head of household where husbands were present. Central Statistics Office (n43) at 37.

Table 5: Marital status of individuals over age 15 by sex & urban/rural residence from the 1991 Population and Housing Census

MARITAL STATUS	URBAN				RURAL				TOTAL	
	Urban Male		Urban Female		Rural Male		Rural Female			
	number	%	number	%	number	%	number	%	number	%
Never married	87,405	55.0%	79,461	53.5%	127,571	54.0%	114,641	41.0%	409,078	50.0%
Married	50,109	32.0%	41,048	27.5%	66,638	28.0%	85,401	31.0%	243,196	30.0%
Living together	16,114	10.0%	16,150	11.0%	29,897	13.0%	37,675	13.5%	99,836	12.0%
Separated	761	0.5%	1,187	1.0%	2,233	1.0%	6,261	2.0%	10,442	1.0%
Divorced	1,757	1.0%	3,395	2.0%	3,163	1.5%	9,163	3.0%	17,478	2.0%
Widowed	1,499	1.0%	6,773	4.5%	3,039	1.5%	25,231	9.0%	36,542	4.5%
Not Stated	949	0.5%	432	0.5%	2,383	1.0%	1,197	0.5%	4,961	0.5%
TOTAL	158,594	100.0%	148,446	100.0%	234,924	100.0%	279,569	100.0%	821,533	100.0%

Source: 1991 Population and Housing Census, Report A, Statistical Tables, Volume II at 489 – 491.

The urban/rural breakdown in Table 5 shows that rural women are the *most likely* to be divorced or separated, with urban men being the *least likely* to fall into either of these categories. However, since the vast majority of civil divorce cases recorded at the High Court (more than 90%) involve parties from urban areas, this indicates that people in rural areas may use the term “divorced” to mean that a civil or a customary marriage has come to an end, rather than to indicate that they have undergone a formal legal procedure to end a civil marriage.

Census update figures published in 1996 show no significant difference in either the overall divorce rate or the regional patterns, other than a slight overall increase in the total number of marriages, and a small *decrease* in divorces and separations across the nation.⁶

The 1992 Demographic and Health Survey produced similar findings on divorce. In this survey, which involved a nationally representative sample of 5 421 women aged 15-49 years, 5% of the women said that they were divorced or separated. It is not clear if the respondents who stated that they were “divorced” meant that they were divorced in the formal, legal sense of the term.

In comparison, about 42% of the respondents were currently in some sort of conjugal relationship, with 27% of these being “married” (with the survey making no distinction between and civil and customary marriage) and 15% living together informally. One out of every eight women in this survey (12.5%) stated that their husbands currently had other wives, with polygynous unions being more common amongst older women and in rural areas, particularly in the Northeast and Northwest regions. About 51% of the respondents stated that they had never been married.

Table 6: Findings on marital status from the 1992 Demographic and Health Survey

Marital Status	Percentage
Never married	51%
Married	27%
Living together	15%
Divorced	3%
Separated	2%
Widowed	1%

Source: Ministry of Health & Social Services, *Demographic and Health Survey*, Table 2.7

⁶ 1996 NIDS/MDGS.

Over the last 10 years, an average of about 5 600 civil marriages have been registered annually nationwide. The average number of divorces (in respect of civil marriages) is about 400 each year over the same period. There are no comparable figures on customary marriage or divorce.

Table 7: Registered civil marriages 1989-1999

Year	Registered civil marriages
1989	5 275
1990	7 379
1991	5 064
1992	7 468
1993	4 107
1994	4 260
1995	4 077
1996	6 048
1997	6 095
1998	6 240
1999	6 519
TOTAL	62 532

Source: Ministry of Home Affairs.

Table 8: Civil divorces 1989-1999

	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total
1989	42	24	15	19	26	30	19	26	31	18	24	13	287
1990	33	18	7	18	21	21	15	21	24	25	46	19	268
1991	25	15	13	23	42	31	21	40	24	30	30	25	319
1992	44	34	15	35	42	23	34	23	20	39	41	18	368
1993	17	34	3	35	35	37	39	27	44	32	25	19	347
1994	7	25	11	53	37	46	42	36	39	30	15	8	349
1995	58	32	30	54	33	36	35	47	42	54	27	11	459
1996	54	32	19	37	51	29	35	49	32	64	62	19	483
1997	43	25	7	41	59	31	45	42	34	49	42	22	440
1998	10	4	17	53	42	40	58	58	46	44	51	24	447
1999	37	41	13	48	32	44	60	34	50	66	47	6	478
Total													4245

Source: Registrar's Office at High Court in Windhoek, Ministry of Health and Social Services (MOHSS). Before Namibia gained its independence on 21 March 1990, the Administrations of Coloureds and Whites requested the Registrar's Office to send them a monthly report on the number of final divorce orders issued by the High Court. In contrast, the Official Register at the High Court lists all divorce cases which were instituted, regardless of whether or not there was a final divorce order. Some of the tallies of divorce orders granted were lost when the MOHSS moved offices, and when staff members left the Ministry. According to administrative officials at the MOHSS an overseas agency has been consulted to construct a database for keeping track of such statistics in future, but it is not clear when this database will be finished. Where the summaries of final divorce orders granted have been lost in respect of certain months, information from the High Court Register for that specific month has been substituted. Therefore, this table may contain a slight overestimate of the number of final divorce orders.

Looking at civil marriage alone, this indicates a divorce rate of about 1:15 -- in other words, about 1 out of every 15 civil marriages ends in divorce. The census figures, which take into account both customary and civil marriages and divorces plus separations (which sometimes substitute for divorce in practice), indicate that about out of every 10 marriages in Namibia break down.

By world standards, this is not high. In 1978, when the South African Law Commission published its report on divorce law reform, the divorce rate for whites in South Africa was 1 out of every 3.2 civil marriages. (The Commission, presumably under the influence of apartheid, did not discuss the divorce rate for other races. But more recent statistics show that the divorce rate for whites is significantly higher than that for other races in South

Africa.)⁷ In Australia, about 1 of every 3 marriages ends in divorce.⁸ In the US, 1 out of every 2 marriages ends in divorce.⁹

Another common way of looking at a country's divorce rate is to calculate the number of divorces for every 1 000 persons in the population in a given year. Applying this standard to Namibia gives a divorce rate of 0.29 for 1996, which compares well with other countries, as Table 9 below illustrates. In fact, Namibia appears to have one of the lowest divorce rates in the world. (Since customary divorces are not registered, it is not possible to include them in this calculation. However, the overall low percentage of divorced persons in the population suggests that the divorce rate for customary marriages is similarly low.) The Namibia divorce rate for 1999 is slightly lower at 0.26.¹⁰

In South Africa, by comparison, the overall divorce rate for 1996 was 0.81. There are significant racial differences within this rate, with the divorce rate for whites being 3.57, Indians 1.42, coloured 1.16 and African 0.23. The total number of civil divorces decreased in South Africa between 1995 and 1996, showing a similar trend to that in Namibia.¹¹

Of course reducing divorce rates are probably a sign that formal legal processes are being more frequently ignored, rather than an indication of a trend towards happier marriages.

Table 9: Divorce rate (divorces per 1 000 population)

Country	Divorce rate
NAMIBIA	0.29
United States	4.95
UK	3.08
Denmark	2.81
Sweden	2.79
Germany	1.91
Finland	1.85
Belgium	1.83
Austria	0.97
Spain	0.88
Portugal	0.88
South Africa	0.81
Switzerland	0.77
Greece	0.76
Japan	0.62
Ireland	0.27

Source: <http://millennium.fortunecity.com/redwood/547/divrape.htm>. The years for these rates obtained from this site are not given, but the site is dated 1996-2000. The South African rate is explained in the text above and if for 1996.

⁷ South African Law Commission, *Report on the law of divorce and matters incidental thereto*, RP 57/1978 at 2.

⁸ "Family law court in the Act", Sydney Morning Herald, 27 May 1999.

⁹ Minow at 331, quoting Weitzman.

¹⁰ According to the Central Statistics Office, the estimated 1996 population of Namibia was 1 644 708, and there were 483 civil divorces in that year. For 1999, the estimated population was 1 805 227, against 478 civil divorces.

¹¹ Statistics South Africa, *Marriages and divorces, 1996*, Report No 03-07-01 (1996). The actual numbers of civil divorces decreased in 1995 for Africans from 8174 in 1995 to 7243 in 1996, coloureds 5029 to 4190, Indians 1601 to 1489 and whites 16 788 to 15831. There a total of 32 775 civil divorces in South Africa in 1996.

One complicating factor in considering the incidence of both marriage and divorce in Namibia is the existence of “hybrid marriages” which combine both civil and customary norms. This phenomenon will be examined below.¹² No comprehensive statistics on the incidence of “hybrid marriages” are available.

3. CUSTOMARY LAW ON DIVORCE

There are several summaries of the customs of the various Namibian communities pertaining to marriage and divorce, although divorce receives less attention than marriage.¹³ This paper will simply highlight a few key points which are relevant to the discussion of divorce. It has also examined the “self-stated laws” which have been collected for some communities by the Centre for Applied Social Studies, but these should be treated with caution, as the stated rules have not been tested to see if they reflect actual community practice.¹⁴

Namibian communities follow a variety of kinship and lineage systems. The four main systems are matrilineal (Ovambo and Kavango communities), patrilineal (San, Nama and Damara communities), double descent (Herero and Himba communities) and cognatic (communities in the Caprivi). Kinship involves a complex set of social relations between the various members of a kin group. Accordingly, a customary marriage is conceptualised as a union between two families or kin groups rather than a union between two individuals.

GROUNDS FOR DIVORCE

A number of grounds for divorce are recognised under Namibia’s various customary systems. These include adultery by the wife, taking a second wife without the consent of the first, barrenness, and various forms of unacceptable behaviour such as drunkenness, witchcraft or neglect of the children.¹⁵

¹² See section 6 of this chapter.

¹³ See particularly Becker/Hinz; TW Bennett, *Customary Law and the Constitution: A Background and Discussion Paper*, Law Reform and Development Commission, 1996 (hereinafter “Bennett”); and Tami Friesen and Jewel Amoah, *Reform of Namibia’s Customary Marriage Law: Issue Paper*, Centre for Applied Social Sciences, 1999 (hereinafter “Friesen/Amoah”).

¹⁴ Manfred O Hinz assisted by Santos Joas, *Customary law in Namibia: Developments and Perspectives-Documentation*, Namibia Papers, Working Document No. 28, Centre for Applied Social Studies, 1995 (hereinafter “Hinz/Joas”).

¹⁵ See Effa Okupa, *Reform and Harmonisation of Family Laws*, Law Reform and Development Commission, 1997, at paragraph 5.11; Bennett at 111.

In respect of the Mbukushu, for example, it is reported that:

A man may divorce his wife for adultery, desertion, too much interference from her parents, laziness and disobedience, talking too much, or rude and insulting behaviour. A woman may divorce her husband for negligence in sexual obligations, excessive attention to other wives, cruelty, laziness, failure to provide for the wife and her children, desertion, or unreasonableness in sexual demands.

Thomas J. Larson, “The Mbukushu” in Gordon D Gibson, Thomas J Larson and Cecelia R McGurk, *The Kavango Peoples* (Franz Steiner Verlag, Wiesbaden, 1981) at 246 (information based on fieldwork results published in 1971). Additional grounds for divorce mentioned in respect of the Mbukushu are false accusation, excessive fighting, general incompatibility and mental illness. Louis Van Tonder, “The Hambukushu of Okavangoland: An anthropological study of a south-western Bantu people in Africa” (1966) at 361-ff.

Grounds for divorce amongst the Few of the Caprivi at the incidence of the wife are said to include the following: impotence, desertion or failure of the husband to support the wife for a given period, cruel behaviour by the husband towards the wife, failure of the husband to provide a hut and

According to customary law expert Professor TW Bennett, the fact that several of these grounds for divorce apply only to wives (adultery by the wife, barrenness and witchcraft) -- and at least one of them only to the husband (the taking of an additional wife without the consent of the first) -- probably violates Article 10(2) of the Constitution forbidding sex discrimination, as well as Article 14(1) which guarantees men and women equal rights as to marriage, during marriage and at its dissolution.¹⁶

There does not seem to be much information on the most common grounds for customary divorce in various communities in post-independence Namibia. Married women in Ovambo-speaking communities surveyed in 1992/93 referred to the absence of their husbands as migrant labourers and to alcohol abuse as contributing factors to divorce.¹⁷ A recent study of a San community in the Omaheke Region found that the most common reason for dissolving a marriage was infidelity, although "excessive beatings" were also cited.¹⁸ A 1996 paper on the Subia of Caprivi states that adultery is the main grievance in that community.¹⁹

CONSEQUENCES OF DIVORCE

Division of property

Customs regarding property division upon divorce vary greatly between communities, but the wife will in many cases end up with nothing more than her personal belongings. "Ownership" of property is not decisive, and the wife's position may be dependent in some cases on her husband's "good will".²⁰

The Herero seem to follow a fairly strict concept of separate property, while in Ovambo communities the concept of separate property is supplemented by the principle that the wife has the right to at least some of the household property acquired during the marriage.²¹

basic household goods or poor treatment by the husband's relatives -- but not accusations of adultery, witchcraft or neglect. The husband can reportedly dissolve the marriage for any reason, although he might have to forfeit his claim to the return of his marriage payment if he could not show an acceptable ground for the divorce. Johan L Pretorius, "The Fwe of the Eastern Caprivi Zipfel: A study of their historical and geographical background, tribal structure and legal system, with special reference to Fwe family law and succession" (1975) at 123-ff.

Adultery by the husband is apparently a ground for divorce by the wife among the Subia, but only a husband can demand compensation for adultery from the unfaithful partner and her lover. Hester van Wingerden, "*I don't want any nonsense in my courtyard!': The position of women in Subia family law*" (Utrecht Unitwin Network, 1996) at 26.

¹⁶ Bennett at 111.

¹⁷ NDT, SIAPAC-Namibia, FES & CASS, *Improving the Legal and Socio-Economic Status of Women in Namibia, Part 1: The Socio-Economic Aspects* (1994) at ES9, 12, 13.

¹⁸ Renee Sylvain, "'We work to have life': Ju/'hoan women, work and survival in the Omaheke Region, Namibia", PhD thesis, Graduate Department of Anthropology, University of Toronto, 1999 at 332. Sylvain goes on to say: "Although sexual jealousy was an issue, most women were also intolerant of such behaviour on the grounds that 'a man can't support two wives'."

¹⁹ Van Wingerden at 26, 60.

²⁰ See Friesen/Amoah at 67-68.

²¹ Lucious Matota, LLB student dissertation, "The matrimonial property regime and related property relations of customary law marriages in Namibia, needs and recommendations for reform", 15 October 1999 at 27 (citing recent interviews as a source for this information).

In Caprivi, one of the few areas in which some categories of property are recognised as joint property (primarily household goods), this joint property is divided half and half in the event of a divorce.²² This appears to be the practice among the Subia, although this principle is not always followed in practice.²³ It is reported with respect to the Few that household property and harvested crops are treated as joint property which must be divided, particularly if the marriage has ended by mutual consent.²⁴ It has also been asserted that, among the Yeyi of the Caprivi, if the divorce was a result of the husband's fault, the traditional authority may intervene to give the wife a share of the property which the couple acquired during the marriage.²⁵

A report on interviews conducted in ten San villages in 'Western Bushmanland' in 1995 indicated that upon divorce, the wife and children usually return to the home of the wife's parents. Assets of the household such as livestock and household items are shared between the two spouses, but there are usually few assets of value -- houses are not regarded as significant assets because "you just build a new one".²⁶

Custody and access

There is a large degree of variation on this issue, with traditional rules being applied with some flexibility and the wishes of the children sometimes being taken into account. For example, when a marriage comes to an end in matrilineal communities, the children should in principle stay with the mother because they "belong" to her side of the family. However, older children are sometimes allowed to choose for themselves whether they will live with their father, mother or mother's brother.²⁷

Among the Sambyu (at least in the past) young children usually remained with the mother while older children traditionally went with the man.²⁸

In Herero communities, children traditionally remained with the father if there was a divorce. Young children might remain with the mother until they were weaned, but would be returned to the father at that point. The current position is less clear.²⁹

According to the "Self-Stated Laws of Kaoko (Himba)" compiled by the Centre for Applied Social Studies (undated), the husband has the right to decide which parent the children

²² Becker/Hinz at 100.

²³ Van Wingerden at 62-3.

²⁴ Pretorius at 129-ff.

²⁵ Matota at 25 (citing 1997 interviews as a source for this information).

²⁶ Axel Thoma and Janine Piek, Customary Law and Traditional Authority of the San (CASS, 1997) at 22, 26, 31, 36, 42 (quotation at 22).

²⁷ Matota at 75.

²⁸ Cecelia R McGurk, "The Sambyu" in Gordon D Gibson, Thomas J Larson and Cecelia R McGurk, *The Kavango Peoples* (Franz Steiner Verlag, Wiesbaden, 1981) at 123-4 (with information based primarily on an unpublished 1954 dissertation).

²⁹ Id at 88.

should remain with in the case of a divorce and the cow which formed the marriage gift stays with the party who keeps the children.³⁰

In the Caprivi, children usually remain with the father in the case of a divorce, although there is some flexibility and the children's wishes are sometimes taken into account.³¹

Information on San communities indicates that custody issues are generally worked out amicably, with reference to the respective resources of the spouses.³² In Western Bushmanland, children usually go with their mother to the home of her parents, but will be welcome at the homes of both parents if they are in the same village.³³

A recent South African judgement suggests that the best interests of the child must be the paramount consideration on questions such as custody, even if this departs from the rules of customary law. In this case, *Hlophe v Mahlalela and Another* 1998 (1) SA 449 (T), the court said that "issues relating to the custody of a minor child cannot be determined in this fashion, ie by the mere delivery or non-delivery of a certain number of cattle".³⁴

Maintenance

Traditionally, the concept of *lobolo* and the obligations of kin networks ensured that women and children were adequately taken care of following a divorce. However, in many communities these mechanisms are no longer adequate or no longer functional. For example, a 1992/93 study in three Ovambo communities found that not a single divorced or separated woman interviewed was receiving any form of maintenance for herself or her children.³⁵ Another study states that while Ovambo women sometimes establish their own homesteads after divorce, they more commonly return to their parents' household.³⁶

In San communities in Western Bushmanland, the husband bears informal maintenance obligations after a divorce, and is expected to continue hunting for the family and to provide them with sufficient livestock or other items from the family assets which will be important for purposes of future maintenance.³⁷ In Subia communities in the Caprivi, fathers have the theoretical obligation to support their children until they become adults, but in practice the ex-wife bears the burden of maintaining the children who are living with her.³⁸

³⁰ Hinz/Joas at 157. Note that it is not clear whether this statement accords with current custom.

³¹ Id at 104-5.

³² Sylvain at 333-34.

³³ Thoma & Piek at 22, 26, 36, 56.

³⁴ At 459D. Although the provisions of the South African Interim Constitution were influential in this case, Namibia's adherence to the Convention on the Rights of the Child binds it to similar principles. It should also be noted that this case dealt with a question of custody following the death of one of the child's estranged parents, but the issue involved were analogous to those which might be presented in the case of a customary divorce.

³⁵ NDT, SIAPAC-Namibia, FES & CASS, *Improving the Legal and Socio-Economic Status of Women in Namibia, Part 2: The Legal Aspects* (1994) at .33-34.

³⁶ Frieda-Nela Williams, *Precolonial Communities of Southwestern Africa: A History of Owambo Kingdoms 1600-1920*, 1991, at 49.

³⁷ Thoma & Piek at 22, 26, 36, 42 and 56.

³⁸ Van Wingerden at 62.

The maintenance procedures under the Maintenance Act apply to both civil and customary marriages, but women in some communities feel that it is culturally and socially inappropriate to make use of these mechanisms.

Return of lobolo

The return of *lobolo* is not generally required in Ovambo, Nama or Damara communities. In Ovambo communities, the *oyonda* which is given by the prospective husband is traditionally an ox which is slaughtered at the wedding feast and thus is more in the nature of a “marriage ratification custom” than *lobolo*. It cannot be, and normally is not, returned in the case of dissolution of the marriage. However, there is some evidence that a repayment of the *oyonda* is expected under certain conditions: if the wife leaves the husband and she has not yet cultivated his field, borne his child or become pregnant by him.³⁹

It has also been reported that the return of bridewealth is required among the Mbukushu when a wife is found guilty of charges in a divorce case. Fines are also frequently imposed in such situations.⁴⁰

Traditionally, in Herero communities, the *otjitunia* had to be returned in a divorce if the woman was the “guilty party”.⁴¹

The “Self-Stated Laws of Kaoko (Himba)” compiled by the Centre for Applied Social Studies (undated) indicate that a husband who divorces his wife takes back from her parents “a particular cow which he originally gave as part of the dowry with all of its calves since then”, unless the children of the marriage remain with the wife.⁴²

In some Caprivi communities, if the wife deserts her husband or is guilty of causing the divorce, the *lobolo* must be returned. She may also have to pay an additional fine of up to 15 head of cattle. But if the husband is the guilty party, he will in theory “lose” his *lobolo* and possibly have to pay an additional fine. The theory may not be easy to implement in practice, however, as women from the Caprivi have cited the return of *lobolo* as a factor which constrains their ability to leave a violent or unhappy marriage. In some communities, the *lobolo* will be split in half between husband and wife if both are considered to be at fault in the break-up of the marriage.⁴³

³⁹ Becker/Hinz at 62, note 250.

⁴⁰ Thomas J. Larson, “The Mbukushu” in Gordon D Gibson, Thomas J Larson and Cecelia R McGurk, *The Kavango Peoples* (Franz Steiner Verlag, Wiesbaden, 1981) at 246 (information based on fieldwork results published in 1971).

⁴¹ Becker/Hinz at 82.

⁴² Hinz/Joas at 157. Note that it is not clear whether this statement accords with current custom.

⁴³ Becker/Hinz at 96; personal communications. It has been reported with respect to the Subia that, while *malobolo* was formerly refundable in the case of a divorce which took place without the consent of the husband or the tribal court, this is no longer the case. However, a wife who leaves her husband is now expected to pay 15 head of cattle to her husband, as a deterrent. Van Wingerden at 47-48.

PROCEDURE

Traditional approach

The extended families of the two spouses play a large role in mediation and attempting to resolve marital disputes. Community elders and members of the community may also play a mediating role.⁴⁴ Age sets give support in marital disagreement in some communities.⁴⁵

However, these traditional procedures may have weakened in some communities in recent times. For example, it has been reported that while divorce in traditional Subia society was preceded by elaborate discussions involving both families, such negotiations play less of a role in recent years.⁴⁶

Divorce is usually accomplished by an informal procedure which takes place without any intervention from traditional leaders, who are more likely to become involved if there are issues which cannot be resolved between the couple and their families.⁴⁷

The “Self-Styled Laws of Kwangali” compiled by the Centre for Applied Social Studies (dated 30 March 1992) state that the traditional court will hear cases involving family disputes, extra-marital relationships on either side and divorces of customary marriages. It was reported that on the first hearing, a warning is given with the emphasis on trying to cure the relationship. Fines will be assessed on the second hearing, with the maximum fine in the case of divorce being four head of cattle paid by the party seeking the divorce to the other spouse.⁴⁸

The “Self-Styled Laws of Gciricu” (dated 24 April 1994) provide for fines for divorce due to alcohol abuse, with the fines being twice as high when the abuser is the wife as when it is the husband (another example of unconstitutional sex discrimination).⁴⁹

The “Self-Styled Laws of Fwe” (undated) provide that “Any person who is left free by the Khuta and goes back to her husband shall be fined 2 beasts”.⁵⁰

⁴⁴ See, for example, Thoma & Piek at 22,26,36, 55.

There can be differences in procedure based on sex. For instance, among the Subia of the Caprivi, a man has the freedom to divorce his wife whenever he wishes by writing a letter to the wife’s parents to inform them of the divorce. Traditional tribunals become involved only if there is a dispute, such as failure to reach agreement about the distribution of property. But a woman who wants to leave her husband must first inform the village headman who may attempt a reconciliation. If no reconciliation is possible, then the case is taken to the tribal district court. If the court agrees with the woman’s arguments, she can divorce without making any payments. But if the court does not find in her favour, she will have to pay her husband 15 head of cattle to obtain a divorce. Van Wingerden at 53-ff.

⁴⁵ See, for example, Margaret Jacobsohn, “Negotiating Meaning and Change in Space and Material Culture: An ethno-archaeological study among semi-nomadic Himba and Herero herders in north-western Namibia” (1995) at 67.

⁴⁶ Van Wingerden at 50.

⁴⁷ See Friesen/Amoah at 85, 89, 95. See also, for example, Sylvain at 331-ff, and Thoma & Piek at 55 (“A divorce in San culture is not identical to that of the western concept, but can be regarded as a mutually agreed upon separation.”)

⁴⁸ Hinz/Joas at 121.

⁴⁹ Id at 129.

⁵⁰ Id at 136.

The other “self-stated laws” which were compiled (Ndonga, Kwanyama, Kwaluudhi, Mbalantu, Ngandjera, Kwambi, Sambyu, Fwe, Herero, Mbanderu, Kaoko (Himba), Damara and Basters) were silent on the issue of divorce, although most set forth fines for adultery or similar offences such as “taking someone’s wife”.⁵¹

In Caprivi, women lack legal capacity to bring marital problems before the *khuta* (the traditional tribunal) without the assistance of their fathers or a senior male member of the family.⁵² This places the wife at a disadvantage in comparison with her husband, and so may be another instance of unconstitutional sex discrimination in systems of customary divorce.⁵³

Civil courts

Historically, the Native Commissioner Courts established by the Native Administration Proclamation 15 of 1928 were empowered to hear civil cases between “natives”, including divorces under customary law as well as civil divorces. In practice, however, these courts did not deal with divorce cases in terms of customary law.⁵⁴

Prior to the enactment of South Africa’s Recognition of Customary Marriages Act, the South African civil courts took the position that they did not have any general power to dissolve customary marriages since they are contracted privately by the families concerned.⁵⁵ According to customary law expert Professor Bennett, “this ruling gave Africans a cheap and expeditious method for terminating their marriages but vulnerable parties – the wife and the children – lost the protection of an authoritative and disinterested outsider, the court”.⁵⁶ This would still presumably be the position in Namibia.

However, Bennett interestingly suggests that the Namibian Constitution could be interpreted to require that the courts hear divorce cases involving customary marriages. He asserts that Article 12(1)(a) of the Constitution gives every person the right “to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law” in order to determine “civil rights and obligations”. Since divorce actions clearly involve civil rights and obligations, it may be that the Constitution obliges general law courts to provide a “fair and public hearing”.⁵⁷

⁵¹ It must be emphasised that this project did not appear to ascertain whether the “self-stated laws” actually comported with community practice.

⁵² Becker/Hinz at 104. According to this report, the *khuta* can pronounce divorce in the case of the Subia, but not in the case of the Yeyi where the *khuta* report that “people can only divorce on their own”. Id at 96. . See also Pretorius at 122, where it is asserted that the tribal courts are normally involved in the dissolution of marriages because marriages are viewed as private contractual arrangements between the husband and the wife’s father or guardian. It is stated at 123 that the marriage contract can be dissolved by common consent between the contracting parties who are free to each any agreement they wish on division of property and the marriage payment, with the tribal courts being involved only where no agreement can be reached.

⁵³ See Bennett at 111.

⁵⁴ Section 8(1) empowered the administrator to constitute courts of native commissioners by notice in the Gazette ‘for the hearing of all civil, including matrimonial, causes and matters between native and native only’. This provision was repealed by Act 27 of 1985. See Gordon at 8-12.

⁵⁵ See TW Bennett, *A Sourcebook of African Customary Law for Southern Africa*, 1991 at 279-ff; *Saulos v Sebeko & Another* 1947 NAC (N&T) 25; *Duba v Nkosi* 1948 NAC 7 (NE).

⁵⁶ Bennett at 110.

⁵⁷ Bennett at 111.

MODERN CUSTOMARY DIVORCE AMONGST THE SUBIA

summarised from Hester van Wingerden, "I don't want any nonsense in my courtyard!": The position of women in Subia family law" (Utrecht Unitwin Network, 1996) at 26, 53-ff, 89-92.

The researchers have located few detailed examinations of divorce procedures in specific communities in post-independence Namibia. However, a 1996 paper on the Subia of the Caprivi Region gives fairly detailed information about divorce among the Subia in recent years. This paper was based on 35 life histories collected from widows, married women and divorced women, as well as observations of court cases and an examination of summaries of previous court cases made by tribal secretaries. The current grounds for divorce among the Subia are: adultery, witchcraft, barrenness, insanity, various kinds of gross misbehaviour by a spouse against the other, disrespectful behaviour against the relatives of the other spouse and desertion. Misbehaviour by a husband would include failure to provide for the family, neglect of sexual duties and cruelty. Misbehaviour by a wife would include disobedience, a quarrelsome disposition, neglect of household duties or children, or refusal of sexual rights. Adultery is cited as being the main grievance, and it is noted that this ground does not apply equally to husband and wife since women are not considered to have exclusive sexual rights to their husbands – a wife could request divorce on grounds of adultery only where she suffers severely from her husband's absence to be with other women, or where he has ignored repeated requests to spend more time with her.

A Subia husband divorces his wife by writing a letter of divorce to the wife's parents. He does not need the consent of either his wife, her relatives or the traditional authorities, but can act unilaterally. The khuta will step in only if there is a conflict concerning details such as the division of property. But if a wife wants to end the marriage, she must first inform the village headman (who will most likely be a member of her husband's extended family, since wives move to their husband's villages). If no reconciliation is reached, the matter is referred to the district khuta and then to the highest traditional tribunal. If the traditional court finds that the wife has a good reason for the divorce, then she will not have to pay anything, but if they do not agree with her reasons she will be fined 15 head of cattle. This fine has reportedly replaced the return of *lobolo* as a deterrent to divorce at the instigation of the wife. The procedures are not always followed in practice.

The husband normally remains in the matrimonial home following a divorce, while the wife returns to her parents. Each spouse keeps the property which he or she brought into the marriage or acquired during the marriage for personal use, while household property brought into the household during the marriage (such as blankets and kitchen utensils) is shared in accordance with who initiated the divorce – if it was the husband, he is supposed to share the household property (although this does not always happen in practice), while a traditional councillor will divide the property in consultation with the elders of the village if the wife initiated the divorce. Crops are always divided equally. If the husband has paid *lobolo*, the children will normally stay with him. But if they are still very young, they might stay with the mother and then decide for themselves where they want to live when they are older.

Case studies

Maria & Lucas

Maria married Lucas in 1969. During the first years of their marriage they stayed in Zambia because Lucas was working there as a policeman. In 1977 they came to Namibia and built their house in Lucas's village. They had eight children together. Maria got a job as a teacher and with the money she earned she bought furniture and cooking utensils. Lucas had a job in Katima Mulilo and stayed there in a rented house most of the time. In 1984, Maria lost her job due to a change in policy in the South African government whereby teachers with a diploma had to leave their job.

In 1991 Maria had a fight with Lucas about their sick child. A few weeks later, Lucas issued her with a divorce letter, her clothes and some old dishes and told her to go to her parents. He did not give her any explanation about why he wanted the divorce but Maria suspected he had another girlfriend. She went to her parent's village and built her own courtyard. She still had some cattle which she had never taken to her matrimonial house, following Subia customs. Unfortunately, she had to sell her cattle soon after her return to her parent's village because one of her relatives became very ill and needed money to visit a traditional healer.

A few days after her return, Maria went to her husband to collect the two youngest children aged two and five. Lucas only permitted her to take the youngest. He kept the other seven children with him. Maria did not agree with the division of the property and wanted back the items she had contributed to the household. When she asked Lucas for her things, he refused. She went to his older brother, who was also a member of the high tribal court, to complain about her husband. He promised he would talk to his brother about it but Lucas refused to see him. The high tribal court told Maria they would send a councillor and a policeman to reallocate the property.

Up to now (three years after the divorce), nothing has happened. Maria has still not received her things. Her parents advised her to leave the issue because her belongings are now being used by her children who are living with their father. She followed their advice. These days Maria works on a piece of land given to her by her father. She brews beer and takes part in an agricultural project to make a living for herself and her youngest child. Her other children visit her during their school holidays. (Interview 10 May 1994).

Charity & Gladstone

In 1987 Gladstone proposed to Charity. When she agreed, he visited her parents and asked for permission to marry their daughter and paid the brideprice. Charity moved to his village and together they worked on a piece of land given to Gladstone by his father. They had one baby. This child was Charity's second child. She had lived with another man (Mozes) for two years before she met Gladstone, and had one child with him. After five years, Gladstone told her he was going to marry a second wife, Debby. Charity was not pleased with it, but she could not stop him. She knew he had many girlfriends as well. One day, she decided to visit the district tribal court to ask for a divorce. "I don't want any nonsense in my courtyard!" said Charity angrily to the headman when he asked her why she wished for a divorce. "He drinks too much, sleeps around and beats me when I get angry about it. Besides, he supports his other wife better because he loves her more." Witnesses confirmed Charity's statement. The headman told Gladstone to stay with his two wives and not favour any of them, and Charity to stay with her husband and be patient with him. However, Gladstone did not change his behaviour. After six months, Charity went to the tribal authority for the second time and asked for a divorce. The court understood her reasons and allowed her to leave her husband. Neither she, nor her family had to pay him anything. Charity returned to her father with her two children, her clothes, some blankets, dishes and pots Gladstone had given her.

Now, Charity lives with her two sons in her father's village. She works on a field her father has given her. By baking scones and brewing beer, she earns some money. Her father also helps her. Gladstone does not help Charity with the upbringing of their child. Mozes, Charity's first boyfriend, sometimes visits her and gives her clothes and money to pay the school fees of his child. "I am not very happy these days. I don't like to trouble my parents and ask them for help. It is better to be married, than to stay alone with two children." (Interview 6 June 1994)

Anna & Adam

On the 17th of January 1992 Adam complained to the court about his wife, Anna, who returned to her parents without his permission. Anna explained to the court that her husband did not support her and often beats her. She felt no love for him anymore. The court tried to reconcile the couple but Anna did not want to give Adam another chance. The court did not agree with Anna's reasons. Adam was a good husband, in their eyes, and she had no reason to complain. They ordered Anna to pay her husband fifteen heads of cattle, and the court one head of cattle.

Gladys & George

On the 27th of August 1992, George complained to the court that his wife, Gladys had left him without his permission. Gladys explained to the court that George would not allow her children from her first husband to stay in their matrimonial home. Divorcing him was not her wish but she did not want to live without her children. However, George did not change his mind. He did not want Gladys' children in his courtyard. The court decided that when a man does not love his wife's children, he cannot love his wife either. They divorced the couple.

Prisca & Chunga

When Prisca's baby was three month's old, her husband, Chunga, asked her to sleep with him. She refused because in Subia belief, sexual intercourse in the first seven months of a child's life brings bad luck to the baby. It might even die. Chunga became angry and beat her. Prisca was upset and asked Chunga to write her a divorce letter. He refused. Then, Prisca wrote Chunga a letter in which she told him she did not love him anymore and he should look for another wife and then went to her parents. Prisca and her parents brought the matter to the attention of the tribal authority in Bukalo. They divorced the couple. The court ordered her to pay one head of cattle to her husband and one head of cattle to the court. Prisca's father had to pay two heads of cattle for not taking his daughter back to her husband. (21 June 1989)

4. CIVIL LAW ON DIVORCE

HISTORICAL DEVELOPMENTS

History of marriage and divorce legislation in Namibia

The earliest statute law on marriage and divorce after the advent of the South African administration of Namibia was Proclamation 16 of 1915, which repealed some of the civil law provisions of the German colonial powers and empowered magistrates in the military government to act as marriage officers.

Then, in 1919, the Administration of Justice Proclamation imported Roman Dutch common law from the Cape Province of South Africa to South West Africa. This had the effect of introducing the Roman Dutch common law on divorce, which still forms the backbone of Namibian law on civil divorce today.⁵⁸

The next relevant statute was the Solemnisation of Marriage Ordinance 31 of 1920, which made no mention of divorce.⁵⁹ This was supplemented by the Native Administration Proclamation 15 of 1928 (most of which came into force on 1 January 1930), which addressed certain matters pertaining to marriages between “natives” and gave jurisdiction over customary and civil divorce cases between “natives” to the Native Commissioners’ Courts (as will be discussed in more detail below).

The Divorce Laws Amendment Ordinance 18 of 1935 (which is still in force) supplemented the Roman Dutch common law by providing for some additional grounds of divorce. Jurisdiction over divorce proceedings was addressed by the South African *Matrimonial Causes Jurisdiction Act 22 of 1939*, and extended by the South African *Matrimonial Causes Jurisdiction Act 35 of 1945*, both of which are still in force.⁶⁰

The Matrimonial Affairs Ordinance 25 of 1955 supplemented the legislative regime pertaining to marriage by placing certain limitations on the marital power of the husband in a civil marriage, in a manner similar to the South African *Matrimonial Affairs Act 7 of 1953*.

The Solemnisation of Marriage Ordinance 31 of 1920 was succeeded by the Marriage Ordinance 33 of 1963, which referred to divorce only to specify that it was permissible for a divorced man or a woman to marry a relative of his or her ex-spouse.⁶¹

⁵⁸ Article 66(1) of the Namibian Constitution provides that “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”.

⁵⁹ This Ordinance was amended by Proclamation 3 of 1925, Proclamation 18 of 1930, Ordinance 12 of 1931, Proclamation 17 of 1935, Proclamation 2 of 1941 and Ordinance 11 of 1954. It was also supplemented by the Publication of Banns Amendment Act 13 of 1945, which has also since been repealed.

⁶⁰ The administration of both of these South African statutes was transferred to South West Africa by the Executive Powers (Justice) Transfer Proclamation, AG 33/1979 as amended, on November 12, 1979. Four months before this transfer, the 1939 Matrimonial Causes Jurisdiction Act was repealed in South Africa and replaced with the Divorce Act of 1979. The Divorce Act, however, was not made applicable to South West Africa. See “Marriage and Divorce” in NAMLEX Index to the Laws of Namibia (Legal Assistance Centre 1997, as updated in 1999 and 2000).

⁶¹ Section 26. The Ordinance was amended by sections 16-17 of the General Law Amendment Ordinance 36 of 1965 and by Ordinance 18 of 1967.

This Ordinance was in turn replaced by the South African *Marriage Act 25 of 1961*, which was applied to “South West Africa” in 1970 by the South African *Marriage Amendment Act 51 of 1970* and remains in force today.⁶²

The Recognition of Certain Marriages Act 18 of 1991 provides for the recognition of marriages contracted in exile under the SWAPO Family Act, 1977. The Dissolution of Marriages on Presumption of Death Act 31 of 1993, as its name indicates, provides for the dissolution of marriages where one spouse is presumed to be dead – a particular necessity in the aftermath of Namibia’s protracted war of liberation. The most recent enactment in this field is the Married Persons Equality Act 1 of 1996, which repealed the discriminatory Roman Dutch law concept of “marital power”, without affecting divorce law in any way. Another relevant piece of current legislation is the Births, Marriages and Deaths Registration Act 81 of 1963 which regulates the registration of marriages.⁶³

Thus, to summarise, marriage is currently governed by Roman-Dutch common law as amended and supplemented by the Native Administration Proclamation 15 of 1928, the Matrimonial Affairs Ordinance 25 of 1955, the *Marriage Act 25 of 1961*, Recognition of Certain Marriages Act 18 of 1991, the Married Persons Equality Act 1 of 1996, and the *Births, Marriages and Deaths Registration Act 81 of 1963* – with italics denoting laws which originated in South Africa.

To focus in on the issue of divorce alone, the Roman Dutch common law on divorce is currently supplemented by the Divorce Laws Amendment Ordinance 18 of 1935, the *Matrimonial Causes Jurisdiction Act 22 of 1939*, the *Matrimonial Causes Jurisdiction Act 35 of 1945* and the Matrimonial Affairs Ordinance 25 of 1955. This means that the last major statutory law reform in the area of divorce took place almost half a century ago. To say that the law on divorce is outdated is an understatement. The common law on divorce is also supplemented by rules scattered amongst three different statutes, in a cumbersome approach which makes divorce law particularly inaccessible to members of the public.

Historical jurisdiction over civil divorce cases

Although civil divorce cases can now be heard only in the High Court, this was not always the case. The “Native Commissioners Courts” established by the Native Administration Proclamation 15 of 1928 (most of which came into force on 1 January 1930) were empowered to hear civil cases between “natives”, including divorces under civil or customary law.⁶⁴ The presiding Native Commissioner had the power to involve assessors who could be, but rarely were, “natives”. Lawyers could not appear in these courts without the

⁶² This Act applies to Namibia as it was amended in South Africa to March 1978, when it was transferred to “South West Africa” by the Executive Powers (Interior) Transfer Proclamation (AG 17/1978). It has been amended in Namibia by AG 8/1977 (sections 2, 3, 5*bis*); the Marriages, Births and Deaths Amendment Act 5 of 1987 (substantial amendments); and the Married Persons Equality Act 1 of 1996 (sections 1, 26).

Initially, South African regulations issued in Government Notices R.1779 of 1971, R.115 of 1972 and R.71 of 1974 applied to Namibia. These were replaced by regulations issued in Government Notice 213 of 1987 (Official Gazette of South West Africa, No. 5480 of 24 December 1997). None in any of these regulations pertains to divorce.

⁶³ This South African Act applies to Namibia as it was amended in South Africa to March 1978. It was substantially amended by Act 5 of 1987.

⁶⁴ Section 8(1) empowered the administrator to constitute courts of native commissioners by notice in the Gazette ‘for the hearing of all civil, including matrimonial, causes and matters between native and native only’. This provision was repealed by Act 27 of 1985.

permission of the Native Commissioner. In theory, appeals from this court could go to a civil court, but there were virtually no such appeals in practice.⁶⁵

According to one official, these courts usually heard divorce cases. In fact, in 1941 the Native Administration Proclamation 15 of 1928 was amended to provide that the Native Commissioners' Courts in Kaokoveld, Ovamboland and the Okavango Native Territory would henceforth have authority to hear *only* "matrimonial causes".⁶⁶

A further amendment added in 1954 expanded the divorce jurisdiction of the Native Commissioners' Courts. The previous rule had been that these courts could hear civil cases if the defendant resided in the court's area of jurisdiction. But after 1954, they also had jurisdiction over "actions for divorce" if the plaintiff resided in the court's area of jurisdiction.⁶⁷

Although the Native Commissioner's Courts had the power to apply "native law", in practice they dealt exclusively with matrimonial cases arising from Western-style civil marriages. It has been suggested that legal disputes in respect of customary marriage were resolved locally, without involving the Commissioner's Courts.⁶⁸ But traditional leaders were expressly denied the power "to determine any question of nullity, divorce or separation" arising from a *civil* marriage".⁶⁹

⁶⁵ Robert J. Gordon, *Vernacular Law and the Future of Human Rights in Namibia*, NISER Discussion Paper No. 11 (1991) at 6-7, note 9.

⁶⁶ Section 8(3)*bis*, added by Proclamation 24 of 1941. As in other cases in other areas, the court had authority to hear matrimonial cases where the defendant resided in the court's area of jurisdiction.

Proclamation 15 of 1928, with the exception of Chapter IV on Marriage and Succession, came into force in all of South West Africa on 1 January 1930 (GN 165 of 11 December 1929). Selected portions of Chapter IV -- section 17(6) and sections 18(3) and (9) -- were subsequently applied to the area north of the Police Zone with retroactive effect from 1 August 1950 (GN 67 of 1 April 1954). The whole of section 18 and its accompanying regulations was made applicable to the whole of South West Africa *with the exception of* Owambo, Kavango and Caprivi by RSA Proclamation R.192 of 15 February 1974. Thus, only sections 17(6) on marriage and sections 18(3) and 18(9) on succession apply in Owambo, Kavango and Caprivi (with effect from 1950). None of section 17 on marriage applies inside the old Police Zone, but the whole of section 18 on succession applies to the remainder of Namibia (with effect from 1974).

⁶⁷ Section 8(3)*ter*, added by Ordinance 11 of 1954.

⁶⁸ Id at 8-12.

⁶⁹ Civil and Criminal Jurisdiction – Chiefs, Headmen, Chief's Deputies and Headmen's Deputies, Territory of South West Africa, SA Proclamation No. R. 348 of 1967, section 2(1). A similar prohibition is contained in the Damara Community and Regional Authorities and Paramount Chief and Headman Ordinance 2 of 1986, section 22(3)(c), and in the Jurisdiction of Chiefs, Chief Tribal Counsellors (Ngambelas), Tribal Councillors (Kuta Members), Tribal Councils (Kutas), Headmen of Wards (Silao Indunas) and Representatives of Chiefs -- Eastern Caprivi Zipfel, RSA Proclamation R.320 of 1970, section 1(1).

The Tswana Chief and Headman Ordinance 3 of 1986 does not contain a similar prohibition, but gives headman only the power "to adjudicate in accordance with the traditional laws and customs of the Tswanas" (section 7(1)).

The Proclamation to Provide for the Establishment of a Nama Council, Tribal Authorities and Village Management Boards in Namaland, RSA Proclamation 160 of 1975 appears to give no civil jurisdiction to chiefs and headmen. (See section 34 on duties, powers, authorities and functions, which refers in subsection (b) only to the power "to try any case where the offence is an offence according to tribal laws, tribal customs or tribal resolutions...".)

There were no costs involved in making use of the Native Commissioner's Courts. Because these courts could grant free divorces, many "coloureds" who wanted to avoid the expense of obtaining a divorce in the ordinary civil courts went through the simple procedure of changing their ethnic classification in order to utilise these "native" courts.⁷⁰

One of the practitioners interviewed described the civil divorce procedure in the Native Commissioner's Courts as being very informal. Procedure in these courts was governed only by a cursory and general set of regulations.⁷¹ Every magistrate was also a native commissioner, and the practice at one stage was to run through divorces quickly along with marriages late in the afternoon. In the opinion of this practitioner, the native commissioners' lack of knowledge and background in family law made this approach unsatisfactory.

One review case gives an indication of some of the drawbacks of the informal procedure. In this case, the Native Commissioners Court granted a divorce on 19 June 1985 on the application of the husband, on the grounds of constructive desertion. The wife applied to have the order set aside on the following grounds: (a) the final divorce order was granted in her absence and without hearing any evidence on her failure to restore conjugal rights; (b) no order was made concerning the proprietary consequences of the divorce, even though the marriage was in community of property; (c) no order was made concerning the minor children of the marriage; and (d) no order was made concerning maintenance for the wife. Unusually, both parties were represented by lawyers. The review court found that there had indeed been irregularities, but did not take the normal course of referring the matter back to a Native Commissioner for re-hearing on the grounds that "because of the lack of adequate rules of procedure, the Native Commissioner's Court "is not an appropriate one for dealing with actions such as the present". In support of this conclusion, the court noted that there were issues in dispute which could only be properly decided after being clearly defined in the pleadings; that the questions of custody of the minor children should be decided by the Supreme Court [which was equivalent to our current High Court] as the upper guardian of all minor children; that no question of "native law or custom" was likely to arise; and that no costs savings would result from continued proceedings in the Native Commissioner's Court since both parties made use of attorneys as well as experienced advocates.⁷²

The provision of the Native Administration Proclamation giving matrimonial jurisdiction to the Native Commissioner's Courts was repealed in 1985.⁷³

THE CURRENT POSITION

The following information is based on books by legal commentators, case law, interviews with judges and legal practitioners and observations made by LAC staff in divorce court.⁷⁴

⁷⁰ Robert J. Gordon, *Vernacular Law and the Future of Human Rights in Namibia*, NISER Discussion Paper No. 11 (1991) at 6-7, note 9.

⁷¹ Government Notice 59 of 1930; see *Kapia v Kapia*, unreported judgement, Supreme Court of South West Africa, 14 March 1986 (Judge Bethune).

⁷² *Kapia v Kapia* (n73) at 8.

⁷³ Native Administration Proclamation Amendment Act 27 of 1985, section 4.

⁷⁴ Most of the cases cited are South African. The reason is that the published law reports of post-independence Namibia at the time of writing include only two reported cases on divorce: *Schlenter v Hoebel* 1993 NR 209 (HC) (concerning the interpretation of a clause in a consent paper on the sale of immovable property and the division of the proceeds); *James v James* 1990 NR 112 (HC) (concerning an offer to restore conjugal rights which was not made in good faith).

JURISDICTION

The current law

Divorces of civil marriages can now be granted only by the High Court in Windhoek.⁷⁵ Magistrates' courts do not have jurisdiction over divorce cases.

The High Court has jurisdiction over a particular divorce case if both parties are, or one party is: (1) domiciled within the jurisdiction of the Court on the date the action is instituted, or (2) ordinarily resident within the Court's jurisdiction on that date and has been ordinarily resident in Namibia for not less than one year immediately prior to that date.⁷⁶ This divorce jurisdiction extends to counterclaims, preliminary orders, ancillary orders -- such as those concerning property rights, guardianship and custody of children and maintenance -- and subsequent amendments of ancillary orders.⁷⁷

The question of domicile (essentially the question of what country's laws should apply to an individual) has been altered by the Married Person's Equality Act. Prior to the enactment of that statute in 1996, Roman-Dutch common law provided that a woman automatically acquired the domicile of her husband upon marriage and gave the court authority to hear divorce cases only where the married couple was domiciled in the court's area of jurisdiction. The two-pronged approach of the Matrimonial Causes Jurisdiction Act (domicile and in some situations "ordinary residence") originally applied only to an action instituted "by a wife against her husband" and was enacted to give some relief to wives who were living apart from their husbands but nevertheless retained their husband's "domicile". For example, this made it possible for a wife to sue for divorce in Namibia if her husband had left her to take up permanent residence in another country -- otherwise she would have had to incur the expense and inconvenience of bringing the divorce action in his country of residence which was legally also her domicile.

Now the domicile of a married woman is determined independently.⁷⁸ The relevant provision in the Matrimonial Causes Jurisdiction Act 22 of 1939 has accordingly been amended by the Married Person's Equality Act to broaden the court's jurisdiction equally in respect of both spouses.

The theory behind the law

Divorce jurisdiction rests with High Court because this is the court which traditionally deals with virtually all matters of *status*. "Status" matters are those which affect a person's overall legal position in relation to other persons and the community.⁷⁹ Examples of legal

⁷⁵ *Matrimonial Causes Jurisdiction Act 22 of 1939 and Matrimonial Causes Jurisdiction Act 35 of 1945.*

⁷⁶ *Matrimonial Causes Jurisdiction Act 22 of 1939*, section 1, as amended by the Married Persons Equality Act 1 of 1996, section 17.

⁷⁷ *Matrimonial Causes Jurisdiction Act 22 of 1939*, section 1(2), as amended by the Married Persons Equality Act 1 of 1996, section 17; *Matrimonial Causes Jurisdiction Act 22 of 1939*, sections 2 and 5.

It seems that section 4 of the *Matrimonial Causes Jurisdiction Act 22 of 1939* on counterclaims should logically have been repealed by the Married Persons Equality Act 1 of 1996, since the new section 1(2) inserted by that Act covers the same ground.

⁷⁸ Married Persons Equality Act 1 of 1996, section 12.

⁷⁹ See *Boberg's Law of Persons and the Family*, Second Edition (1999) at 65.

proceedings which affect status are marriage and divorce, the declaration of a minor as a major, adoption and insolvency.⁸⁰

Civil marriage has a profound effect on the status of a person. The spouses are no longer free to marry anyone else. They have a reciprocal duty of support towards each other, and the power to bind each other to third parties for the cost of necessities for their joint household. Depending on the marital property regime chosen, they may share in each other's assets and liabilities. Legal relationships of affinity are created between each spouse and the blood relations of the other. A right of intestate succession arises between the spouses. If the two parties already have children, the father acquires parental powers for the first time.⁸¹

Members of the public interviewed about divorce have pointed out that if it is possible to get married in a magistrate's court, why is it not equally possible to get divorced in a magistrate's court?⁸² Many of the judges and practitioners who were interviewed, while not altogether foreclosing the possibility of magistrates' court jurisdiction over divorces, pointed out that while marriage is always by mutual consent, divorce is not. They also emphasised how much more complex it is to "undo" a marriage than to make one, as divorce involves disentangling marital property and finances, as well as making future provision for the children of the marriage.

CHOICE OF LAW

The court is obligated to deal with divorce cases where either (or both) of the parties are not domiciled in Namibia in accordance with the law which *would have applied* if both parties had been domiciled in Namibia when the divorce action was instituted. This means that a Namibian court would apply Namibian law on grounds of divorce, as well as on related issues such as property rights, maintenance, child custody.⁸³

However, in terms of the Roman-Dutch common law, the personal and proprietary consequences of marriage are, with a few exceptions, normally determined in accordance with the place where the husband was domiciled at the time of the marriage.⁸⁴ This common law rule favouring the husband was not affected by the Married Persons Equality Act.

Thus, for example, if a couple married under a particular property regime in Germany, that property regime would guide the division of their estate upon divorce in Namibia. But Namibian rules such as the forfeiture of benefits by the guilty party (discussed below) could be applied to the property as part of the divorce proceedings.⁸⁵

⁸⁰ See Boberg at 216-19.

⁸¹ Boberg at 161-ff.

⁸² Magistrates in their capacity as Commissioners of Child Welfare also have the capacity to deal with adoptions under the *Children's Act 33 of 1960*, and do so in practice throughout the country, with jurisdiction being based on the residence of the adoptive parents.

⁸³ *Matrimonial Causes Jurisdiction Act 22 of 1939*, section 1(2), as amended by the Married Persons Equality Act 1 of 1996, section 17; see also HR Hahlo, *The South African Law of Husband and Wife* (4th edition, 1975) at 638.

⁸⁴ Hahlo, 4th edition at 622-ff; *Esterhuizen v Esterhuizen* 1991 (1) SA 492 at 494: "That the law governing the proprietary consequences is determined by the *lex domicilii matrimonii* is now beyond question (*Frankel's Estate and Another v The Master and Another* 1950 (1) SA 220 (A); *Sperling v Sperling* 1975 (3) SA 707(A))."

⁸⁵ See, for example, Hahlo, 4th edition at 638 and note 507.

GROUNDS FOR DIVORCE

The current law

There are a total of four grounds for divorce, set forth in Roman-Dutch common law and the Divorce Laws Amendment Ordinance 18 of 1935. They are: (1) adultery; (2) malicious desertion; (3) the imprisonment for at least five years of a spouse who has been declared a habitual criminal; or (4) the incurable insanity of a spouse which has lasted for at least seven years. These grounds (with the exception of incurable insanity) are based on the principle of fault – the idea that one spouse must be guilty of committing some type of wrong against the other spouse. Unlike the law of most countries today, Namibian law does not allow a divorce to be granted simply because the couple's marriage has irretrievably broken down.

Only the first two grounds existed under Roman-Dutch common law. The latter two were added by the Divorce Laws Amendment Ordinance 18 of 1935, in an effort to mitigate some of the hardships of the narrow common-law grounds.

Adultery occurs when one spouse has voluntary sexual intercourse with a person who is not the other spouse. Adultery has been interpreted to include sodomy and bestiality.⁸⁶ The common-law defences to a divorce case based on adultery include condonation (forgiveness in full knowledge of the misconduct), connivance (anticipatory consent to future misconduct), and collusion (where the parties act in agreement). Other excuses, such as seduction by a third party or long absence by the other spouse, do not constitute legal defences to adultery. It is possible for the “innocent” spouse to bring a civil case against the third party for damages based on loss of consortium (the marital relationship), and this is occasionally still done in Namibia.

There are four forms of malicious desertion: (1) Actual or physical desertion occurs when one spouse leaves the other without good cause and with the intention to end the marriage relationship. (2) Constructive desertion occurs when one spouse, without good reason and with the intention to end the marriage relationship, forces the other spouse to leave -- for example by making life dangerous or unbearable for him or her. Thus, domestic violence could create a form of constructive desertion. (3) Malicious desertion also includes the situation where one spouse continually refuses to have sex with the other spouse without good reason. (4) Life imprisonment is sometimes referred to as a variant of malicious desertion, and sometimes referred to as an independent common-law basis for divorce. The defences to a claim of malicious desertion include condonation, collusion, consent, justification and resumption of cohabitation.

In a case based on habitual criminality, the defendant must have been declared a habitual criminal in terms of the Criminal Procedure and Evidence Act, 1917 (as applied to “South West Africa” by the Criminal Procedure and Evidence Proclamation 20 of 1919) and must have been imprisoned for at least five years after this declaration.⁸⁷ The Court may, however, refuse to grant a divorce on this ground “if it is satisfied that the plaintiff voluntarily assisted the defendant in the commission of any crime of which he or she has been convicted.”⁸⁸

⁸⁶ Rape constitutes adultery for the rapist, but not for the person who is raped. Hahlo, 4th edition at 366.

⁸⁷ Divorce Laws Amendment Ordinance 18 of 1935, section 1(1)(b).

⁸⁸ Id, section 1(2).

In a case based on incurable insanity, the defendant must have been subject to the provisions of the Mental Disorders Act, 1916 (as extended to “South West Africa” by the South West Africa Mental Disorders, Act No. 22 of 1926) for a period of not less than seven years, and there must be no hope of restoration to a state of mind which would enable a normal life.⁸⁹ The High Court cannot grant a divorce on this ground “unless it is satisfied by the evidence of three medical practitioners of whom two shall be alienists [psychiatrists] appointed by the Court that the defendant is incurable and unless it is also satisfied that the plaintiff (if the plaintiff is the husband of the defendant) is in no way to blame for the mental condition of the defendant.”⁹⁰ The typical common-law defences do not apply in a case of this sort, as this ground is not based on one party’s fault.

The latter two statutory grounds are very narrowly drawn and, not surprisingly, hardly feature in Namibian divorce cases in practice.

The theory behind the law

Namibia’s divorce law stems from the influence of the Christian church on Roman-Dutch common law.

Early Roman law was concerned with determining whether or not a marriage had been concluded or terminated, because of concerns regarding inheritance and the obligations of *patres familias* (heads of households). But the law did not prescribe any formalities for the conclusion of a marriage and no court degree or other official authorisation was ever required for a divorce. The law thus did not prescribe any grounds for divorce, as marriage was considered to be a social institution rather than a legal one.⁹¹

But in the eyes of the church of the Middle Ages, a consummated marriage was a sacrament which no earthly power could dissolve: “What God has joined together let no man put asunder.” Nevertheless, even with the view of marriage as an indissoluble union, there were some “safety valves” in the form of procedures for annulments and judicial separations.

Divorce became possible again only after the Reformation, and then only if requested by the “innocent” spouse in a case where the other spouse was “guilty” of violating the fundamental tenets of marriage, through adultery or malicious desertion. Divorce was viewed, in essence, as a punishment for a serious matrimonial offence.⁹²

The minor statutory revisions applied to the common law in Namibia to deal with habitual criminals and mentally ill spouses did not change the underlying theory of divorce, which is still based on these religious principles – a particularly inappropriate approach in a nation like Namibia which is established under the terms of its own Constitution as a *secular* state.⁹³

Most industrialised countries have in the last 30 years moved away from laws which made divorce possible only for serious causes, towards laws making marriages more or less

⁸⁹ Id, section 1(1)(a).

⁹⁰ Id, section 1(1).

⁹¹ Max Rheinstein, “Trends in Marriage and Divorce Law of Western Countries”, 1952 at 6-7, reprinted in Henry D. Krause, ed, *Family Law: Volume I (International Library of Essays in Law & Legal Theory)*, 1992

⁹² HR Hahlo & J Sinclair, *The Reform of the South African Divorce Law* (1980) at 2; Glendon, *Transformation* at 19-ff.

⁹³ Namibian Constitution, Article 1(1).

terminable at will.⁹⁴ Namibia retains the kind of system which most comparable countries have discarded.

Divorce grounds in practice

If adultery is cited as the ground for divorce, it is not always necessary to name the third party (so long as other adequate evidence of the adultery is provided) – but if the third party is named, then he or she must be served with the divorce papers. However, it is not necessary for the third party to be joined as a party to the divorce action. In some cases, an angry plaintiff is eager to name the third party and even to sue the third party for damages arising from the loss of consortium.

Constructive desertion is a wide category which in practice encompasses a broad range of problems such as physical violence, psychological abuse, aggressive behaviour, alcohol abuse, or one spouse's failure to make financial contributions to the household.

The plaintiff's papers often include statements to the effect that the parties fail to communicate, that the defendant shows no love and affection and that the defendant fails to show any interest in the continuation of the marriage. Although these facts are usually not put forward as grounds for divorce on their own, they indicate how the legal process has evolved towards recognising the heart of the matter as being marital breakdown rather than simply the fact of adultery or constructive desertion.

In general, the party seeking the divorce can usually make the situation fit the legal requirements. It is extremely rare for the Court to deny a divorce on the basis that no legitimate ground for divorce has been established. But the statements made in the court papers seldom tell the true story. Collusion sometimes occurs where both parties want out of the marriage. The plaintiff sometimes conceals the real grounds to avoid having the family's "dirty linen" aired in the newspaper. Experienced legal practitioners try to draft the grounds for divorce sensitively, to avoid unnecessary trauma. Several longstanding legal practitioners assert that, whatever the stated grounds, the real reason for most divorces is the irreconcilable breakdown of the marriage.

One practitioner called the present set of grounds "patronising", arguing that two adults who have freely joined together in marriage should be similarly free to terminate that marriage. A judge described the present system as a "horrible ritual", asking what point there be in refusing to grant a divorce when the marriage has clearly collapsed. No one from the legal profession who was interviewed recommended the retention of the existing system. There was unanimous agreement that the present approach is outdated and unsuited to modern concepts of marriage.

CONSEQUENCES OF DIVORCE

Division of property

The way that the couple's property will be divided upon divorce depends on the marital property regime applicable to the marriage. If the couple was married in community of property, the joint marital estate will be divided into two equal parts, and each person will receive one part. If the couple was married out of community of property, each person will receive his or her own separate property.

Which marital property regime governs a particular marriage depends on where the couple was married and whether they agreed prior to being married that a particular regime should apply. For couples married in the south or central parts of Namibia, the rule is that civil

⁹⁴ Glendon, *Transformation* at 149.

marriages are automatically in community of property, unless the parties entered into an agreement before the marriage (an ante-nuptial contract) providing that the marriage would be out of community of property. However, for black couples married north of the Police Zone (in Owambo, Kavango, Caprivi and Kaoko) after 1 August 1950, the marriage is automatically out of community of property, unless the couple has declared before the marriage officer, within one month before the marriage, that they want to be married in community of property. Such a choice is only possible, however, if the man is not already customarily married to another woman.⁹⁵

Couples who have entered into ante-nuptial agreements sometimes apply a variation of out of community of property known as the accrual system. Under this approach, the property of each spouse prior to the marriage remains separate, but the spouses share equally in the profits and losses which accrue during the course of the marriage.

In divorce cases based on adultery or malicious desertion, the plaintiff (the “innocent” spouse) may request a court order that the defendant (the “guilty” spouse) forfeit any past and/or future benefit that he or she derived or will derive from the marriage in community of property, or under an ante-nuptial contract if there is one.⁹⁶ This is called “forfeiture of benefits”. It is based on the idea that no spouse should profit from a marriage that he or she has destroyed. A request for forfeiture of benefits must be made while the divorce proceedings are pending; it cannot be made after the divorce is granted. If such an order is requested, the Court has no discretion to refuse to grant it.

It must be remembered that an order for the forfeiture of benefits is possible only where the plaintiff has contributed more than the defendant to the joint estate. If the defendant has contributed more, then this remedy is of no use since the defendant will have no benefits to forfeit. For this reason, “forfeiture of benefits” is seldom of use in practice to female plaintiffs, who often have lower-paying jobs or take greater responsibility for child care. However, as long ago as 1940, at least one South African case has held that the court is entitled to take into account the services of a spouse in managing the joint household and caring for the children, in its calculation of the spouses’ respective contributions.⁹⁷

Either spouse in a marriage in community of property may also ask for an adjustment upon division of the joint estate in terms of the Married Persons Equality Act, on the grounds that the other spouse entered into a transaction which required the consent of the first spouse

⁹⁵ Native Administration Proclamation 15 of 1928, section 17(6); Proclamation 67 of 1954 (Application of Certain Provisions in Chapter IV of Proclamation 15 of 1928 to the Area Outside the Police Zone). The Police Zone is defined in the First Schedule to the Prohibited Areas Proclamation 26 of 1928.

⁹⁶ Forfeiture of benefits in a marriage out of community of property which also excludes community of property and loss could include benefits by virtue of a succession clause, donations to be made between the spouses in terms of the ante-nuptial contract which were not yet concluded, or the right to a tenancy. DSP Cronje, *The South African Law of Persons and Family Law* (3d edition, 1994) at 266-267.

⁹⁷ *Gates v Gates* 1940 NPD 361 at 364-5: “Further, it seems to me indisputable that although a wife may not, in a positive sense, actually bring in or earn any tangible assets or money during the marriage, her services in managing the joint household, performing household duties, and caring for children, have a very real and substantial value, which may well and usually does, exceed the bare cost of her maintenance. ...[O]n general principles I think it is but equitable that a wife, devoting herself to domestic services, should be credited with the value of such of them as she is shown to have performed. It may be very difficult to arrive at anything like an accurate valuation of such services, nevertheless I think an estimate of their value ought to be attempted.”

without obtaining such consent, that the other spouse knew or reasonably should have known that he or she would probably not obtain such consent, and that the joint estate has suffered a loss as a result of the transaction.⁹⁸

Most estates are in practice divided in terms of a settlement agreement between the parties which is made into an order of court. If there is no agreement, the court will usually make only a general order, such as an order “that the joint estate be divided”. If the parties cannot agree on the division of the joint estate (which is rarely the case), the Court can appoint a Receiver to sort out the details. The Receiver will be paid a portion of the estate for his or her services.

Guardianship, custody and access

The High Court may make an order regarding the guardianship and custody of, and access to, any minor children of the marriage. Such an order may be made not only during the divorce proceeding, but at any time upon the application of either parent of a minor whose parents are divorced or living apart.⁹⁹

In practice, custody of young children is often awarded to the mother.¹⁰⁰ Practitioners report that men sometimes request custody to avoid having to pay maintenance – with the actual intention of turning the daily child care over to the mother or an extended family member. Custody of a child may in theory be given to one parent until the child reaches a certain age, and then to the other parent afterwards. It is also possible in unusual circumstances for custody to be given to a third party, such as a grandparent or other extended family member. The Court will usually not separate siblings unless there is a good reason to do so. “Guilt” or

⁹⁸ Married Persons Equality Act 1 of 1996, section 8.

⁹⁹ Matrimonial Affairs Ordinance 35 of 1955, section 4, as amended by section 3 of the Matrimonial Affairs Amendment Ordinance 9 of 1967 and by section 21 of the Married Persons’ Equality Act 1 of 1996.

¹⁰⁰ The recent South African case *Ex Parte Critchfield and Another* 1999 (3) SA 132 (WLD) , after considering the issue of “maternal preference”, gave the following sensible holding on the point at 143B-D: “In my view, given the fact of pregnancy or more particularly, the facts of the dynamics of pregnancy, it would not amount to unfair discrimination (ie it would not be unconstitutional) for a court to have regard to maternity as a fact in making a determination as to the custody of young children. On the other hand, it would amount to unfair discrimination (and, correspondingly, be unconstitutional) if a court were to place undue (and unfair) weight upon this factor when balancing it against other relevant factors. Put simply, it seems to me that the only significant consequence of the Constitution when it comes to custody disputes is that the Court must be astute to remind itself that maternity can never be, willy-nilly, the only consideration of any importance in determining the custody of young children.” In this case, custody was in fact awarded to the father.

See also *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O), which held that the assumption that a mother is of necessity in a better position to care for a child than the father belongs to an era from the past. In this case, custody was in fact awarded to the mother, with the fact that the child was a very young girl tipping the scales in favour of the mother, whom the court viewed as being particularly suitable to serve as a role model and to look after the child’s physical and emotional needs through puberty.

See also R Rosen, ‘Is there any Real Basis for the Preference Accorded to Mothers as Custodian Parents?’ , 95 SALJ 246 (1978) and E Kahn, “A Note” commenting on the aforementioned article 95 SALJ 249 (1978); S Boyd, “Potentiality and Perils of the Primary Caregiver Approach”, 7 *Canadian Family Law Quarterly* 1991; *The Marriage of Raby* 12 ALR 669 (Family Court of Australia).

“innocence” in the divorce action is not decisive on the question of custody, which is guided only by what is best for the children.¹⁰¹

One relatively recent innovation is joint custody. In practice, this may give the two parents custody for alternating periods, or the children may live with one parent while the other parent continues to play a role in decisions about the day-to-day lives of the children (such as what school or church they will attend). Some High Court judges in Namibia are unwilling to make orders for joint custody because of concerns about its practicality, while others are prepared to consider such arrangements if they are properly motivated.¹⁰²

Access provisions of divorce orders may be very general, requiring that the non-custodial parent be given “reasonable access” to the child or children, or they may give precise details about access arrangements.¹⁰³

In the past, a common outcome of divorce actions was for the mother to be given custody of the children while the father retained all guardianship powers aside from those of custody. But since the advent of the Married Persons Equality Act, it would seem that both parents

¹⁰¹ The South African case of *McCall v McCall* 1994 (3) SA 201 (C) contains a highly praised list of criteria for determining the best interests of the child. It reads as follows (at 205B-G):

- (a) the love, affection and other emotional ties which exist between parent and child and the parent’s compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child’s needs and desires;
- (c) the ability of the parent to communicate with the child and the parent’s insight into, understanding of and sensitivity to the child’s feelings;
- (d) the capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called ‘creature comforts’, such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child’s existing environment, having regard to the desirability of maintaining the *status quo*;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child’s preference, if the Court is satisfied that in the particular circumstances the child’s preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same sex matching...; and
- (m) any other factor which is relevant to the particular case with which the Court is concerned.

The issue of domestic violence is, however, notably absent from the list. See E Bonthuys, “Spoiling the Child: Domestic Violence and the Interests of Children”, 15 *SAJHR* (1999) at 317.

See also *French v French* 1971 (4) SA 298 9W) at 298H-299H.

¹⁰² Joint custody is also a new concept in South Africa, with courts and judges manifesting wide differences in their attitudes. See *Corris v Corris* 1997 (2) SA 930 (WLD) and *V v V* 1998 (4) SA 169 (CPD) (both of which include surveys of recent South African decisions); see also B Clarke and B van Heerdan, “Joint Custody: Perspectives and Permutations” 112 *SALJ* 315 (1995); Felicity Kaganas, “Joint custody and equality in South Africa”, *Acta Juridica* 169 (1994); ID Schäfer, “Joint Custody”, 104 *SALJ* 149 (1987).

¹⁰³ If the divorce order is silent on access, a right of reasonable access by the non-custodian parent is presumed.

retain equal guardianship powers unless the Court makes an order giving sole guardianship to one parent.¹⁰⁴

The Court may grant either parent sole guardianship (which includes the power to consent to marriage) and/or sole custody.¹⁰⁵ The Court also may order that, upon the death of the parent granted sole custody and/or guardianship, a person other than the surviving parent shall be the child's guardian.¹⁰⁶

All of these decisions are to be made based on what is in the best interests of the child or children.¹⁰⁷

The Court may incorporate into the divorce decree any agreement between the parties as to guardianship, custody, and access, as long as the Court determines that the agreement is in the best interests of the child or children.

In deciding what is best for the child, the court will take into consideration factors such as the child's sex, age and health; the child's educational and religious needs; the respective special and financial position of the parents; the parents' respective character, temperament and past behaviour towards the child.

Even if the parents are in agreement about custody, the Court may request a report from a social worker if it has any doubt about what will be best for the children.¹⁰⁸ This report is prepared at state expense, but can entail delays of up to 6-8 months. The cause for delays can be that the social workers must often travel long distances and may have trouble locating the relevant parties for interviews, particularly in rural areas, or in cases where persons are trying to evade them. A senior social worker reports that the sheer volume of work is problematic, suggesting that the Ministry of Justice should appoint its own social workers for court work rather than relying on the resources of the Ministry of Health & Social Services. Another obstacle is the lack of resources such as telephones and transport in some regions. The depth of an individual report also varies with the experience and commitment of the social worker who prepares it.

If a social worker finds that a particular custody case is unusually complex, he or she may call in outside assistance, such as a child psychologist if necessary. But this approach is complicated by the fact that the costs of such assistance must come from the budget of the Ministry of Health. Some private practitioners will assist in these cases without charge, while free expert assistance can also sometimes be obtained from international volunteers (such as VSO workers) or the few state psychologists (based at the Windhoek State Hospital or the Ministry of Education).

¹⁰⁴ Married Persons Equality Act 1 of 1996, section 14(1).

¹⁰⁵ Matrimonial Affairs Ordinance 35 of 1955, section 4. A court order granting sole guardianship supersedes the equal guardianship provisions of the Married Persons Equality Act 1 of 1996 (see section 14(1)).

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Social worker reports are commonly requested by courts in three kinds of cases: (1) divorce (on questions of child custody); (2) children in need of care in terms of the Children's Act 33 of 1960; and (3) criminal cases involving juvenile offenders.

Some practitioners say that many social worker reports are of poor quality, while others say that they are usually helpful. Judges normally follow the recommendations made by the social workers. Several practitioners expressed concern that judges sometimes follow inadequate social worker reports uncritically because they lack other input.¹⁰⁹

The Court has discretionary power to appoint a *curator ad litem* (a person appointed to assist another in specific legal proceedings), where it possible that the interests of the child may be in conflict with those of the parents. A *curator ad litem* is usually a legal practitioner, although the court can choose any person whom it considers suitable.¹¹⁰ This is rarely done in practice in divorce cases.

In other countries, the terminology is changing from "custody" and "access" to terms such as "residence" and "contact", to emphasis the child's point of view rather than the parents' perspective.¹¹¹

Child maintenance

The High Court when granting a divorce may also make any order as to the maintenance of the children of the marriage it deems just. Such an order may be made against either party, regardless of "guilt" or "innocence". It is the non-custodian spouse who makes maintenance payments to the custodian spouse.

The Court may make an agreement between the parties as to the maintenance of children into a binding court order, as long as the Court finds the agreement to be in the best interests of the children.

Such orders typically require the payment of maintenance until the child in question reaches a certain age. If no age is fixed, the order becomes inoperative as soon as the child becomes self-supporting.

An agreement to pay a lump sum for the purposes of child maintenance will not be treated by the courts as a final discharge of the parental obligation to maintain the child.¹¹²

Any High Court order concerning child maintenance can later be altered, upon a showing of good cause, by a magistrate's court sitting as a maintenance court.

Unlike spousal maintenance, a request for maintenance of children can be made in the maintenance court at any time, even after the High Court has granted the divorce without making such an order. This is because the legal obligation of both parents to support their children, according to their respective means, continues after a divorce.

¹⁰⁹ The social worker can be called in for cross-examination in an opposed divorce, but they are seldom questioned in an unopposed divorce.

¹¹⁰ See Boberg at 902, note 12 and 904, note 13; *Wolman v Wolman* 1963 (2) SA 452 (A) at 459.

¹¹¹ See, for example, the UK Children's Act 1989, the Children (Scotland) Act 1995 and the Australian Family Law Act 1975, which was significantly amended by the Family Law Reform Act 1995.

¹¹² *Bleazy* 1947 (2) SA 523 (C). It has furthermore been held that a lump sum cannot actually be considered "maintenance" because maintenance is defined in the Maintenance Act 23 of 1963 as any order for the "periodical payment of sums of money". *Zwiegelaar v Zwiegelaar* 1999 (1) SA 1182 (CPD), which deals primarily with the interpretation of section 7(2) of the South African Divorce Act 70 of 1999.

Spousal maintenance

In granting a divorce, the High Court may order the “guilty” spouse to pay maintenance to the “innocent” spouse until the “innocent” spouse dies or remarries, whichever comes first, as the court deems just.¹¹³

The Court also may make any agreement between the parties as to spousal maintenance a binding court order, including an agreement in which the “innocent” spouse agrees to pay spousal maintenance to the “guilty” spouse.¹¹⁴

Once made, such an order may be rescinded, suspended or varied upon a showing of good cause, by any court of competent jurisdiction, including a magistrate’s court sitting as a maintenance court under the Maintenance Act 23 of 1963. “Good cause” may include a cause other than the financial means of either of the parties.¹¹⁵

A request for spousal maintenance must be made during the divorce proceeding. If no such order is issued by the High Court at the time when the divorce is granted, neither ex-spouse can later approach either the High Court or a maintenance court seeking such an order. This is because the spouses’ legal duty to support one another ends when the marriage ends – thus if there is no court order extending that duty beyond the time of divorce, there is no basis for finding that one spouse is obligated to support the other.

As a result, sometimes a spouse will request token maintenance (such as N\$1/month), just to leave the door open for an amended maintenance order should circumstances change in the future.

Some practitioners reported that they have a significant number of cases in which husbands request maintenance from their wives, although the majority of those interviewed found it more common for wives to request maintenance from their husbands.

Other consequences of divorce

The wife may retain her married name or resume her maiden name or any other name she bore at any prior time. If she resumes her maiden name, she may apply to change the name of the children of the marriage to that name as well. She may also apply to change the surname of the children of the marriage to that of a man which she subsequently marries.¹¹⁶

Both spouses are free to marry again, even to re-marry each other should they wish.

It may be that the spouses have named each other as heirs in their wills. A divorce does not automatically affect such a provision. The will continues to apply as it stands until it is changed.

¹¹³ Matrimonial Affairs Ordinance 25 of 1955, section 5(1).

¹¹⁴ *Id.*, section 5(1)(b). See *D. Hubbard, Maintenance: A Study of the Operation of Namibia’s Maintenance Courts* (Legal Assistance Centre 1995) at 37 & note 134.

¹¹⁵ Matrimonial Affairs Ordinance 25 of 1955, section 5(1).

¹¹⁶ Section 8A, Births, Deaths and Marriages Registration Act 81 of 1963, as amended by South West African Act 5 of 1987. The child may also make an application for the alteration of his or her surname under such circumstances.

The same is true for other documents, such as the nomination of a spouse as a beneficiary in a life insurance policy. A divorce does not automatically affect such documents. They must be independently altered.

Special rules for cases of incurable insanity

Certain unique rules apply to divorces on the ground of incurable insanity. In this type of case (as in other divorce cases), the Court may order the plaintiff to pay the defendant's costs.¹¹⁷ But the Court may further order that the plaintiff "make provision . . . for the proper maintenance of the defendant and any child or children of the marriage and for the securing of any benefits to which the defendant may be entitled."¹¹⁸ In addition, in such a case the Court "shall not, as against the defendant, order the forfeiture of any benefits arising out of the marriage."¹¹⁹ Finally, if a person who is granted a divorce on this ground later wishes to remarry, he or she must first obtain a certificate stating either that the divorce court's order regarding costs, maintenance and/or the securing of benefits was complied with or that no such order existed. This certificate must be presented to the marriage officer prior to the re-marriage; failure to do so subjects both the individual and the marriage officer to a fine or, if the fine is not paid, to imprisonment.¹²⁰

PROCEDURE

Judicial separation

Judicial separation has been referred to as a "half-way house between marriage and divorce". An order of judicial separation temporarily suspends some of the spouses' marital obligations, particularly that of cohabitation. In theory, the court has the power to issue such an order upon the application of the "innocent" spouse. The grounds for judicial separation are essentially the same as those for divorce.¹²¹

This common-law procedure is virtually never used in practice and seems to serve no practical purpose.¹²² It was abolished in South Africa by section 14 of the Divorce Act 70 of 1979, and should probably be similarly abolished in Namibia.¹²³

Private separation

Spouses may make a private agreement to live apart. They can agree between themselves on the details of this arrangement, such as who will stay in the common home, who will have custody of the children, and how property and finances will be arranged during the period of separation.

¹¹⁷ Divorce Laws Amendment Ordinance 18 of 1935, section 2(a).

¹¹⁸ Id. Spousal maintenance was permitted in these types of divorce cases even before the Matrimonial Affairs Ordinance 35 of 1955 made clear that spousal maintenance was permitted in divorce cases generally.

¹¹⁹ Id, section 2(b).

¹²⁰ Id, section 3.

¹²¹ Hahlo, 4th edition at 329.

¹²² Hahlo commented back in 1975: "Judicial separation is not a popular institution and the question may be asked whether it still fulfils a useful function". Hahlo 4th edition at 329, note 1.

¹²³ Cronjé at 249; Hahlo, 4th edition at 329-ff.

Such an agreement has no binding legal effect, however. It does not affect the power of either party to sue for divorce, and it will not influence the terms of a subsequent divorce order.¹²⁴

Interim relief

Rule 43 of the High Court Rules deals with interim relief in matrimonial proceedings, which include divorce. This rule provides a simple and quick procedure by which one spouse can seek the following from the other spouse:

- maintenance *pendente lite* (pending the resolution to the case)
- contributions towards the costs of a pending case
- interim custody of a child
- interim access to a child.

The applicant must submit an affidavit setting out the grounds for the relief. This is served on the respondent together with a notice giving the respondent 10 days to reply. If the respondent opposes the relief claimed, the matter must be set down before the court for a summary hearing. If the Rule 43 application is not opposed, there is no need for the respondent to appear in court. The rule places a ceiling on the fee which legal practitioners can charge in respect of such motions (N\$200 for an appearance in an undefended case and N\$450 in a defended case, plus a maximum of N\$450 for other services rendered in respect of the claim).

¹²⁵

This rule can be particularly useful in cases where there is a possibility of a substantial delay either because the case is defended or because a social worker report has been requested. It can also be useful in a case where one spouse has engaged a lawyer but the other spouse does not have access to sufficient finances to do so.

The courts do not hear a large number of Rule 43 applications in practice, but this does not mean that the Rule plays no role -- the threat to bring a Rule 43 application is often sufficient to inspire an agreement between the parties. Some judges and practitioners report that the Rule 43 process works smoothly and effectively, while a few practitioners maintain that there can be long delays or that the cost to the client of bring the application can be more than it is worth.

Divorce

Most couples who want to dissolve a civil marriage do so with the assistance of an attorney. To commence the case, the attorney will draft the particulars of claim setting forth the details of the marriage (i.e. when and where it occurred, whether it is in or out of community of property, and whether there are minor children), the ground upon which the divorce is sought, the evidence in support of that ground, and the requested relief (including orders as to maintenance, guardianship and custody of minor children, and the division of property). The particulars of claim and a summons issued by the Registrar of the High Court will then be served on the defendant, in person, by a deputy sheriff.

The costs of service can be very expensive, as there are standard rates based on the kilometers which must be travelled by the sheriff. Service can be especially expensive in the north (up to N\$700-800), as the closest sheriff is currently based in Tsumeb. Costs of serving papers on the defendant currently average about N\$120 in Windhoek. The filing fee for a divorce case is only N\$5.

¹²⁴ See Cronjé at 249; Hahlo, 4th edition at 351-ff.

¹²⁵ Rule 43, Rules of the High Court of Namibia, Government Notice 59 of 1990 (GG 90), as amended by GN 81/1996 (GG 1293).

The defendant must then give notice of an intention to defend the divorce within ten court days after he or she is served with the summons and particulars. The case will usually be set down in court on the Friday following the expiry of this time period. (All divorce applications are dealt with in motion court on Friday mornings.) The plaintiff must give evidence of the existence of the marriage and the grounds for divorce in person and under oath.

The defendant rarely appears in court at this stage, and the questions put to the plaintiff are fairly standard, along the following lines:

- Were you married to [the defendant] in/out of community of property on [date] and are you still so married?
- Is this a copy of your marriage certificate?
- Do you regard Namibia as your permanent place of residence?
- What went wrong with your marriage?
- Have you spoken to your husband/wife about this?
- Does your husband/wife show any interest in the continuation of the marriage?
- Do you still share a common home?
- [If the defendant has left the common home:] On what date did he/she leave and did he/she take all of his/her personal possessions?
- Are there any minor children born of the marriage? [names and ages confirmed]
- Do you work? [If so] Who takes care of the children while you are at work?

During one month of observations of motion court, the researchers saw little meaningful questioning by either the legal practitioners or the judges, with the court proceedings being primarily devoted to correcting misspellings of names or other minor points of clarification, and amending errors in the pleadings.

If the defendant does not oppose the divorce, the next step depends upon the ground for divorce – if adultery is established, the Court can grant a final order of divorce at this time. Otherwise the Court must first issue an order requiring the restitution of conjugal rights. This order must be served personally on the defendant.

The order for restitution of conjugal rights will contain a “return date” which is 6-8 weeks from the date of issue. If reconciliation does not occur by this date, and if this is confirmed under oath, the Court can issue a final divorce decree. Confirmation of non-reconciliation is normally done by way of an affidavit from the party seeking the divorce, but the party’s legal representative must appear in court to obtain the final divorce order. This second appearance by an attorney or an advocate adds additional costs.

If the divorce is opposed, the parties will exchange legal documents identifying the legal and factual issues that are in dispute. Before a trial date can be obtained, a mandatory pre-trial conference must occur. (This conference, which is mandated by rule 37 of the High Court Rules, must be attended by the attorneys, although not necessarily by their clients.) At the trial, the parties’ attorneys will present evidence and arguments about the factual and legal issues in the case. Divorce litigation is an adversarial process, in which the opposing parties’ lawyers put forth their respective evidence and arguments on the issues and the Court makes the ultimate findings as to fault, maintenance, custody, etc.

Most divorces in Namibia are resolved by agreement of the parties, without a trial. Typically what will happen is that the defendant will enter a notice of intention to oppose (to prevent the plaintiff from being able to obtain a restitution order or a final divorce order), and the parties’ attorneys will then attempt to negotiate a settlement agreement on behalf of their clients. If the parties do come to a settlement, the High Court typically will approve it, as

long as it resolves all of the issues arising from the divorce and is in the best interests of any children of the marriage.

The High Court is not required to make an order as to costs in favour of the successful party in a divorce case. The Court may, however, make whatever order as to costs that it deems just, in light of the means of the parties and their conduct. Such an order may require that the costs of the proceedings be apportioned between the parties. Practitioners report that the plaintiff will sometimes agree not to request costs if the defendant does not oppose the divorce action.

Appeals from divorce matters are to the full bench of the High Court.¹²⁶ These are rare in practice in divorce cases.¹²⁷

Most of those interviewed estimated that an unopposed divorce done with the assistance of legal practitioners costs a minimum of about N\$2500-N\$3000 at present, with higher costs where service of process involves long distances or where the case is defended. It is no longer necessary for an attorney to brief an advocate to appear in the High Court, as the profession has now been technically fused. However, in practice, some legal practitioners continue to brief advocates, especially if it appears that the divorce is unusually complex or is likely to be opposed. Some legal practitioners say that involving an advocate increases the cost to the client, while others say the cost is about the same either way since the legal practitioner will have to spend more time on the case if no advocate is briefed.

Options for persons who cannot afford a lawyer

Legal aid

Legal aid is available in divorce cases. A person seeking legal aid must fill in an application form which is available at any magistrates' court. Application forms can also be obtained from social workers and other officials, or by post. The application form must be accompanied by a copy of the marriage certificate, a copy of the birth certificates of the couple's children, and the applicant's pay slip (or, in the case of informal employment, an explanation of the applicant's income).

The Legal Aid Act prescribes three conditions for legal aid in civil cases: (1) the applicant must have reasonable grounds for instituting or defending the proceedings, (2) it must be "in the interest of justice" that the applicant has legal representation, and (3) the applicant must have "insufficient means" to engage a legal practitioner privately.¹²⁸

A means test has been set by regulation, with the maximum monthly income varying from N\$500 to N\$1100, depending on the number of dependants.¹²⁹ The applicant can be

¹²⁶ Rule 49, Rules of the High Court of Namibia, Government Notice 59 of 1990 (GG 90)

¹²⁷ The single divorce appeal case encountered during the course of the research fell away when the parties re-married.

¹²⁸ Legal Aid Act 29 of 1990, section 11.

¹²⁹ A person qualifies for legal aid if his or her monthly income is below the following amounts, after deducting payments for income tax, contributions to pensions funds and maintenance payments in terms of a court order:

- N\$ 500 (no dependants)
- N\$ 650 (one dependant)
- N\$ 800 (two dependants)
- N\$ 950 (three dependants)
- N\$1100 (four dependants)

required to make a contribution towards the cost of legal assistance, with the amount being in the discretion of the Director of Legal Aid.¹³⁰ In practice, applicants in divorce cases are usually asked to pay N\$100. This is their total contribution, with all other costs, including disbursements, being paid by legal aid.

Many people who do not qualify for legal aid can not realistically afford to engage a lawyer privately. Directorate staff sometimes try to give informal assistance to such persons, but there is no official policy on this.

Before granting legal aid, the Directorate must establish that there are in fact grounds for the divorce. Sometimes social workers are asked to investigate this issue. Cases are also referred to social workers if the application form is incomplete, or if there is a need to investigate the means of the applicant. Such referrals can cause substantial delays.

Divorce cases are sometimes done in-house by the three legal practitioners employed by the Directorate, but are more often given to private practitioners on a rotating basis. The use of advocates in legal aid divorces is discouraged, in an effort to keep costs as low as possible.

Most applicants for legal aid for divorce are women. Members of the public are not well-informed about the possibility of obtaining legal aid in divorce cases. Applicants are referred to legal aid by social workers and NGOs (such as the Legal Assistance Centre), or they hear of legal aid by word-of-mouth. (For example, at the time of writing, there are many persons seeking legal aid for divorces from Rehoboth because word-of-mouth has been effective in that area.)

The 1995 Annual Report from the Directorate of Legal Aid reports that a total of 629 applications were received in respect of divorces in 1995 (a substantial increase over previous years), with 228 of these being approved. It is interesting to note that the number of applications received (629) was significantly higher than the total number of divorce cases filed in 1995 (481). Since some divorces obviously took place without legal aid during that year, this indicates that some persons who were not approved for legal aid must have chosen not to seek a legal divorce – possibly choosing to separate informally, without the benefit of certainty on matters relating to their property and their children.

Table 10A: Legal aid in divorce cases, 1992-1995

Year	Applications received	Applications approved	Total divorce cases filed
1992	291	87	361
1993	319	151	484
1994	392	214	544
1995	629	228	481

Source: Annual reports, Directorate of Legal Aid; Ministry of Health and Social Services and High Court. The Directorate of Legal Aid could not make any data available for the period 1996-1999.

Regulation 2, GN 107/1991 (GG 273). An amendment which would raise this means test is under consideration, but this would strain on the resources of the Directorate of Legal Aid without a substantial budgetary increase.

The value of any property other than the applicant's dwelling house, household furniture and tools used for the purpose of a trade is supposed to be taken into account, but in practice few applicants own any other property. Occasionally applicants will own motor vehicles or some livestock, but they are not willing to sell off such property in order to pay for legal assistance. Ministry of Justice, Directorate of Legal Aid, *Annual Report 1995* at 7-ff.

¹³⁰

Legal Aid Act 29 of 1990, section 15(1).

It is also interesting to note that the number of applications for legal aid in divorce cases exceeded those in criminal cases in 1995, which is the most recent year for which statistics on legal aid are currently available. For divorce, there were 629 divorce applications of which 228 were approved; for criminal cases, there were 507 applications of which 475 were approved (125 in the High Court and 350 in magistrates' courts).¹³¹

Table 10B: Legal aid, 1995

Nature of matter	Applications received	Applications approved
Divorce	629 (46%)	228 (30%)
Other civil matters	235 (17%)	64 (27%)
Criminal cases	507 (37%)	475 (62%)
Total	1371 (100%)	767 (100%)

Source: Ministry of Justice, Directorate of Legal Aid, *Annual Report 1995*. These statistics compare only applications for legal aid made by individuals in terms of sections 10 and 11 of the Legal Aid Act. It does not include legal aid certificates issued by the High Court or recommendations for legal aid by magistrates or designated officers (clerks of court).

Divorce cases are not delayed if the legal aid budget has been exhausted near the end of the government's financial year. They proceed in the normal fashion, and the legal practitioners involved are paid when the new budget becomes available.

In forma pauperis

One alternative to legal aid in a divorce case would be an application to the Registrar of the High Court to proceed *in forma pauperis* (in the manner of an indigent). The Registrar refers such cases to an attorney, who must inquire into the person's financial position and the merits of the case. If it is clear that the person in question is "unable to pay fees", then he or she must be referred to a legal practitioner who is willing to take the case free of charge. The Court can suggest that such an application be made.¹³²

The Court can refer a person to the Registrar to make such an application if it appears necessary. However, this option is seldom utilised in practice, having been superseded in large part by the legal aid system.

Self-representation

It is possible in theory for a person to represent themselves in a divorce case, but this is difficult in practice because the procedure is fairly complicated for a layperson. The Registrar estimates that there have been no more than 10 such cases in his 24-year tenure at the Court. A person who is attempting to represent him or herself can ask for assistance from the Registrar's office, but this will be provided only if the staff have time since it is not really their function.

The researchers located one well-educated woman who successfully managed to represent herself, but she was guided through the forms and procedures by a supportive friend with legal training.

¹³¹ Ministry of Justice, Directorate of Legal Aid, *Annual Report 1995* at 26-27.

¹³² Rule 41, Rules of the High Court, Government Notice 59 (GG 90), as amended by Government Notice 81 (GG 1293).

PRIVACY

Divorce proceedings, like most court proceedings in Namibia, are generally open to the public and the media. Article 12(1)(a) of the Constitution of the Republic of Namibia guarantees to all persons the right to “a fair and *public* hearing” (emphasis added) in both criminal and civil matters. That article further provides, however, that a court “may exclude the press and the public from all or any part of the trial for reasons of morals, the public order, or national security, as is necessary in a democratic society.”

Some legal proceedings in Namibia are not public. The Maintenance Act 23 of 1963 requires that maintenance enquiries are to be held in private, and makes it a criminal offence, punishable by a fine and/or imprisonment, to publish the name or other information about a child under the age of 18 years involved in such an enquiry without written permission from the Ministry of Justice or the presiding magistrate.¹³³ Another example can be found in the Magistrates’ Courts Act, which provides that a magistrate’s court “may in any case, in the interest of good order or public morals, direct that a trial shall be held *in camera* or that (with such exceptions as the court may direct) minors or other categories of persons or the public generally shall not be permitted to be present thereat.”¹³⁴ The recently enacted Combating of Rape Act goes even further by providing protection for the privacy of the complainant from the time the charge is laid.¹³⁵

Many clients fear publicity about their divorces, in the one Namibian newspaper which regularly carries salacious details about such matters. Negative publicity is a particular concern where children are involved. Practitioners report that this is a factor which inspires clients to conceal the true reason behind the divorce, or at least to keep details to a minimum. For example, a client may admit that domestic violence has taken place but ask that this fact be kept out of the court papers if sufficient grounds can be established otherwise. Some persons interviewed suggested that some couples may avoid obtaining a formal divorce because of their fears about embarrassing publicity. There are even cases where persons intending to divorce approach the editor of the newspaper in question to plead for privacy.

Some interviewees suggested that restriction should be placed on the publication of details about divorces, insofar as this can be done constitutionally. Others suggested that reforming the grounds for divorce to something such as irretrievable breakdown might make it unnecessary to place restrictions on publication, by making court papers less personal.

5. CIVIL DIVORCE CASES IN THE HIGH COURT

RESEARCH METHODOLOGY

Information for this survey was gathered from divorce cases heard by the High Court over the period 1990-1995. A random sample of 434 divorce cases (or nearly 20% of the sampling frame) was selected by choosing a sampling interval for every fifth case from the sampling

¹³³ Maintenance Act, 1963, Sections 5(3) and 5(11); see generally D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts* (Legal Assistance Centre, 1995) at 15-16.

¹³⁴ Magistrates’ Courts Act 32 of 1944, section 5(2), as amended by section 18 of the Married Persons’ Equality Act 1 of 1996.

See also Section 78 of the First Schedule to the Defence Act, No. 44 of 1957, as amended by section 22 of the Married Persons Equality Act 1 of 1996 (specifying when military trials may be held in private).

¹³⁵ Section 15, Combating of Rape Act 8 of 2000.

frame of 2247 divorce cases. A structured questionnaire was used to gather information from the documents in the files.

Information from the focus groups discussions which are described more fully below, and from interviews with judges, legal practitioners, traditional authorities, community leaders and other key informants has been used to help guide interpretation of the statistical data.

Table 11: Sampling of civil divorce files (1990-1995)

Year	Total number of divorce cases filed	Case files examined	Sample as percentage of total divorce cases filed
1990	327	57	17.4
1991	331	71	21.5
1992	361	94	26.0
1993	484	74	15.3
1994	544	81	14.9
1995	481	57	11.9
Total	2528	434	17.1

Note: The researcher attempted to examine every the file for every 5th divorce case entered into the High Court register for the years in question. The variations resulted in part from difficulties encountered in working with the Register.

RESEARCH FINDINGS

Sex and age of plaintiffs and defendants

The study showed that *it is most often wives who seek the divorce*. It is the plaintiff who initiates the divorce, and there were many more female plaintiffs (63.4%) than males (36.6%).

Table 12: Sex of plaintiff and defendant

	Plaintiff		Defendant	
	# Cases	Percent	# Cases	Percent
Male	159	36.6	275	63.4
Female	275	63.4	159	36.6
Total	434	100.0	434	100.0

Note: The sex of the defendants was recorded to provide a control group, as this should obviously mirror the sex of the plaintiffs in reverse.

Means and medians were used in the calculation of the “average” age of plaintiffs and defendants at the time of marriage and divorce.¹³⁶

The minimum age of marriage recorded for plaintiffs as well as defendants was 16 years, and the maximum was 74 for plaintiffs and 73 for defendants. The mean age of marriage was about 27 years for both categories, and the median age was 25.

The minimum age at the time of divorce was very young – 20 for plaintiffs and 18 for defendants. The maximum age recorded at the time of divorce was 76 years for a plaintiff and 84 years for a defendant. The mean age at the time of divorce was about 37 years for both and defendants, while the median age was 35-36 years.

¹³⁶ The mean is computed by summing the values of several observations and dividing by the number of observations. The median represents the value of the middle case in a rank-ordered set of observations. The median often gives a more accurate picture of the typical case, as one very low or very high number can skew the mean in one direction or the other.

Table 13: Age of plaintiff and defendant

	#	Mean	Median	Minimum	Maximum
Average age at Marriage					
Plaintiff	384	26.6	25.0	16.0	74.0
Defendant	357	27.2	25.0	16.0	73.0
Average age at time of final divorce order					
Plaintiff	383	36.9	36.0	20.0	76.0
Defendant	356	36.8	35.0	18.0	84.0

Length of marriage

There was a wide range in the length of marriages before divorce. The minimum time that a divorcing couple was married was 1 year, while the maximum was 47 years. The mean length of marriage for a divorcing couple was just under 11 years, while the median was 9 years. This shows that there are very few couples who are divorcing almost immediately after hasty marriages, with the average case being one of a marriage of reasonable duration which has broken down.

Table 14: Average length of marriage

#	Mean	Median	Minimum	Maximum
433	10.7	9.0	1.0	47.0

Note: One date of divorce was missing, therefore only 433 cases are recorded.

Place of marriage

Most of the marriages which were involved in divorce cases were concluded in the Khomas region (43%), and the overwhelming majority were concluded in an urban location (almost 90%). The place of marriage correlated closely with the residence of the plaintiff and defendant, which is discussed in more detail below.

A significant percentage of marriages in the sample took place outside Namibia (13%), with most of these being in South Africa (74%) followed by Germany (12%).

Table 15A: Place of marriage by region

	#Cases	Percent
Khomas	185	42.8
Otjzondjupa	27	6.3
Erongo	41	9.5
Hardap	43	10.0
Karas	18	4.2
Omaheke	18	4.2
Kunene	5	1.2
Oshikoto	15	3.5
Oshana	7	1.6
Ohangwena	6	1.4
Okavango	4	0.9
Omusati	4	0.9
Namibia (place unspecified)	1	0.2
Outside Namibia	58	13.4
Total	432	100.0

Two places of marriages were missing.

Table 15B Urban/rural

	#Cases	Percent
Urban	334	89.5
Rural	39	10.5
Total	373	100.0

Note: The following places have been defined as “urban”, with the remainder being counted as “rural”: Windhoek, Rehoboth Walvis Bay, Tsumeb, Okahandja, Swakopmund, Mariental, Luderitz, Otjiwarongo, Gobabis, Grootfontein, Keetmanshoop, Outjo, Usakos, Otavi, Rundu, Oshakati, Omaruru, Okakarara, Ondangwa, and Karasburg.

**Table 15C: Place of marriage
for marriages outside Namibia**

Country of marriage	# Cases	Percent
South Africa	43	74%
Germany	7	12%
Zambia	2	3%
Zimbabwe	2	3%
Austria	1	2%
Botswana	1	2%
Sweden	1	2%
UK	1	2%
Total	58	100%

Apparent home language of plaintiffs and defendants

Home language was deduced from the surnames of the parties, which means that allowances must be made for some possible inaccuracies. *The highest number of cases by far (more than half of the total) involve both plaintiffs and defendants who appear to speak Afrikaans as a home language, followed by German, Oshiwambo and English.* The lowest number of cases involve plaintiffs and defendants from the Rukwangali language group, who were all but absent from the sample (accounting for only about 1% of plaintiffs and defendants).

Information obtained from the focus group discussions suggests that Afrikaans, English and German language users are better informed about the High Court procedures than any of the other language groups in Namibia. Factors such as a couple’s economic resources and ability to travel to Windhoek for High Court proceedings also affect their willingness to invoke formal divorce procedures. The focus group discussions showed that people whose home language are Otjiherero, Oshiwambo, Damara/Nama and Rukwangali do not often make use of civil court procedures. They tend to divorce through their own customary law procedures, hence the lower recorded divorce cases among these language groups in the High Court.

Information on the home language of the plaintiff and the defendant obtained from the divorce case file questionnaires (Table 16) shows a correlation with the information obtained from the focus group discussions.

It should be noted that the 14 plaintiffs and 22 defendants identified as "other" in Table 16 include Tswana and Lozi speakers, as well as persons who use languages that are not widely spoken in Namibia (Xhosa, Portuguese, Polish and French).

Table 16: Apparent home language of plaintiff and defendant

	Plaintiff		Defendant	
	# Cases	Percent	# Cases	Percent
Afrikaans	250	57.6	239	55.1
German	44	10.1	41	9.4
Oshiwambo	40	9.2	37	8.5
English	31	7.1	37	8.5
Damara>Nama	28	6.5	34	7.8
Otjiherero	24	5.5	19	4.4
Rukwangali	3	0.7	5	1.2
Other	14	3.2	22	5.1
	434	100.0	434	100.0

Regional distribution of plaintiffs and defendants

The region with the highest recorded plaintiffs and defendants cases is, not surprisingly, Khomas -- more than half of the plaintiffs (57.5%) and defendants (52.4%) gave residential addresses in the Khomas region. This can be explained due to the easy access the region's residents have to the High Court in Windhoek. Almost all of the divorce cases in Khomas were brought by persons living in Greater Windhoek (Katutura, Khomasdal or central Windhoek). (The regional information in Table 17A is broken down by major urban centres in Table 17B.)

Table 17A: Plaintiff and defendant by region

Region	Plaintiff		Defendant	
	# Cases	Percent	# Cases	Percent
Khomas	238	57.5	197	52.4
Otjozondjupa	38	9.2	40	10.6
Erongo	38	9.2	40	10.6
Hardap	20	4.8	19	5.1
Karas	25	6.0	23	6.1
Omaheke	13	3.1	10	2.7
Kunene	8	1.9	6	1.6
Oshikoto	18	4.3	12	3.2
Oshana	10	2.4	20	5.3
Ohangwena	1	0.2	0	0.0
Okavango	4	1.0	8	2.1
Omusati	1	0.2	0	0.0
Caprivi	0	0.0	1	0.3
Total	414	100.0	376	100.0

Other regions which feature strongly in the divorce case files are Otjizondjupa and Erongo. Again, a high proportion of residential addresses from these regions were from the region's major urban centres (Okahandja, Otjiwarongo and Grootfontein for Otjizondjupa, and Walvis Bay and Swakopmund for Erongo).

Table 17B: Residential address of plaintiff and defendant

	Plaintiff			Defendant	
	#Cases	Percent		#Cases	Percent
Central Windhoek	150	35.3	Central Windhoek	120	28.7
Katutura	45	10.6	Katutura	31	7.4
Khomasdal	40	9.4	Khomasdal	46	11.0
Okahandja	11	2.6	Okahandja	8	1.9
Rundu	4	0.9	Rundu	7	1.7
Swakopmund	25	5.9	Swakopmund	28	6.7
Arandis	3	0.7	Arandis	1	0.2
Oranjemund	3	0.7	Oranjemund	3	0.7
Keetmanshoop	11	2.6	Keetmanshoop	11	2.6
Rehoboth	9	2.1	Rehoboth	11	2.6
Mariental	5	1.2	Mariental	5	1.2
Oshakati	6	1.4	Oshakati	8	1.9
Tsumeb	17	4.0	Tsumeb	11	2.6
Luderitz	7	1.6	Luderitz	7	1.7
Otjiwarongo	12	2.8	Otjiwarongo	14	3.3
Gobabis	10	2.4	Gobabis	5	1.2
Otavi	1	0.2	Otavi	4	1.0
Stampriet	2	0.5	Leonardville	1	0.2
Ai-Ais	1	0.2	Ai-Ais	1	0.2
Khorixas	2	0.5	Khorixas	3	0.7
Outjo	4	0.9	Outjo	2	0.5
Karibib	2	0.5	Karibib	1	0.2
Grootfontein	7	1.6	Grootfontein	11	2.6
Uis	1	0.2	Aranos	1	0.2
Usakos	1	0.2	Usakos	3	0.7
Ongwediva	1	0.2	Ongwediva	2	0.5
Walvis Bay	4	0.9	Walvis Bay	5	1.2
Ruacana	1	0.2	Okaku	1	0.2
Karasburg	1	0.2	Karasburg	1	0.2
Maltahohe	1	0.2	Kavango	1	0.2
Henties Bay	1	0.2	Henties Bay	1	0.2
Kombat	2	0.5	Opuwo	1	0.2
Oshigambo	1	0.2	Oshigambo	0	0.0
Omaruru	1	0.2	Omaruru	1	0.2
Okakarara	1	0.2	Okakarara	1	0.2
Omitara	1	0.2	Katima Mulilo	1	0.2
Bushmanland	1	0.2	Ondangwa	4	1.0
Oshitayi	1	0.2	Owambo	5	1.2
Hoachanas	1	0.2	Farm Gobabis Dist	4	1.0
Uukwambi	1	0.2	Farm Grootfontein	1	0.2
Odibo/Uukwayama	1	0.2	Farm Tsumeb	1	0.2
Owambo	2	0.5	Farm Maltahohe	1	0.2
Farm Gobabis Dist	3	0.7	Farm Mariental	1	0.2
Farm Grootfontein	2	0.5	Farm Okakarara	1	0.2
Farm Bethanien	1	0.2	Botswana	1	0.2
Farm Maltahohe	1	0.2	South Africa	24	5.7
Farm Windhoek	2	0.5	Not in file	17	4.1
Farm Otjiwarongo	1	0.2			
Farm Mariental	1	0.2			
Farm Karasburg	1	0.2			
Farm Outjo District	1	0.2			
South Africa	3	0.7			
Not in file	8	1.9			
TOTAL	425	100.0	TOTAL	418	100.0

Note: The place of employment was treated as the place of residence where no other information was contained in file. There were 9 cases missing for the plaintiff and 16 cases for the defendant.

The discrepancy in some instances between plaintiff and defendant addresses is not surprising, since the couple may have separated before the divorce proceedings were initiated.

Regions that accounted for the lowest numbers of plaintiffs and defendants were Kunene, Okavango, Ohangwena and Omusati, where a combined total of only 14 plaintiffs resided. It is interesting to note that no plaintiffs came from Caprivi.

In total only 15 defendants came from the lowest ranking "defendant" regions Okavango, Kunene and Caprivi. No defendants resided in the regions Ohangwena or Omusati.

The Kunene has a low number of both plaintiffs and defendants due in part to the fact that the region is so sparsely populated. People interviewed in the Kunene region focus group discussions also indicated that it was too expensive for them to travel the long distance to the High Court in Windhoek to file for a divorce. Some of the interviewees also stated that it is easier for people in this region to simply separate from one another than to go through a complicated and costly divorce procedure. In the northern Kunene region, marriages and divorces amongst the Himba and Tjimba people are still very much influenced by customary law.

The low numbers of plaintiffs and defendants from the regions of Okavango, Ohangwena and Omusati could also be ascribed to the influence that customary law plays in these regions. Some of the interviewees in the focus group discussions in these areas also said that women sometimes lose their right to use property or cultivate land once they are divorced, with the result that many women would prefer to stay in an unhappy marriage than to divorce.

Caprivi is unique among Namibia's regions because of the continuing preference there for customary marriage on its own, as opposed to customary marriage combined with a civil marriage performed in church. This could account for the low numbers of divorce cases from persons resident in Caprivi, alongside the fact that the distance between Caprivi and Windhoek is so great.

Urban/rural distribution of divorce cases

Information obtained from the divorce case files shows that many more divorce cases involve parties from urban areas than rural areas. According to Table 18, 91.3% of all plaintiffs who filed for a divorce came from urban areas while only 8.7% came from rural areas. This suggests that people living in rural areas are either less informed about the civil divorce procedure, are discouraged from utilising civil divorce procedures because of their distance from the High Court, or prefer not to make use of the civil divorce procedure. It is also possible that people living in rural areas are more likely to be married under customary law alone, meaning that they divorce in terms of customary law – or that they are married under both civil and customary law, and choose to make use of more informal and accessible customary law divorce procedures (despite the fact that this leaves them still technically joined in civil marriage).

Table 18 Urban/rural distribution of parties

	Plaintiff		Defendant	
	#Cases	Percent	#Cases	Percent
Urban	378	91.3	353	93.9
Rural	36	8.7	23	6.1
Total	414	100.0	376	100.0

Note: The following locations were recorded as being "urban", with the remainder being counted as "rural": Windhoek, Okahandja, Rundu, Swakopmund, Keetmanshoop, Rehoboth, Mariental, Oshakati, Tsumeb, Luderitz, Otjiwarongo, Gobabis, Otavi, Opuwo, Khorixas, Outjo, Karibib, Grootfontein, Usakos, Ongwediva, Walvis Bay and Karasburg. Addresses given as being outside Namibia have been excluded from this calculation, as well as case files with no residential address recorded.

Employment status of plaintiffs and defendants

The majority of both plaintiffs (75%) and defendants (63%) indicated that they are employed.

Table 19A: Employment status of plaintiff and defendant

	Plaintiff			Defendant	
	#Cases	Percent		#Cases	Percent
Employed	323	74.8	Employed	273	62.9
Unemployed	38	8.8	Unemployed	55	12.7
Not Clear	71	16.4	Not Clear	106	24.4
Total	432	100.0	Total	434	100.0

Many persons interviewed in focus group discussions complained about the high costs involved in getting a divorce. So, the statistics do not indicate that employed people have a higher tendency to divorce than unemployed people, but more likely that unemployed persons cannot afford the formal legal process of divorce. In the focus group discussions interviewees mentioned that people who cannot afford to get a formal divorce, opt to separate informally instead.

Table 19B indicates the employment status of plaintiffs and defendants by sex. The plaintiff table shows that 81% of the male plaintiffs were employed, compared to 71% of the female plaintiffs. Only one case involved a male plaintiff who was clearly unemployed, with almost 13% of the female plaintiffs being clearly unemployed. The remainder of the case files did not provide clear indications of employment status.

With respect to defendants, 71% of the male defendants were employed while some 10% were clearly unemployed. In contrast, 48% of female defendants were employed while 16% of them were clearly unemployed. Employment status was not clear with regard to a high percentage of female defendants (35%).

If men and women from both plaintiff and defendant categories are looked at in total, about twice as many women involved in divorce cases are clearly unemployed (14%) as men (7%). However, the percentages of males and females who were clearly employed were not so far apart (75% for men compared to 63% for women). The high percentage of cases where employment status was not clear makes meaningful comparison difficult here. It must also be remembered that women with young children are more likely than men to be employed on a part-time basis. The data does not take into account the possibility of informal sector income for males and females, especially in rural areas of the country.

Table 19B: Employment status of plaintiff and defendant by sex

Plaintiff

	Male		Female	
	# Cases	Percent	# Cases	Percent
Employed	128	81.5	195	70.9
Unemployed	1	0.6	37	13.5
Not clear	28	17.8	43	15.6
Total	157	100.0	275	100.0

Defendant

	Male		Female	
	# Cases	Percent	# Cases	Percent
Employed	196	71.5	77	48.4
Unemployed	29	10.5	26	16.4
Not clear	50	18.2	56	35.2
Total	275	100.0	159	100.0

Both plaintiff and defendant

	Male		Female	
	# Cases	Percent	# Cases	Percent
Employed	324	75.0	272	62.7
Unemployed	30	6.9	63	14.5
Not clear	78	18.0	99	22.8
Total	432	100.0	434	100.0

Employment is crucial in cases where child maintenance or spousal maintenance is sought, as Table 19C shows.

Table 19C Employment status of plaintiff/defendant paying maintenance**Plaintiff**

	Employed		Unemployed		Not Clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
Male	61	96.8	0	0.0	9	100.0	70	94.6
Female	2	3.2	2	100.0	0	0.0	4	5.4
Total	63	100.0	2	100.0	9	100.0	74	100.0

Defendant

	Employed		Unemployed		Not Clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
Male	124	100.0	8	100.0	24	92.3	156	98.7
Female	0	0.0	0	0.0	2	7.7	2	1.3
Total	124	100.0	8	100.0	26	100.0	158	100.0

Note: For one male plaintiff (Case #103) the employment status was missing, leaving only 74 instead of 75 cases for the plaintiff.

Marital property regimes

According to the information obtained from the divorce case files, *most divorcing couples were married in community of property*. As explained above, this is the default regime for civil marriages in Namibia -- with the exception of marriages between black couples contracted after 1 August 1950 in the areas formerly known as Caprivi (Caprivi Region), Kavangoland (Kavango Region), Kaokoland (a portion of the current Kunene Region) and Owamboland (now the "Four O" regions), which are automatically out of community of property unless the parties agree otherwise.

However, even in the regions where the default regime is out of community of property for blacks, most of the divorce cases involved marriages which are in community of property. This could be either because the parties entered into an ante-nuptial agreement to make the marriage in community of property or because the divorces in these regions involved marriages between persons of races who are not subject to the default regime set forth in the Native Administration Proclamation. The regional breakdown of data indicated that correct explanation is the latter.

Table 20A: Property regime

	#Cases	Percent
In community of property	308	71.6
Out of community of property	118	25.1
Accrual	2	2.3
Other	2	0.5
Total	430	100.0

Note: Four cases are missing for this variable. The two cases for the 'Other' cohort are Case # 40 (Not clear) and Case # 384 (Law of Germany for a couple married in Germany).

Table 20B: Main property regimes by place of marriage

	In community of property		Out of community of property		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent
Khomas	128	69.6	55	29.9	183	100.0
Otjozondjupa	19	70.4	8	29.6	27	100.0
Erongo	30	73.2	11	26.8	41	100.0
Hardap	39	90.7	4	9.3	43	100.0
Karas	15	83.3	3	16.7	18	100.0
Omaheke	13	72.2	5	27.8	18	100.0
Kunene	5	100.0	0	0.0	5	100.0
Oshikoto	13	86.7	2	13.3	15	100.0
Oshana	6	85.7	1	14.3	7	100.0
Ohangwena	4	66.7	2	33.3	6	100.0
Kavango	4	100.0	0	0.0	4	100.0
Omusati	2	50.0	2	50.0	4	100.0
	278	74.7	93	25.0	371	100.0

Note: In the regions printed in bold, apartheid era legislation which remains in force provides that the default regime for marriages between blacks is *out of community of property*. In contrast, the default regime for all other marriages in Namibia is *in community of property*.

The relatively high percentage of people who were married in community of property stems primarily from the operation of the default system.

However, *at least one-fifth of the divorce cases in the sample involved marriages by ante-nuptial contract*. Fewer than half of the cases with marriage certificates stating that the marriage was by ante-nuptial contract had the ante-nuptial contract in the file (37 out of 98), so the property regime established by the ante-nuptial contract was not always clear from the documentation.

Conversely, it was not always clear from the documentation in the file whether the marriage was by ante-nuptial contract or not, even where the property regime could be ascertained. There are several reasons for this. Firstly, there are different default regimes for different persons in different parts of Namibia. Secondly, there were some marriages which took place outside of Namibia. Thirdly, ante-nuptial contracts can be entered into even where the default property regime is maintained, to alter matters of detail (such as excluding certain items from the community in a marriage under the default regime of community of property). Finally, to further complicate matters, some case files contained contradictory information.

Keeping these caveats in mind, it was obvious from the available data that *most ante-nuptial contracts (88%) were used to establish out of community of property regimes, without community of profit and loss or the accrual system*. (In the focus group discussions some of the interviewees stated that magistrates' courts should give couples more information about the option of getting married out of community of property.) However, some couples (11%) entered into ante-nuptial contracts while maintaining a marital property regime of in community of property. The accrual system was rarely encountered, being clearly present in only two cases (1%).

As a point of comparison, the situation was similar in South Africa prior to the marriage and divorce law reforms there. Before the introduction of the 1984 Matrimonial Property Act in South Africa, most couples who entered into an ante-nuptial contract chose to exclude community of property as well as community of profit and loss – in other words, a total separation of property both before and during the marriage. This was so common that ante-

nuptial contracts providing for this system were known as “standard form ante-nuptial contracts”.¹³⁷

Table 21A: Ante-nuptial contracts

	Yes		No		Not clear		Total	
	#Case	Percent	#Case	Percent	#Case	Percent	#Case	Percent
Marriage by ante-nuptial contract	98	22.8	245	57.0	87	20.2	430	100.0

Note: 4 and 5 cases are missing for these two questions respectively.

Table 21B: Ante-nuptial contracts by property regime

	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	11	11.3	234	95.5	59	70.2	304	95.5
Out of community of property	85	87.6	10	4.1	23	27.4	118	4.1
Accrual	1	1.0	1	0.4	0	0.0	2	0.4
Other	0	0.0	0	0.0	2	2.4	2	0.0
Total	97	100.0	245	100.0	84	100.0	426	100.0

Note: For one case the 'Property regime' was missing for an 'Ante-nuptial contract' coded 'Yes'.

For three cases the 'Property regime' was missing for an 'Ante-nuptial contract' coded 'Not clear'.

Looking at those places with large enough sample sizes for significant analysis, it appears that *ante-nuptial contracts were particularly popular in the Omaheke, Erongo, Otjozondjupa and Khomas regions*, as well as in respect of marriages concluded in other countries. Ante-nuptial contracts were not common in marriages which were concluded in either the south or the north.

Table 21C: Ante-nuptial contracts by place of marriage

Region	Total number of divorce cases	Number of ante-nuptial contracts	Percentage
Khomas	185	46	25%
Otjozondjupa	26	7	27%
Erongo	41	11	27%
Hardap	43	3	7%
Karas	18	2	11%
Omaheke	18	5	28%
Kunene	5	1	20%
Oshikoto	15	1	7%
Oshana	7	1	14%
Ohangwena	6	0	0%
Okavango	4	0	0%
Omusati	4	1	25%
Caprivi	0	0	0%
Namibia (unspecified)	1	0	0%
Outside Namibia	58	19	33%
Total	432	97	22%

There is no indication that the use of ante-nuptial contracts was influenced by the different default regimes for black couples in the different regions. This could be because black couples from these regions are less likely to bring cases before the divorce court.

¹³⁷

Cronje at 238.

Table 21D: Property regime by ante-nuptial contract by region

Khomas	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	5	10.9	103	92.8	19	73.1	127	69.4
Out of community of property	41	89.1	8	7.2	6	23.1	55	30.1
Other	0	0.0	0	0.0	1	3.8	1	0.5
Total	46	100.0	111	100.0	26	100.0	183	100.0

Otjozondjupa	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	1	14.3	16	94.1	1	50.0	18	69.2
Out of community of property	6	85.7	1	5.9	1	50.0	8	30.8
Other	0	0.0	0	0.0	0	0.0	0	0.0
Total	7	100.0	17	100.0	2	100.0	26	100.0

Erongo	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	1	9.1	21	100.0	7	87.5	29	72.5
Out of community of property	10	90.9	0	0.0	1	12.5	11	27.5
Other	0	0.0	0	0.0	0	0.0	0	0.0
Total	11	100.0	21	100.0	8	100.0	40	100.0

Hardap	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	0	0.0	34	100.0	5	83.3	39	90.7
Out of community of property	3	100.0	0	0.0	1	16.7	4	9.3
Other	0	0.0	0	0.0	0	0.0	0	0.0
Total	3	100.0	34	100.0	6	100.0	43	100.0

Karas	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	0	0.0	12	100.0	3	75.0	15	83.3
Out of community of property	2	100.0	0	0.0	1	25.0	3	16.7
Other	0	0.0	0	0.0	0	0.0	0	0.0
Total	2	100.0	12	100.0	4	100.0	18	100.0

Omaheke	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	0	0.0	9	100.0	4	100.0	13	72.2
Out of community of property	5	100.0	0	0.0	0	0.0	5	27.8
Other	0	0.0	0	0.0	0	0.0	0	0.0
Total	5	100.0	9	100.0	4	100.0	18	100.0

Kunene (in part, default regime for blacks = out of COP)	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	1	100.0	3	100.0	0	0.0	4	100.0
Out of community of property	0	0.0	0	0.0	0	0.0	0	0.0
Other	0	0.0	0	0.0	0	0.0	0	0.0
Total	1	100.0	3	100.0	0	0.0	4	100.0

Oshikoto (default for blacks = out of COP)	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	0	0.0	12	100.0	1	50.0	13	86.7
Out of community of property	1	100.0	0	0.0	1	50.0	2	13.3
Other	0	0.0	0	0.0	0	0.0	0	0.0
Total	1	100.0	12	100.0	2	100.0	15	100.0

Oshana (default for blacks = out of COP)	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	1	100.0	2	100.0	3	75.0	6	85.7
Out of community of property	0	0.0	0	0.0	1	25.0	1	14.3
Other	0	0.0	0	0.0	0	0.0	0	0.0
Total	1	100.0	2	100.0	4	100.0	7	100.0

Ohangwena (default for blacks = out of COP)	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	0	0.0	2	100.0	2	100.0	4	100.0
Out of community of property	0	0.0	0	0.0	0	0.0	0	0.0
Other	0	0.0	0	0.0	0	0.0	0	0.0
Total	0	0.0	2	100.0	2	100.0	4	100.0

Okavango (default for blacks = out of COP)	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	0	0.0	2	100.0	2	100.0	4	100.0
Out of community of property	0	0.0	0	0.0	0	0.0	0	0.0
Other	0	0.0	0	0.0	0	0.0	0	0.0
Total	0	0.0	2	100.0	2	100.0	4	100.0

Omusati (default for blacks = out of COP)	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	0	0.0	1	100.0	1	50.0	2	50.0
Out of community of property	1	100.0	0	0.0	1	50.0	2	50.0
Other	0	0.0	0	0.0	0	0.0	0	0.0
Total	1	100.0	1	100.0	2	100.0	4	100.0

Caprivi (default for blacks = out of COP)	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	0	0.0	0	0.0	0	0.0	0	0.0
Out of community of property	0	0.0	0	0.0	0	0.0	0	0.0
Other	0	0.0	0	0.0	0	0.0	0	0.0
Total	0	0.0	0	0.0	0	0.0	0	0.0

Total	Yes		No		Not clear		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
In community of property	9	11.5	217	96.0	48	75.0	274	74.5
Out of community of property	69	88.5	9	4.0	15	23.4	93	25.3
Other	0	0.0	0	0.0	1	1.6	1	0.3
Total	78	100.0	226	100.0	64	100.0	368	100.0

Notes: (1) There were 19 cases involving ante-nuptial contracts where the place of marriage was outside Namibia. There was one other case where data relevant to this table was missing, giving a total of 20 missing cases. (2) For 'Ante-nuptial contract' coded 'No', 19 cases do not list the 'Region'. None is missing for 'Property regime'. (3) For 'Ante-nuptial contract' coded 'Not clear', 20 cases for 'Region' are missing. Two cases that are missing for 'Property regime' also have the 'Region' missing. One case has only 'Property regime' missing. This gives a total of 23 missing cases.

There were significant differences between different language groups regarding the use of ante-nuptial contracts, with German, Afrikaans and English speakers being the most likely to utilise them than other language speakers. This accords with findings in a study of divorce cases in the Cape Town Supreme Court, which found that white couples were more likely than couples of other races to have ante-nuptial contracts. According to the author of this study, the reason for the discrepancy is probably because of easier access to legal advice and a greater amount of property to be regulated.¹³⁸

¹³⁸ Debbie Budlender, *In Whose Best Interests?: Two studies of divorce in the Cape Town Supreme Court*, University of Cape Town Law Race and Gender Research Unit, 1996 at 13.

Table 21E: Ante-nuptial contracts by language group of plaintiff

Language group of plaintiff	Total number of divorce cases	Use of ante-nuptial contract	Percentage
Afrikaans	250	67	27%
German	44	16	36%
Oshiwambo	40	2	5%
English	31	8	26%
Damara/Nama	28	1	4%
Otjiherero	24	2	8%
Rukwangali	3	0	0%
Other	14	2	14%
Total	434	98	23%

Grounds for divorce

Table 22A gives a breakdown of the grounds for divorce. As explained above, the grounds for civil divorce are essentially limited to adultery and/or malicious desertion. *Malicious desertion is the most common ground cited (in about 92% of cases)*, even though this involves the longer restitution order procedure whereas adultery provides a basis for an immediate divorce order.

There were only 45 cases in total (around 10% of the sample) which cited adultery as a formal ground for divorce, and only 36 cases (8% of the sample) where adultery was the operative ground (as evidenced by a final divorce order being granted without being preceded by a restitution order). But a third party was named in 49 cases. This discrepancy can be explained by the fact that adultery is sometimes cited as part of the explanation for the defendant's malicious desertion (eg he or she has left the common home to move in with a third party).

The grounds for divorce from habitual criminals and incurably insane persons, obviously appropriate only in unusual circumstances, did not feature at all in the files examined.

An analysis of the grounds cited by sex reveals no difference, with the sexual split in respect of each ground being almost identical (Table 22C).

Table 22A: Grounds for divorce

	# Cases	Percent
Adultery	29	6.7
Malicious desertion	389	89.6
Adultery & malicious desertion	16	3.7
Total	434	100.0

Table 22B: Order for restitution of conjugal rights

Restitution order issued?	Yes		No		Total	
	# Cases	Percent	# Cases	Percent	# Cases	Percent
	398	91.7	36	8.3	434	100.0

Table 22C: Grounds for divorce by sex of plaintiff

	Male		Female		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent
Adultery	10	6.3	19	6.9	29	6.7
Malicious desertion	143	89.9	246	89.5	389	89.6
Adultery & malicious desertion	6	3.8	10	3.6	16	3.7
Total	159	100.0	275	100.0	434	100.0

The details given in support of these grounds must be treated with caution. As explained above, the parties sometimes conceal some details, or keep their allegations as vague as possible, out of fear of publicity or a desire to avoid exacerbating the conflict. These concerns would tend to inspire restraint, but there may also be cases where angry parties wished to blacken the reputation of their spouses as thoroughly as possible. What can be safely be said is that brief court papers can never tell a full and accurate story of why a complex marriage relationship failed.

The malicious desertion cases involved actual desertion in some instances, and a mixture of types of constructive desertion in others – such as requesting or ordering the plaintiff to leave the common home, the consistent refusal of sexual relations, physical violence and threats of violence, or other behaviour which made it impossible for the plaintiff to remain in the common home.

Physical violence or threats of physical violence against the plaintiff or minor children was cited in 126 cases (almost 30% of the total), including several cases where sexual abuse was alleged and one case where the plaintiff asserted that the defendant had hired an assassin to kill the plaintiff. Almost 90% of the cases citing domestic violence (113 out of 126 cases) involved female plaintiffs.

Alcohol abuse was mentioned in 113 cases (26% of the total sample). Financial failings (such as failure to maintain or squandering the marital assets was another fairly frequently-cited complaint.

Plaintiffs commonly allege that the defendant shows no love and affection towards them and has no interest in the continuation of the marriage, but these are fairly standard legal formulas used to reinforce the idea that the marriage has irrevocably broken down. Interestingly, there were 27 cases (6% of the sample) where the plaintiff stated that the defendant had asked the plaintiff to institute divorce proceedings.

One case involved a defendant who was alleged already married at the time of marriage to the plaintiff, and in two other cases the plaintiff alleged that the defendant subsequently entered into a second marriage while still married to the plaintiff.

There appear to have been *no cases in the sample in which divorce was denied because the grounds for divorce were insufficient*. Interviews with judges and practitioners confirmed that this is rare.

There were only 26 cases out of the total sample of 434 in which no final divorce order was issued, apparently because the parties reconciled. In addition, there was one case which was still pending at the time the data from the files was recorded. This means that *reconciliation took place during the divorce process in only about 6% of the cases*, calling into question the perception of some that the restitution order procedure provides a useful waiting period for encouraging reconciliation.

Division of property

The division of property depends primarily on the couple's marital property regime. *The most common outcome is for the marital property to be divided in accordance with a detailed agreement made between the parties, which is incorporated into the final divorce order as an annexure (40% of the cases)*. In the absence of such an agreement, the court order is likely to make only a general directive "that the joint estate be divided", leaving the details to be worked out between the parties. As explained above, in those rare cases where the parties cannot divide the joint estate satisfactorily, the Court can appoint a Receiver to settle the matter. It is very rare for the Court to give detailed orders about who will keep what property.

The plaintiff as the “innocent” party can ask for an order of forfeiture of benefits against the “guilty” defendant. However, as explained above, this can assist the plaintiff only where he or she has contributed more than the defendant to the joint assets, or where the defendant otherwise has some prospect of benefit under the terms of the ante-nuptial contract. *Forfeiture of benefits was ordered in 22% of the cases in the sample (88 cases). Most of these (89%) involved marriages in community of property, while a small proportion (11%) involved marriages out of community of property.*

Table 23A: Details concerning division of property

	# Cases	Percent
Property divided as per agreement between parties	162	39.9
Forfeiture of benefits ordered	88	21.7
“Joint estate to be divided”	73	18.0
Property divided as per detailed court order	2	0.5
Divorce order silent	80	19.7
Other	1	0.2
Total	403	100.0

Note: The one “other” case involved a detailed division based on a specific clause in the parties’ ante-nuptial agreement concerning a donation. The cases in which no final divorce order was issued are omitted from this tabulation.

Table 23B: Approach to division of property by property regime

	In community		Out of community		Accrual		Other		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent	#Cases	Percent
Agreement between parties	96	33.3	60	53.6	2	16.6	1	100.0	159	39.5
Order for forfeiture of benefits	78	27.1	0	0.0	10	83.3	0	0.0	88	21.7
“Joint estate to be divided”	71	24.7	2	1.8	0	0.0	0	0.0	73	18.1
Detailed court order	2	0.7	0	0.0	0	0.0	0	0.0	2	0.5
Divorce order silent	40	13.9	11	9.8	0	0.0	0	0.0	79	19.6
Other	1	0.3	0	0.0	0	0.0	0	0.0	1	0.2
Total	288	100.0	112	100.0	12	100.0	1	100.0	403	100.0

Note: The two cases involving marriages out of community of property in which the final divorce order directed that the “joint estate be divided” probably contain some error, either in the description of the property regime in the file or the terms of the divorce order contained in the file.

Children and divorce

The 434 cases in the sample involved a total of 656 children, including 1 child not yet born and 44 children whose ages were not specified in the files. Thus, the sample involved 611 children whose ages are known. Most of these children were minors and 94% were still under the age of 18. The children were about evenly split between sons and daughters.

Table 24 shows that *most couples with children get divorced when their children are between the ages of 3-14 years old* (455 out of 611 children were in these age brackets, for a total of 74%). This figure correlates roughly with the fact that the typical divorcing couple has been married for 9-11 years.

Table 24: Ages of children at time of final divorce order

	# Child	Percent
0-2 years	59	9.7
3-5 years	133	21.8
6-8 years	138	22.6
9-11 years	97	15.9
12-14 years	87	14.2
15-17 years	60	9.8
18 years and above	37	6.1
Total	611	100.0

It should be noted that the agreements between the parties which are annexed to the divorce order often include agreements about custody and access.

Custody

Of the total sample of 434 cases, 100 (22%) involved marriages where there were no children and another 10 (2%) involved only major children – including one case where the child was a minor at the time the divorce was instituted, but became a major before it was finalised. This leaves 324 cases involving at least some minor children. Of these 324 cases, no final divorce orders were issued in 22 cases -- reconciliation in 21 cases and 1 case still pending. (There were a total of 26 cases which were finalised without a divorce order, but 5 of these involved no children.) This leaves 302 *finalised divorce cases involving custody issues relating to minor children* (including 17 cases where there were both major and minor children).

Table 25A: Custody of children (all cases)

	# Cases	Percentage
No final divorce order issued	27	6.2
No children	95	21.9
Only major children	10	2.3
Custody to plaintiff	198	45.6
Custody to defendant	83	19.1
Split custody	11	2.5
Custody to third party	2	0.5
Custody and sole guardianship to plaintiff	1	2.3
Custody outcome not clear from file	7	1.6
Total	434	100.0

Table 25B: Custody of children (finalised cases involving minor children)

	# Cases	Percentage
Custody to plaintiff	198	65.5
Custody to defendant	83	27.5
Split custody	11	3.6
Custody to third party	2	0.7
Custody and sole guardianship to plaintiff	1	0.3
Custody outcome not clear from file	7	2.3
Total	302	100.0

Custody awards of minor children were made to one or the other spouse in 281 (93%) of these 302 cases involving minor children, with custody of siblings being split between the spouses in another 11 cases (4%).

“Guilt” and “innocence” are not directly relevant to the question of custody, although they may have an indirect bearing. (For example, where violence against a spouse or a child is part of the basis for an allegation of constructive desertion, the same facts would obviously have a

bearing on the fitness of the parent in question for custody). The plaintiff was awarded custody in 198 of the 281 cases where custody of minor children was given to one spouse (70%), as compared to only 83 cases (30%) in which the defendant was given custody.

Custody most often went to mothers, in 89% of the divorce cases where minor children went to one or the other spouse (250 out of 281 cases). Of course, this was most often a result of the fact that the parties agreed upon this outcome. In contrast, fathers took custody of children in only 11% of these cases (31 out of 281 cases).

Table 26A: Custody of children by sex of custodian

	Plaintiff		Defendant		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent
Male	19	9.6	12	14.5	31	11.3
Female	179	90.4	71	85.5	250	88.7
Total	198	100.0	83	100.0	281	100.0

Divorce cases where custody of minor children was at issue most frequently involved two children (in 42% of such cases) or only one minor child (in 35% of such cases). A breakdown of the number of children by the sex of the custodian did not reveal any significant patterns.

Table 26B: Number of minor children by sex of custodian

Minor Children	Male		Female		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent
One child	9	29.0	90	36.0	99	35.2
Two children	15	48.4	102	40.8	117	41.6
Three children	4	12.9	33	13.2	37	13.2
Four children	1	3.2	17	6.8	18	6.4
Five children	2	6.5	4	1.6	6	2.1
Six children	0	0.0	2	0.8	2	0.7
Seven children	0	0.0	2	0.8	2	0.7
Total	31	100.0	250	100.0	281	100.0

There was some indication that younger children were more likely to be placed in the custody of the mother, but this pattern was not as strong as might be expected – particularly with respect to the age of second and third children.

Table 26C: Average age of child by sex of custodian

	Male	Female
First Child		
#	29	235
Mean	12.9	9.3
Median	12.7	8.8
Minimum	2.0	0.0
Maximum	21.7	22.3

Second Child		
#	21	148
Mean	9.3	8.2
Median	7.0	7.0
Minimum	3.0	1.0
Maximum	17.5	20.1
Third Child		
#	6	53
Mean	7.9	7.5
Median	7.0	7.0
Minimum	3.0	1.0
Maximum	11.0	14.0
Fourth Child		
#	3	20
Mean	7.0	5.5
Median	6.0	4.1
Minimum	4.0	1.0
Maximum	11.0	14.0
Fifth Child		
#	2	6
Mean	6.0	4.9
Median	6.0	4.0
Minimum	4.0	0.0
Maximum	8.0	10.5
Sixth Child	0	3
#	.	4.7
Mean	.	6.0
Median	.	2.0
Minimum	.	6.2
Seventh Child	0	1
#	.	3.6
Mean	.	3.6
Median	.	3.6
Minimum	.	3.6
Maximum	.	3.6

There were 11 cases (4% of the total of 302 cases involving minor children) in which *split custody of siblings* was approved by the Court, in some cases on the basis of sex or age. For example, in one case, custody of three minor sons was given to the male defendant and custody of two minor daughters to the female plaintiff. In one case which cited “Herero custom and tradition”, the court accepted the parties’ agreement that two minor sons would stay with their mother until age 15, when they would go to their father, while the daughter would continue in the custody of the mother indefinitely. In another case (which could perhaps be more properly characterised as joint custody), the child was to stay with the plaintiff for one year, and then go to live with the defendant. Judges and practitioners interviewed say that the Court frowns on such arrangements unless there are good reasons for them. For example, such an approach may simply maintain the status quo where there has been a long separation prior to the divorce proceeding.

There were no cases involving *joint custody*, which has only become acceptable in the eyes of some judges very recently.

There were two cases in which custody was given to someone other than a parent. In one case, custody of the children was given to their grandparents. In another case, the children of the marriage were legally adopted by a third party.

The outcome of some cases on the issue of custody was not clear from the papers in the files.

Guardianship

There was only one case in which an award of sole guardianship was made to the plaintiff, with the remainder of the cases being silent on the question of guardianship.

Since all of these divorce orders were made prior to the Married Persons Equality Act, the effect of an order which is silent on guardianship is to leave all guardianship powers (aside from custody) with the father. Now, since the advent of the Act, the effect of an order which is silent on guardianship would presumably be to leave both parents with equal powers of guardianship.

Access

Out of the total of 302 cases involving the custody of minor children, there were no cases where access by the non-custodial parent (or parents) was explicitly denied. The final divorce orders in these cases typically (in 82% of these cases) incorporated details about the particulars of the access. In a few cases, the order allowed only access or “reasonable access” (3% of these cases).

Table 27A: Access to minor children

Total access outcomes	# Cases	Percentage
Particulars of access given	262	86.8
Reasonable access allowed	21	7.0
Access allowed	1	0.3
Divorce order silent	15	5.0
Custody/access outcome not clear from file	3	1.0
Total	302	100.0

Looking at only the 281 cases where custody of all children was awarded to one or the other spouse, the outcomes for access followed the same pattern, with particulars of access being set out in most divorce orders.

Table 27B: Access to minor children in cases where custody of all children awarded to one or the other spouse

	# Cases	Percentage
Particulars of access given	252	89.7%
Reasonable access allowed	20	7.1%
Access allowed	1	0.4%
Divorce order silent	8	2.8%
Total	281	100.0

The particulars of access are typically recorded in a standard format. The final order of divorce will often include a statement to the effect that “the custody and control of the ... minor children born of the marriage be and is hereby awarded to the plaintiff subject to access by the defendant as per Annexure A” which is then attached to the order. Annexure A sets forth a standard outline for access of the child or children at various ages. It reads as shown below.

ANNEXURE "A"

1. Before the child(ren) goes/go to school the Plaintiff shall be entitled to reasonable access to the said child(ren) or to take him/her with him/her at his/her own costs as follows:
 - a) Up to the age of 12 months to visit the child(ren) as follows:
 - (i) One evening per week for one hour.
 - (ii) Every alternative weekend for two hours.
 - b) Between the ages of 12 months and 24 months, to visit the child(ren) as follows:
 - (i) Every alternative weekend for three hours.
 - (ii) At Christmas for four hours.
 - c) Between the ages of two and six years, he/she may visit and/or take the child(ren) with him/her as follows:
 - (i) Between the ages of two and four years, for a day every alternative weekend during the hours 9h00 and 16h00.
 - (ii) Between the ages of four years until they attend school, every alternative weekend commencing on Friday afternoon till Sunday at 18h00 as well as holidays which holidays shall be varied so that the Plaintiff shall have the said child(ren) with him/her every alternative Christmas holiday.
 2. When the child(ren) attend school the Plaintiff shall be entitled to have the said child(ren) with him/her every alternative weekend and every alternative long and short school holiday which holidays shall be varied so that the Plaintiff shall have the said child(ren) with him/her every alternative December holiday..
-

Annexure "A" may be replaced by an individual agreement made between the parties, which is attached to the divorce order as part of their overall settlement (usually incorporated into the order as "Annexure B"). Such an agreement will usually cover a range of issues, including custody and access, the division of property and any other matter which has been part of the settlement between the parties.

The sample examined had few cases in which the parties concluded personalised agreements about access, with "Annexure A" being utilised in the vast majority of the total of 262 cases where particulars of access were given. Even where an agreement between the parties is incorporated into the final order, this agreement often says that access is granted as per "Annexure A".

Table 28: Form of details about access to minor children

	# Cases	Percentage
Annexure A	256	97.7%
Annexure A plus further reasonable access	2	0.8%
Annexure B (parties' agreement)	3	1.1%
One weekend per calendar month	1	0.4%
Total	262	100.0

Child maintenance

Of the 302 cases which involved minor children, *maintenance payments for the children were awarded in 230 cases (76%)*. This does not include 2 of the 11 cases involving split custody in which it was ordered that each parent would simply take care of the expense of the child or children in his or her custody. The most typical case involving maintenance payments included payments for two children.

Table 29: Maintenance outcomes

	# Cases	Percent
Maintenance to be paid for one child	86	28.5
Maintenance to be paid for two children	94	31.1
Maintenance to be paid for three children	32	10.6
Maintenance to be paid for four children	13	4.3
Maintenance to be paid for five children	2	0.7
Maintenance to be paid for six children	1	0.3
Maintenance to be paid for seven children	2	0.7
Split custody; each parent pays for own child/ren	2	0.7
Final order states that no maintenance ordered	5	1.7
Maintenance not mentioned	62	21.0
Maintenance outcome unclear	3	1.0
Total	302	100.0

Table 30: Average number of children receiving maintenance payments

# Cases	Mean	Median	Minimum	Maximum
230	2.0	2.0	1.0	7.0

“Guilt” and “innocence” are irrelevant to the payment of maintenance for children, with the key factors being the relative financial position of the parties and the best interests of the children. However, it worked out that defendants paid maintenance to plaintiffs for children about twice as often as it was the other way round, with maintenance payments obviously correlating with custody arrangements. Maintenance is often addressed in the settlement agreements which are annexed to divorce orders.

Women are most often divorce plaintiffs and custody is most often awarded to mothers. Therefore it follows that maintenance payments are most often made by male defendants, and to a lesser extent by male plaintiffs. There were only 6 cases (3% of the total) in which mothers were to make maintenance payments to fathers who had custody of minor children.

This does not mean that mothers are not contributing to the maintenance of their children after divorce, of course. In fact it is usually the custodial parent who bears the brunt of child care expenses, as maintenance payments are generally based on underestimates of the actual costs of child-rearing. Furthermore, the labour expended by the custodial parent is seldom adequately taken into account.

Table 31A: Maintenance payments by plaintiff and defendant

	# Cases	Percent
To be paid by plaintiff	75	22.1
To be paid by defendant	154	45.4
Maintenance payable to foster parents	1	0.3
Total	230	100.0

Table 31B: Maintenance payments by sex of parent paying

	To be paid by plaintiff		To be paid by defendant		Total	
	# Cases	Percentage	# Cases	Percentage	#Cases	Percentage
Male	71	94.6	152	98.7	223	97.4
Female	4	5.4	2	1.3	6	2.6
Total	75	100.0	154	100.0	229	100.0

Note: The case involving payments to foster parents has been excluded.

Child maintenance payments ranged from a token N\$1/month to a maximum of N\$100/month per child. Typical payments were N\$200/month for the first child and N\$150/month for the second and third children, falling to N\$100/month for fourth children and N\$60/month for fifth and sixth children. Thus, maintenance payments tended to decrease with the order of the child in the family, although it is not clear that the idea of “economies of scale” applies to some of the major costs of child-rearing (such as food, medical expenses and school fees).

Common sense knowledge of the costs of feeding, housing and educating a child clearly shows that the major burden of the costs of caring for the children in question falls on the custodial parent.

Table 32: Average amount of maintenance/month paid for each child (in N\$)

	# Cases	Mean	Median	Minimum	Maximum
First child	226	238.5	200.0	1.0	1000.0
Second child	142	225.6	150.0	1.0	1000.0
Third child	50	188.8	150.0	30.0	1000.0
Forth child	18	116.6	100.0	30.0	500.0
Fifth child	5	74.8	60.0	30.0	150.0
Sixth child	3	64.7	60.0	50.0	84.0
Seventh child	2	55.0	55.0	50.0	60.0

Note: The amount of maintenance was missing in several cases.

Maintenance payments were to continue until the child reached majority in only about one-fifth of the cases involving maintenance payments. However, the time period was unspecified in most cases, which would still entail maintenance payments until the age of majority or until the child becomes self-supporting.

Table 33: Duration of maintenance - all children

	#Child	Percent
Until majority	95	21.1
Not specified	351	78.0
Until sons revert to plaintiff	2	0.4
As long as child is resident at mentioned address	2	0.4
Total	450	100.0

It is instructive to look at total child maintenance payments in each case, to get some idea of the total obligations imposed on the non-custodial parent. *Total monthly payments for child maintenance ranged from a low of N\$1 to a high of N\$3000, with the typical case involving total payments of about N\$300/month.*

Table 34: Total maintenance for children payable by a single party per month (in N\$)

	#Cases	Mean	Median	Minimum	Maximum
Total child maintenance	226	434.3	300.0	1.0	3000.0

Spousal maintenance

Spousal maintenance was awarded in only 34 cases of the 407 which resulted in final divorce orders (8% of the total cases). As in the case of child maintenance, spousal maintenance is often addressed in the settlement agreements which are annexed to divorce orders. Of the few cases which feature spousal maintenance, 27 involved an order or agreement by the defendant to maintain the plaintiff (79.4%) and 7 involved an order or agreement by the plaintiff to maintain the defendant (20.6%).

Table 35: Sex of spouse paying maintenance

	Plaintiff to maintain defendant		Defendant to maintain plaintiff		Total	
	# Cases	Percentage	# Cases	Percentage	#Cases	Percentage
Male	7	100.0	26	96.3	33	97.1
Female	0	0.0	1	3.7	1	2.9
Total	7	100.0	27	100.0	34	100.0

There was only one case in which a wife was ordered to pay maintenance to a husband, with the female defendant being ordered to pay maintenance for her spouse as well as her minor child.¹³⁹ No cases where a female plaintiff had to pay maintenance to a male defendant were encountered. All the other cases involved spousal maintenance payments by husbands to their wives.

Amounts of spousal maintenance generally ranged from token maintenance of N1/month to a maximum of N\$2000/month, with the typical case involving maintenance of N\$200/month.

Table 36A: Average monthly spousal maintenance (in N\$)

Spousal maintenance	#Cases	Mean	Median	Minimum	Maximum
	33	390.8	200.0	1.0	2000.0

Note: The amount was not given in one case.

Monthly payments by plaintiffs were smaller than those by defendants, probably because the “innocent” party cannot be ordered by the Court to pay spousal maintenance unless he or she is willing.

Table 36B: Average monthly spousal maintenance payment by plaintiff/defendant (in N\$)

	Plaintiff male	Defendant male
# cases	7	25
mean	147.3	458.7
median	150.0	200.0
minimum	1.0	1.0
maximum	300.0	2000.0

Note: The single case involving spousal maintenance by a wife has been omitted. One other case involving maintenance payable by the defendant has been omitted because the amount of maintenance was missing.

Spousal maintenance payments were typically for an unspecified duration. This is somewhat unexpected, as the theory of spousal maintenance in some other countries is that it should be only for a limited period, to allow for readjustment. However, in cases where a mother has dropped out of the job market to rear children or to manage the household, she may be permanently disadvantaged in terms of employment skills or marketability. Payments until death or remarriage, or for a set duration, were rare.

¹³⁹ Case # 247: The mother lives in South Africa and her husband has the custody of two children aged 21 and 20 years. (There are also three major children.) She was ordered to pay her husband N\$400/month and the younger child N\$300/month.

Table 37: Period of spousal maintenance

	# Cases	Percent
Period unspecified	22	64.7
Until death or remarriage	3	8.8
For set period (6 months to 2 years)	5	14.7
As long as plaintiff is unemployed	2	5.9
Other	2	5.9
Total	34	100.0

One of the 2 cases listed under “other” provided alternative cut-off provisions – until the plaintiff is self-supporting, but for a maximum of 6 months. The other provided one amount for a set period, and then a lower amount indefinitely.

Total maintenance for spouse and children

Looking at spousal maintenance and child maintenance together by case gives an idea of the total financial consequences of a divorce. However, *there were only 26 cases in which a party was expected to pay both spousal and child maintenance at the same time, accounting for only 11% of the total number of cases involving maintenance. All but one of these cases involved payments by fathers.*

Table 38A: Total maintenance payments by plaintiff and defendant

	Plaintiff		Defendant		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent
Spouse & children	5	6.7	21	13.3	26	11.2
Spouse only	2	2.7	5	3.2	7	3.0
Children only	68	90.7	132	83.5	200	85.8
Total	75	100.0	158	100.0	233	100.0

Table 38B: Total maintenance payments by sex

Male	Plaintiff		Defendant		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent
Spouse & children	5	2.2	20	8.8	25	11.0
Spouse only	2	0.9	5	2.2	7	3.1
Children only	64	28.2	131	57.7	195	85.9
Total	71	31.3	156	68.7	227	100.0
Female	Plaintiff		Defendant		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent
Spouse & children	0	0.0	1	16.7	1	16.7
Spouse only	0	0.0	0	0.0	0	0.0
Children only	4	66.7	1	16.7	5	83.3
Total	4	66.7	2	33.3	6	100.0
Total	Plaintiff		Defendant		Total	
	#Cases	Percent	#Cases	Percent	#Cases	Percent
Spouse & children	5	2.1	21	9.0	26	11.2
Spouse only	2	0.9	5	2.1	7	3.0
Children only	68	29.2	132	56.7	200	85.8
Total	75	32.2	158	67.8	233	100.0

Combining the amount of spousal maintenance with the total amount of child maintenance gives an indication of the total maintenance consequences of divorce cases. *Total maintenance responsibilities ranged from a token amount of N\$1 to a maximum of N\$3000/month, but the typical case involved total maintenance responsibilities of between N\$300 and N\$500 per month.*

The following tables examine total maintenance responsibilities by party and by sex. The difference between total maintenance payable by plaintiffs and by defendants was not

substantial. The division by sex is surprising. The maximum payments by men were higher, but the typical amounts (both mean and median) paid by females were higher than those paid by males, despite the fact that women typically were given custody of the children and thus eligible to receive child maintenance payments in addition to potential spousal maintenance. However, because the number of cases involving maintenance payments by women was so small (only six cases, as compared to 227 cases where spousal and/or child maintenance was paid by men), it is not possible to draw a meaningful conclusion on this point.

Table 39A: Total maintenance payable per month in N\$

	#Cases	Mean	Median	Minimum	Maximum
Maintenance for spouse only	33	390.8	200.0	1.0	2000.0
Total maintenance for children only	226	434.3	300.0	1.0	3000.0
Total maintenance (spouse & children)	233	476.7	300.0	1.0	3000.0

Table 39B: Total maintenance payable per month by plaintiff and defendant (in N\$)

	#Cases	Mean	Median	Minimum	Maximum
Total maintenance payable by plaintiff	75	506.8	301.0	20.0	3000.0
Total maintenance payable by defendant	158	462.3	300.0	1.0	2600.0
Total maintenance payable by any party	233	476.7	300.0	1.0	3000.0

Table 39C: Total maintenance payable per month by sex of spouse paying (in N\$)

	#Cases	Mean	Median	Minimum	Maximum
Total maintenance payable by male	227	477.8	300.0	1.0	3000.0
Total maintenance payable by female	6	433.3	500.0	100.0	700.0
Total maintenance payable by any party	233	476.7	300.0	1.0	3000.0

Time frame

The time frame was calculated from the information in the court files by using the date of the special power of attorney as the starting point. This is a document normally signed at the time of the client's first consultation or contact with his or her legal practitioner, authorising the legal practitioner to institute divorce proceedings on the client's behalf.

It typically took just over 2 months from the time the special power of attorney was signed until the order for the restitution of conjugal rights was issued. The divorce case was typically set down in court about 2 weeks after the return of service was received, showing that the defendant had been notified of the plaintiff's intention to seek a divorce. It was typically again just over 2 months from the date on which the restitution order was issued until the date of the final divorce order – in other words, *the typical divorce case in Namibia takes about 5 months from start to finish*. (This includes the period up to the time of an order discharging the *rule nisi* – in other words, it includes the time frame to finalisation of those few cases in which no divorce order was issued.)

There were of course, exceptions. There were cases where the ground for divorce was adultery, meaning that no order for the restitution of conjugal rights was required, which were completed from start to finish in just over three weeks. There were other cases -- probably where the defendant opposed the divorce or where the wait for a social worker report involved a delay -- which lasted up to 5 years.

Table 40: Average time span in months

	#	Mean	Median	Minimum	Maximum
Date of special power of attorney – date of restitution order	384	4.5	2.1	0.2	61.8
Date of restitution order – date of final divorce order or final order	397	3.3	2.3	1.2	18.2
Date of special power of attorney – date of final divorce order or final order	418	7.7	5.3	0.3	64.1

Note: There were some cases where the relevant documents were missing from the divorce file.

SUMMARY OF STATISTICAL FINDINGS

To summarise, this substantial sampling of five years of civil divorce cases in Namibia, supplemented by interviews with practitioners, produces the following profile:

Which spouse seeks the divorce

- *Wives are the parties who seek the divorce in about two-thirds of the cases.*

Profile of the marriage

- *Divorcing couples typically married at about age 27, although the range for age of marriage was from 16 to 74.*
- *Marriages most often lasted for 9-11 years before the divorce, although the length of marriage ranged from 1 to 47 years.*
- *Most of the marriages which were involved in divorce cases were concluded in the Khomas region (43%), and the overwhelming majority were concluded in an urban location (almost 90%). The place of marriage correlated closely with the residence of the plaintiff and defendant.*
- *Most divorcing couples (more than 70%) were married in community of property. This is the default regime in most parts of Namibia, with the exception of marriages between blacks in the areas formerly known as Owamboland, Kavangoland, and Caprivi after 1 August 1950.*
- *At least one-fifth of the divorce cases in the sample involved marriages by ante-nuptial contract. Most ante-nuptial contracts (88%) were used to establish out of community of property regimes, regardless of the default regime which applied to the majority of inhabitants in the region in question. The other ante-nuptial contracts were used primarily to alter details in marriages which were in community of property, with the accrual system being rare.*

Age at divorce

- *The age of the parties at the time of divorce was typically about 37, but ranged from 18 to 84.*

Language groups

- *The highest number of cases by far (more than half of the total) involve both plaintiffs and defendants who appear to speak Afrikaans as a home language, followed by German, Oshivambo and English. The lowest number of cases involve plaintiffs and defendants from the Rukwangali language group, who were all but absent from the sample.*

Geographical distribution of divorce cases

- *The region with the highest recorded plaintiffs and defendants cases is, not surprisingly, Khomas -- more than half of the plaintiffs (57.5%) and defendants (52.4%) gave residential addresses in the Khomas region. This can be explained due to the easy access the region's residents have to the High Court in Windhoek. Other regions which feature strongly in the divorce case files are Otjizondjupa and Erongo.*
- *Regions that accounted for the lowest numbers of plaintiffs and defendants were Kunene, Okavango, Ohangwena and Omusati, where a combined total of only 14 plaintiffs resided. No plaintiffs and only one defendant came from Caprivi.*
- *Many more divorce cases involve parties from urban areas than rural areas -- 91.3% of all plaintiffs who filed for a divorce came from urban areas while only 8.7% came from rural areas. This suggests that people living in rural areas are either less informed about the civil divorce procedure, are discouraged from utilising civil divorce procedures because of their distance from the High Court, or prefer not to make use of the civil divorce procedure. It is also possible that people living in rural areas are more likely to be married under customary law alone, meaning that they divorce in terms of customary law – or that they are married under both civil and customary law, and choose to make use of more informal and accessible customary law divorce procedures.*

Employment status

- *A high percentage of persons involved in divorce cases are employed (75% of plaintiffs and 63% of defendants), indicating that those who cannot afford legal representation do not make use of the formal divorce procedure in large numbers.*

Marital property regimes

- *Most divorcing couples were married in community of property, which is the default regime for civil marriages in Namibia -- with the exception of marriages between black couples contracted after 1 August 1950 in the areas north of the colonial "Police Zone". However, even in the regions where the default regime is out of community of property for blacks, most of the divorce cases involved marriages which are in community of property – apparently because the majority of divorce cases from these regions involved marriages between persons of races who are not subject to the default regime set forth in the Native Administration Proclamation.*
- *At least one-fifth of the divorce cases in the sample involved marriages by ante-nuptial contract. Most ante-nuptial contracts (88%) were used to establish out of community of property regimes, without community of profit and loss or the accrual system. There were significant differences between different language groups regarding the use of ante-nuptial contracts, with German, Afrikaans and English speakers being the most likely to utilise them than other language speakers.*
- *Looking at those places with large enough sample sizes for significant analysis, it appears that ante-nuptial contracts were particularly popular in the Omaheke, Erongo, Otjizondjupa and Khomas regions, as well as in respect of marriages concluded in other countries. Ante-nuptial contracts were not common in marriages which were concluded in either the south or the north. There were no significant differences in the use of ante-nuptial contracts based on the different default regimes for black couples in the different regions.*

Grounds for divorce

- *Malicious desertion is the most common ground cited (in about 92% of cases), even though this involves the longer restitution order procedure whereas adultery provides a basis for an immediate divorce order.*
- *Physical violence or threats of physical violence against the plaintiff or minor children was cited in 126 cases (almost 30% of the total), and almost 90% of the cases citing domestic violence (113 out of 126 cases) involved female plaintiffs. Alcohol abuse was mentioned in 113 cases (26% of the total sample). Financial failings (such as failure to maintain or squandering the marital assets) was another fairly frequently-cited complaint.*
- *There appear to have been no cases in the sample in which divorce was denied because the grounds for divorce were insufficient.*

Reconciliation

- *Reconciliation took place during the divorce process in only about 6% of the cases (26 out of 434 cases).*

Settlement agreements

- *Settlement agreements between the parties were annexed to the divorce orders in about 40% of the cases. Such agreements commonly address division of property and sometimes spousal maintenance. Where there are minor children of the marriage, such agreements will sometimes include arrangements for custody, access and child maintenance.*

Division of property

- *The most common outcome is for the marital property to be divided in accordance with a detailed agreement made between the parties, which is incorporated into the final divorce order as an annexure (40% of the cases). In the absence of such an agreement, the court order is likely to make only a general directive “that the joint estate be divided”, leaving the details to be worked out between the parties.*
- *Forfeiture of benefits was ordered in 22% of the cases in the sample (88 cases). Most of these (89%) involved marriages in community of property, while a small proportion (11%) involved marriages out of community of property.*

Children and divorce

- *The 434 cases in the sample involved a total of 656 children, about evenly split between sons and daughters. Of the 611 children whose ages are stated in the files, most were minors and 94% were still under the age of 18.*
- *Most couples with children get divorced when their children are between the ages of 3-14 years old.*

Custody

- *Of the total sample of 434 cases, there were 302 finalised divorce cases involving custody issues relating to minor children. Divorce cases where custody of minor children was at issue most frequently involved two children (in 42% of such cases) or only one minor child (in 35% of such cases).*
- *Custody awards of minor children were made to one or the other spouse in 281 (93%) of these 302 cases involving minor children, with custody of siblings being split between the spouses in another 11 cases (4%).*

- *Custody most often went to mothers, in 89% of the divorce cases where minor children went to one or the other spouse (250 out of 281 cases). Of course, this was most often a result of the fact that the parties agreed upon this outcome. In contrast, fathers took custody of children in only 11% of these cases (31 out of 281 cases).*
- *There was some indication that younger children were more likely to be placed in the custody of the mother, but this pattern was not as strong as might be expected – particularly with respect to the age of second and third children.*
- *There were 11 cases (4% of the total of 302 cases involving minor children) in which *split custody of siblings* was approved by the Court, in some cases on the basis of sex or age. There were no cases involving *joint custody*, which has only become acceptable in the eyes of some judges very recently.*

Access

- *There were no cases where access by the non-custodial parent was explicitly denied. Final divorce orders involving custody typically (in 82% of these cases) incorporated details about the particulars of the access, most often in the form of a standard annexure.*

Child maintenance

- *Of the 302 cases which involved minor children, *maintenance payments for the children were awarded in 230 cases (76%)*. This does not include 2 of the 11 cases involving split custody in which it was ordered that each parent would simply take care of the expense of the child or children in his or her custody. The most typical case involving maintenance payments included payments for two children.*
- *Because custody most often went to mothers, it was fathers who were most often ordered to pay maintenance.*
- *Child maintenance payments ranged from a token N\$1/month to a maximum of N\$1000/month per child. Typical payments were N\$200/month for the first child and N\$150/month for the second and third children, falling to N\$100/month for fourth children and N\$60/month for fifth and sixth children. Thus, maintenance payments tended to decrease with the order of the child in the family. Common sense knowledge of the costs of feeding, housing and educating a child clearly shows that the major burden of the costs of caring for the children in question falls on the custodial parent.*
- *Looking at the total obligations imposed on the non-custodial parent, *total monthly payments for child maintenance for all children involved in the case ranged from a low of N\$88 to a high of N\$1475, with the typical case involving total payments of about N\$325/month.**

Spousal maintenance

- *Spousal maintenance was awarded in only 34 cases of the 407 which resulted in final divorce orders (8% of the total cases).*
- *There was only one case in which a wife was ordered to pay maintenance to a husband. All the other cases involved payments by husbands to their wives.*
- *Amounts of spousal maintenance generally ranged from token maintenance of N1/month to a maximum of N\$2000/month, with the typical case involving maintenance of N\$200/month.*

- *Spousal maintenance payments were typically for an unspecified duration. Payments until death or remarriage, or for a set duration, were rare.*
- Looking at spousal maintenance and child maintenance together by case gives an idea of the total financial consequences of a divorce. However, *there were only 26 cases in which a party was expected to pay both spousal and child maintenance at the same time, accounting for only 11% of the total number of cases involving maintenance. All but one of these cases involved payments by fathers.*

Total maintenance responsibilities

- *Total maintenance responsibilities ranged from a token amount of N\$1 to a maximum of N\$3000/month, but the typical case involved total maintenance responsibilities of between N\$300 and N\$500 per month. There were too few cases involving maintenance payment by women to draw any conclusions on patterns based on gender, and the total responsibilities of plaintiffs and defendants were similar.*

Time frame

- *The typical divorce case in Namibia takes about 5 months from start to finish. There were of course, exceptions. There were cases where the ground for divorce was adultery, meaning that no order for the restitution of conjugal rights was required, which were completed from start to finish in just over three weeks. There were other cases -- probably where the defendant opposed the divorce or where the wait for a social worker report involved a delay -- which lasted up to 5 years.*

6. HYBRID FORMS OF MARRIAGE

Many commentators refer to the situation where the same two partners conclude a marriage in terms of *both* civil and customary law as “dual marriage”. We use the term “hybrid marriage”, to reflect the fact that the two forms may be intricately intertwined, rather than occurring as two clear co-existing forms of marriage. Furthermore, it is not accurate to imply that the spouses themselves consider that they have two separate forms of marriage. Couples who marry in terms of both civil and customary law may simply choose to conduct their marriages according to the norms which are familiar to them. The term “hybrid marriage” also points to the difficulty of dealing with the inconsistent consequences of the differing forms of marriage, such as conflicting marital property regimes and contrasting procedures for divorce.

The available data indicates that civil marriages seem to be growing in popularity, except in the Caprivi Region. However, there is also evidence that it is not uncommon in regions other than the Caprivi for a couple to enter hybrid marriages, and to rely upon different legal and social norms, depending on the situation at hand. For example civil marriage has risen in popularity in Katutura in recent years, applying to almost half of the conjugal households in the early 1990s, while customary marriages are extremely rare. However, civil marriages in Katutura often incorporate customs usually associated with traditional marriage, such as bridewealth, thus producing an intertwining of the two systems.¹⁴⁰

A similar pattern can be observed in some rural areas. For example, a study of Herero communities in Omatjette conducted in the late 1980s found that most married couples in the

¹⁴⁰

Wade Pendleton, *Katutura: A Place Where We Stay* (1994) at 82, 90.

area had married both in church (in a civil marriage) and in terms of customary law.¹⁴¹ In all Herero communities, the transfer of *otjitunia* is usually an integral part of church marriages, which formalises them in terms of customary law as well as civil law.¹⁴²

It has been reported that not one civil marriage existed in Ovambo-speaking areas until 1952, because the church officers who conducted the ceremonies were not recognised as marriage officers prior to this date.¹⁴³ Yet a 1992/93 survey of 600 women in three Ovambo communities – Uukwambi, Ombalantu and Uukwanyama – found that only about 5% of respondents had been married solely in accordance with customary law, while 33% of the respondents had been married in church or a magistrate's court. However, there were many cases in which traditions associated with marriage under customary law were observed in conjunction with the marriages solemnised according to civil law. What is particularly important to note is that in these study areas, “people did not choose between the general and customary legal systems; they tended to mix elements of both.”¹⁴⁴

Where a couple have been married under both civil and customary law systems, it is possible that they will ignore the civil law requirements for divorce altogether, observing only the cheaper and less-complicated norms of customary divorce recognised by the community in which they live. Where this takes place, the couple will still be technically married in the eyes of the civil law, although they are divorced in customary law terms. For example, some of the respondents interviewed in the three Ovambo-speaking communities indicated that their concept of divorce did not refer to the technical, legal meaning of the term:

*In-depth interviews with respondents who had given their marital status as “divorced” during the survey revealed that these women were mostly oblivious to the consequences of civil law marriage when it comes to the dissolution of the marriage. None of the respondents was aware of the fact that the divorce of a civil law marriage can only be pronounced by the High Court in Windhoek; they were furthermore mostly of the opinion that the dissolution of a marriage does not require the involvement of a third party. One of the interviewees said, for instance: “Nobody gave us permission to get a divorce, we got divorced by ourselves.”*¹⁴⁵

Women in these villages stated that it is usually the man who decides upon a divorce.¹⁴⁶ It appears that family members or church officials are sometimes consulted about divorces, but essentially it is treated as a personal matter between the two spouses.¹⁴⁷

Although the “divorced” women who were interviewed in this survey did not appear to be divorced in legal terms, they stated that they did not experience any problems in entering into new relationships following the “divorce”. But these women generally did not receive any

¹⁴¹ HP Steyn, *Huwelikspatrone by die Herero van Omatjette, Namibie*, in 14 (3) *South African Journal of Ethnology* 79, quoted in Becker/Hinz at 78.

¹⁴² Becker/Hinz at 82.

¹⁴³ M Tuupainen. “Marriage in a Matrilineal African Tribe: A Social Anthropological Study of Marriage in the Ondanga Tribe in Ovamboland, 1970 at 112, quoted in Becker & Hinz at 30.

¹⁴⁴ H Becker, “Experience with Field Research into Gender and Customary Law in Namibia” in Law Reform & Development Commission at 95.

¹⁴⁵ Becker/Hinz at 55.

¹⁴⁶ Id at 12.

¹⁴⁷ NDT, SIAPAC-Namibia, FES & CASS, *Improving the Legal and Socio-Economic Status of Women in Namibia, Part 2: The Legal Aspects* (1994) at 28-30.

share of the marital property, and they sometimes found it difficult to obtain maintenance for their children.¹⁴⁸

Excerpts from 1992/93 interviews with divorced women in Uukwambi, Ombalantu and Uukwanyama

From NDT, SIAPAC-Namibia, FES & CASS, *Improving the Legal and Socio-Economic Status of Women in Namibia, Part 2: The Legal Aspects* (1994) at 28-30, 33-34.

Divorce

The case studies findings in Uukwambi, Ombalantu and Uukwanyama with regard to divorce are interesting. All the divorced women interviewed were of the opinion that a divorce does not cost any money. They therefore did not pay to get a divorce.

In response to the question, "how did the divorce come about?", a general pattern emerges: The respondents consulted members of their families or the pastor prior to the divorce. One woman said:

"Before my divorce from my husband, I consulted my parents and a board member of our congregation." (Uukwambi case study 4.2)

Following such consultation, the parties jointly or separately concluded that they are divorced. One woman said:

"I personally divorced myself because I want to join the church." (Ombalantu case study 4.1)

Another respondent stated:

"Nobody gave us permission to get a divorce, we got divorced by ourselves." (Ombalantu case study 4.4)

One respondent in Uukwanyama noted:

"Divorce is between man and woman. We agreed to get a divorce. Nobody gave us permission to do so." (Uukwanyama case study 4.2)

Another Uukwanyama respondent said:

"I did not go to the church for the divorce, we got divorced by ourselves. It was a long time ago." (Uukwanyama case study 3.1)

These findings raise a number of questions. It appears that there is a misconception about the concept of divorce. The position must be clarified. It is possible that many women who indicated their status as divorced are merely separated. On the other hand, these women may have been married under customary law and are therefore now divorced in terms of customary law. One of these respondents said:

"My divorce was between husband and wife. I did not get any papers to show I am divorced." (Ombalantu case study 4.5)

In the light of the above, it is not surprising that all the respondents in the three regions indicated that they did not know how to go about getting a divorce. One woman said:

"I tried to get help from the Human Rights Centre (in Ongwediva) and I will go to the church to get a divorce, that is the only way." (Uukwambi case study 1.5)

The separated women did not know anything about the costs involved in obtaining a civil law divorce or on whom the responsibility rests to pay such expenses. One of these respondents said:

"I do not know if a divorce costs money, but I will not pay for a divorce if it costs money. My husband must pay as he chased me away from the house." (Ombalantu case study 1.3)

The majority of the women interviewed in the three areas indicated that they obtained legal information from their families or from the church.

The divorced women were asked what divorce means:

"Divorce means husband and wife hate each other and they do not longer love each other." (Uukwambi case study 4.2)

One respondent commented as follows:

"Divorce is something bad, it is better if your husband is dead." (Ombalantu case study 4.4)

Another one stated:

"Divorce means that husband and wife are separated forever. The husband tells the wife to stay away until she dies." (Uukwanyama case study 4.1)

¹⁴⁸ Id at 33-34. None of the 25 "divorced" women interviewed in this survey received any maintenance for themselves from their former spouses, and the 9 "divorced" women with children who were interviewed similarly stated that they received no maintenance in any form for their children.

All the respondents in Ombalantu and Uukwanyama and seven out of eight of those in Uukwambi noted that they had made no attempt to recover their share of the estate following the divorce separation. The exception, a separated woman from Uukwambi, consulted the headman after separation so that he could assist her to claim her share of the estate. The headman did not assist her. She said:

"After the separation my husband took all the cattle. I tried to recover my share but it did not work. I consulted the headman but nothing happened, they just kept quiet." (Uukwambi case study 2.2)

A similar situation was evident in a 1994 study of Southern Communal Areas in the Hardap and Karas Regions, which compared information from the 1991 Population and Housing Census with information collected from 43 interviews with women in these areas. This study suggested that the low percentage of divorce in these Nama-speaking areas stems from the fact that divorce is not approved by the church (particularly the Catholic church) or by the community. The women interviewed generally knew that couples have the right to get legally divorced if they decide to separate, but this choice is seldom made. The absence of a formal divorce procedure means that the division of assets is also handled informally:

*Whether or not they then [when they decide to separate] share their assets depends entirely on the husband. Although women in such situations did not claim any property from their husbands, they nonetheless felt that the animals should have been shared. Women who decided to leave their husbands simply took their personal belongings and left home. None of the women interviewed realised the importance of a legal divorce to secure their rights to property.*¹⁴⁹

Religious influence has contributed to the fact that many people combine civil marriage and customary marriage. For example, many want the blessing of the church (which makes their marriage into a civil marriage if the religious leader performing the marriage is a marriage officer), whilst at the same time intending that customary law will determine the consequences of the marriage.¹⁵⁰

Sometimes couples enter a civil marriage because they want the formal recognition of marriage certificate. This can be useful for matters such as obtaining housing or (in the past) for tax benefits.¹⁵¹ For example, according to research conducted by Becker and Hinz, some couples enter into a civil marriage after living together for some years in a customary marriage or in a more informal relationship, and after having children together. Their reasons may be a belief that such a marriage will strengthen their relationship, increase their social reputation or bring certain monetary benefits they are entitled to only when married under general law. But the research results indicate that "the civil marriage conducted under such circumstances may not be seen by the couple as an act that changes the matrimonial property regimes which the couple exercised over the years of living together".¹⁵²

It is possible that the co-existence of two parallel avenues to divorce in respect of hybrid marriages can be used to disadvantage the party who is in the weaker position. For example, a recent study of the Subia of Caprivi describes several divorces in hybrid marriages where husbands tried to manipulate the situation to their own advantage – by ignoring the civil law procedures, for example. The author of the study, Van Wingerden, observes that "the differences in laws create room for flexibility. Men rather than women will gain from this

¹⁴⁹ Id at 20, 52.

¹⁵⁰ See, for example, id at 32.

¹⁵¹ All remaining distinctions between married and single taxpayers were removed by Act 25 of 1992.

¹⁵² Becker/Hinz at 32.

situation, since they have more knowledge of, and access to official institutes, including the civil system of law.”¹⁵³

For instance, she reports on one case she observed in a subkhuta in 1994 where a village councillor advised a husband with a hybrid marriage as follows:

I know you were married at the magistrate's office and in this case I advise you not to divorce your wife because if you do, you will lose all your belongings. I had a civil marriage with my first wife and when I wanted to divorce her, a man at the Ministry of Home Affairs told me I would have to give all my belongings to her. I therefore changed my mind. Now, she lives in my village, next to my courtyard. I am still supporting her but don't live with her anymore.

The couple in question eventually followed divorce procedures under both customary and civil law.¹⁵⁴

The existence of such hybrid marriages points to the need to reconcile civil and divorce procedures in some way.

HYBRID MARRIAGE, CUSTOMARY DIVORCE

The following letter from a woman in the Caprivi was referred to the Legal Assistance Centre in 1998:

I am a thirty year-old lady, married in 1985 by Customary Union / Common Law. After a long period of marriage, my husband and I went to get married in court thus obtaining a marriage certificate (a marriage in community of property) in 1995.

In 1990 my husband had a child outside marriage, with another lady. They kept it secret and my husband denied to have been the father of the child for religious reasons. He had a lot of girlfriends, which he kept as secret until 1996, when he impregnated another lady and things started showing up.

The lady started phoning and insulting me using annoying words to me. I tried to find out the reasons for the insults over the phone. I discovered that my husband was the one causing all these problems and that my husband is supporting her and the child privately. It really annoyed me when I thought of our own four children – none of them has a bank account. I thought my husband never had enough money.

One day I found them standing together then we starting fighting with the lady. From then on our marriage had problems.

In December 1997 my husband and I were removed from the church house in which we were living because of those scandals. We then moved to my sister's house temporarily. There we were not accommodated for a long time so one day my husband said that I must see for myself, he wanted a divorce.

He went his way to lodge with his relatives and took all my clothes with except what I had on that day. I remained at my sister's house and did not bother to follow him for fear that he might do something bad to me as he looked sober. After ten days I went to the traditional court and I told them my husband moved out to his brother's house. The Induna called my parents and I to the court where I was charged N\$900 to go to my husband and I was instructed to follow him to where he is lodging.

My father asked what my husband meant by saying I must see for myself but he was silenced by the Induna who said that my father had no right to ask such a question and was charged N\$250 or failure to pay that he be locked up. I paid N\$300 of the N\$900 which I was charged.

I went to my husband as instructed where I only stayed for three days, then my husband wrote a letter to my parents that he is giving me five months vacation leave (in marriage) and on condition that I am not allowed to go to town where he stays. He took me to my father's village after which I showed the letter to my parents. After two days without seeing him, my parents decided not to keep me any longer. 'You must go to the traditional court because something like this could mean divorce', my father said.

¹⁵³ Van Wingerden at 66.

¹⁵⁴ Id at 66, 96.

We summoned my husband to court with regard to the letter. I was, to my surprise, charged another sixteen cattle. The reason being that I should not have taken my own cattle from my husband's kraal at his village. I took the cattle in order for me to sell and start a business so that I could support myself during the five months period that I was given. The traditional court decided we must be divorced with the sixteen cattle in payment and this includes even cattles, which any man who will happen to marry has to pay, and some are for the cancellation of the marriage certificate.

What I want to find out is whether what the Traditional Court did is really lawful. Does it have say in a marriage that has been carried out by a Magistrate's court? I really wonder, as we did not marry in their Traditional Court.

After the separation I stayed only one week then my husband married another lady and took my two young children with her outside Caprivi Region where she is working, one three years old and the other five years old, without my knowledge. I then went to ask my husband about the issue who then beat me up. I consequently went to the police to open a case against him but was partially handled. He still demands the money that he once gave me before our problems.

I am not even educated neither is I working. He made me leave school in Standard 7 when he impregnated me with our first child. Please I need my children back as I can't bear hearing the treatment that my husband's girlfriend may give them. They are very far away from me and they could also be missing me.

I can't really bear all this. One thing I only think of now is may me committing suicide in order to avoid all these problems. This is the reason for my writing to you that I may get an alternate solution.

PLEASE HELP

PLEASE HELP

PLEASE HELP

7. PUBLIC ATTITUDES AND EXPERIENCES

RESEARCH METHODOLOGY

Fieldwork was conducted to sample public opinion in the form of focus group discussions, case study interviews and key informant interviews. Fieldwork took place primarily between April and August 1997. All interviews were conducted by paralegals from the Legal Assistance Centre, who received preliminary training and discussion guidelines. The following tables are indicators of the group compositions.

A focus group discussion is not a test of knowledge, but rather a discussion of ideas, opinions and experiences. The advantage of a focus group is that individuals are able to expand and refine their opinions through interaction with others. This process provides more detailed and accurate information than could be derived from each individual separately.

The focus group discussions for this research were conducted in Otjiherero, Oshiwambo, Nama/Damara, Afrikaans, English, Rukavango and German. All of the interviews were taped, transcribed and then translated into English if necessary.

There were focus groups made up of males only, females only and combinations of male and female interviewees. The focus group participants were grouped on the basis of their marital status where possible.

In cases where planned focus groups discussions did not take place, it was mainly because no willing or suitable interviewees could be located. In certain cases some of the groups were compiled of mixed sexes, because interviewers could not find enough interviewees of the same sex.

Table 41: Focus group discussions

Location	Urban/Rural	Sex	Marital Status	Language(s) used	# of participants
1. Gobabis	Urban	Mixed	Married	Otjiherero	9
	Rural	Mixed	Separated/Divorced	Otjiherero	Not indicated
	Rural	Mixed	Separated/Divorced	Otjiherero	6
	Rural	Mixed	Mixed Statuses	Otjiherero	7
	Rural	Female	Mixed Statuses	Otjiherero	7
2. Ongwediva	Urban	Female	Separated/Divorced	Oshiwambo	Not indicated
	Urban	Female	Mixed Statuses	Oshiwambo	8
	Rural	Female	Separated/Divorced	Oshiwambo	Not indicated
	Rural	Male	Separated/Divorced	Oshiwambo	6
	Rural	Mixed	Mixed Statuses	Oshiwambo	8
	Rural	Male	Mixed Statuses	Oshiwambo	7
3. Opuwo	Urban	Female	Mixed Statuses	Otjiherero	10
	Urban	Male	Mixed Statuses	Otjiherero	6
4. Katutura	Urban	Female	Separated/Divorced	Otjiherero	6
	Urban	Male	Separated/Divorced	Otjiherero	4
	Urban	Female	Separated/Divorced	Damara/Nama	Not indicated
	Urban	Mixed	Mixed Statuses	Not indicated	Not indicated
	Urban	Mixed	Mixed Statuses	Not indicated	Not indicated
5. Khomasdal	Urban	Mixed	Mixed Statuses	Afrikaans	Not indicated
	Urban	Female	Separated/Divorced	Afrikaans	4
6. Windhoek	Urban	Female	Divorced	Afrikaans, English, German	6
	Urban	Male	Divorced	Afrikaans, English, German	3
7. Rehoboth	Urban	Mixed	Mixed Statuses	Afrikaans	6
8. Keetmanshoop	Urban	Female	Separated/Divorced	Damara/Nama	8
	Urban	Male	Separated/Divorced	Damara/Nama	6
	Urban	Mixed	Separated/Divorced	Damara/Nama	7
	Urban	Female	Separated/Divorced	Afrikaans	6
	Rural	Female	Separated/Divorced	Damara/Nama	6
	Rural	Female	Separated/Divorced	Damara/Nama	7
	Rural	Mixed	Separated/Divorced	Damara/Nama	6
	Rural	Mixed	Mixed Statuses	Damara/Nama	8
9. Rundu	Urban	Female	Separated/Divorced	Rukwangali	8
	Urban	Male	Separated/Divorced	Rukwangali	4
	Urban	Mixed	Separated/Divorced	Rukwangali	5
	Rural	Female	Separated/Divorced	Rukwangali	8
	Rural	Mixed	Mixed Statuses	Rukwangali	8
	Rural	Mixed	Mixed Statuses	Rukwangali	9
10. WalvisBay	Urban	Female	Separated/Divorced	Not indicated	5
	Urban	Male	Separated/Divorced	Afrikaans	5
	Urban	Mixed	Mixed Statuses	Not indicated	6
11. Damaraland*	Rural	Mixed	Single/Married	Damara/Nama	8
	Rural	Female	Separated/Divorced	Damara/Nama	7
	Rural	Male	Separated/Divorced	Damara/Nama	6
	Rural	Mixed	Single/Married	Damara/Nama	5
12. Katima Mulilo	Urban	Mixed	Divorced/Single	Lozi, English	4
	Rural	Female	Separated/Divorced	Lozi, English	9

*Note: Focus groups and interviews were held at Uis, Okombahe, Khorixas and Fransfontein.

Case study interviews were held with divorced or separated male or female interviewees. In all cases interviewees indicated that children were born out of the relationships in question before separation or divorce took place. Each interview took place in the language preferred by the interviewee and was translated afterwards into English. There was an uneven ratio between women and men interviewed, with women predominating, which is partly due to the fact that some planned case studies were not accomplished. Another reason for this imbalance is that it is primarily women with divorce problems and questions who establish contact with the Legal Assistance Centre.

Table 42: Case study interviews

LAC field office	Sex of respondent	Marital Status	# of Children	Employment status
1. Gobabis	1. Female	Married	2	Cashier
	2. Female	Separated	5	Cleaner
	3. Female	Divorced	5	Senior clerk
	4. Male	Divorced	3	Driver
	5. Male	Divorced	4	Labourer
	6. Female	Separated	3	Cleaner
	7. Male	Divorced	10	Labourer
	8. Female	Separated	9	Housewife
2. Ongwediva	1. Male	Separated	8	Unemployed
	2. Female	Separated	2	Assistant nurse
	3. Female	Divorced	5	Paralegal
	4. Female	Separated	3	Businesswoman
	5. Female	Divorced	1	School Principal
	6. Female	Separated	2	Nurse
	7. Female	Separated	2	Chef
	8. Female	Separated	1	Chef
	9. No particulars provided			
	10. No particulars provided			
	11. No particulars provided			
3. Katutura	1. Female	Divorced	2	Domestic worker
	2. Female	Not provided	Not provided	Not provided
	3. Female	Separated	2	Teacher
4. Keetmanshoop	1. Female	Divorced	3	Credit Controller
	2. Female	Divorced	4	Cleaner
	3. Female	Separated	4	Cleaner
	4. Female	Separated	3	Sales Lady
	5. Male	Divorced	4	Labourer
5. Rundu	1. Female	Separated	5	Student
	2. No particulars provided			
	3. Female	Separated	1	Unemployed
	4. Female	Separated	2	Teacher
	5. Male	Divorced	2	Liaison Officer
	6. Male	Separated	2	Postmaster
	7. Female	Divorced	3	Nurse
	8. Male	Separated	5	Security Officer
	9. Female	Separated	3	Laboratory Assist.
6. Walvis Bay	1. Female	Divorced	2	Bar lady
	2. Female	Separated	4	Bookkeeper
	3. Male	Married	6	Fisherman
	4. Male	Separated	3	Boilermaker
	5. Female	Divorced	5	Housewife
	6. Female	Divorced	5	Housewife
7. Katima Mulilo	1. Male	Married	2	Field assistant
	2. Female	Divorced	1	Domestic worker
	3. Female	Separated	6	Unemployed
	4. Male	Single	0	Farm worker

Key informant interviews were conducted with persons who play an influential or dynamic role in their communities. The list included traditional kings, junior and senior headmen, social workers, legal practitioners and court clerks.

Table 43A: Key informant interviews (details)

Date of Interview	Venue	Name of Interviewer	Language	Interviewee Information			
				Occupation	Sex	Marital Status	Residential Address
28/06/97	Ezongorondo	M.Kamaheke	Otjiherero	King of the Mbanderus	Male	Married	Ezongorondo
28/06/97	Ezongorondo	B. Kandukira	Otjiherero	Chief Munjuku	Male	Married	Ezongorondo
06/06/97	Epukiro post 3	M. Kamaheke	Otjiherero	Counselor A. Murangi	Male	Widower	Ozombuovapo
18/06/97	Omitara	M. Kamaheke	Afrikaans	Domestic Worker	Female	Divorced	Omitara
05/06/97	Burma Farm	M. Kamaheke	Otjiherero	Farmer	Male	Married	Burma Farm
27/06/97	Ongwediva	H.Andjamba	Oshiwambo	Social Worker	Female	Married	Ongwediva
25/07/97	Ongwediva	U.Napoleon	Oshiwambo	King in Ondonga	Male	Widower	Okadhimeti-Ondangi
25/07/97	Ongwediva	U.Napoleon	Oshiwambo	Village Headman	Male	Married	Okadhimeti-Ondangi
26/07/97	Headman's Homestead	B. Ausiku	Oshiwambo	Junior Headman	Male	Married	Ombandaulai Uukwaluudhi
28/06/97	Ongwediva	B. Ausiku	Oshiwambo	Pastor	Male	Married	Ongwediva
19/06/97	Windhoek Central Hospital	L. Tjitendero	Afrikaans	Senior Social Worker	Female	Single	Khomasdal
13/08/97	Ministry of Justice, Windhoek	M.Kahuure	English	Attorney-Legal Aid Board	Female	Married	Windhoek
13/08/97	Windhoek	C. Orren	English	Marriage Counsellor	Female	Not stated	Windhoek
23/05/97	Mariental	T. Bock	Afrikaans	Legal Practitioner	Male	Married	Mariental
29/05/97	Mariental	T. Bock	Afrikaans	Pastor	Male	Married	Keetmanshoop
19/08/97	Rundu	A. Makonga	Rukwangali	Deacon	Male	Married	Rundu
13/08/97	Nkurenkuru	A. Makonga	Rukwangali	Nurse	Female	Married	Nkurenkuru
22/05/97	Rundu	A. Makonga	Rukwangali	Regional Coordinator (MBEC)	Female	Widow	Tutungeni
13/05/97	Walvis Bay	T. Pietersen	English	Clerk of Magistrate Court	Female	Married	Walvis Bay
23/05/97	Walvis Bay	T. Pietersen	English	Social Worker	Female	Divorced	Walvis Bay
05/05/2000	Katima Mulilo	W. Odendaal	English	Social Worker	Female	Single	Katima Mulilo
05/05/2000	Katima Mulilo	W. Odendaal	English	Sister	Female	Single	Katima Mulilo
06/05/2000	Katima Mulilo	W. Odendaal	English	Interviewer	Male	Married	Katima Mullio
07/05/2000	Katima Mulilo	W. Odendaal	Afrikaans	2 nd Village Induna	Male	Married	Sikubi Village
07/05/2000	Katima Mulilo	J. Ziezo	Lozi	Village Induna	Male	Married	Sikubi Village
07/05/2000	Katima Mulilo	J. Ziezo	Lozi	District Induna	Male	Married	Sibbinda Village
08/05/2000	Katima Mulilo	W. Odendaal	English	Village Induna	Male	Married	Bukalo

Table 43B: Key informant interviews (summary)

LAC field office	# of male interviewees	# of female interviewees	Total key informant interviews
1. Gobabis	6	2	8
2. Ongwediva	3	1	4
3. Katutura	1	3	4
4. Keetmanshoop	1	1	2
5. Rundu	1	2	3
6. Walvis Bay	1	2	3
7. Katima Mulilo	5	2	7
Total	18	13	24

Additional interviews were conducted in Windhoek in February-March 2000 with other key informants in Windhoek, primarily members of the legal profession.

Table 43C: Additional key informant interviews

Name	Occupation or organisation
Judge President Pio Teek	Judge President of Namibia*
Judge N Hannah	Judge
Judge G Maritz	Judge
Mr. Joubert	Registrar of the High Court
Adv Suzanne Vivier-Turk	Advocate
Adv Kato van Niekerk	Advocate
Adv Johan Swanepoel	Advocate
Adv Geoffrey Dicks	Advocate
Mr Claus Hinrichsen	Attorney, Lorentz and Bone
Mr Billy Dicks	Attorney, Weder, Kruger and Hartmann Attorneys
Ms Sylvia Steenkamp	Attorney, Muller and Brandt**
Mr Elia Shikongo	Attorney, Shikongo Law Chambers
Ms Tanya Pearson	Attorney, Shikongo Law Chambers
Ms Darengo	Attorney, Legal Aid
MrTousy Namiseb	Attorney, Legal Aid
Ms Eva Weitz	formerly Senior Control Social Worker, Ministry of Health of Social Services
Dr Debbie le Beau	Lecturer, Sociology Department, University of Namibia
Ms Rianne Selle	Multi-Media Campaign on Violence Against Women and Children
Ms Pamela Leipoldt	Namibia Women's Association

All of these interviews were conducted by Dianne Hubbard and Elizabeth Cassidy, in English.

* Note: Brief telephonic interview.

**Note: This interview was conducted on the basis of written questions and answers at the request of the interviewee.

REASONS FOR DIVORCE

The two most common reasons given by interviewees as grounds for divorces in practice were:

- (a) adultery practised by one or both parties; and
- (b) the use of domestic violence, in most cases against women.

A high correlation seems to exist between the use of violence, alcohol and drug abuse. Some interviewees suggested that the abuse of alcohol should be made a reason to file for divorce.

Attitudes about adultery differ in many communities, depending on whether it is the husband or the wife who is unfaithful. For example, a junior headman from Uukwaluudi in the Omusati region stated that it was considered normal in his community for men to have extramarital affairs, but it is considered improper for women to have such affairs. He felt that it was the men who had to decide when to get a divorce, since men were the heads of households. A male interviewee suggested that one should be able to sue the person with whom one's partner started an affair, on the theory that such a person should be held responsible for the violation of a marriage contract. (It should be noted that this is in fact already a possibility under existing law.)

Sexual abuse of wives by their husbands (including rape) was also mentioned in the focus groups. This was also a feature of the case study below.

Other marital problems mentioned in the focus groups included sexual abuse of children and the couple's loss of interest in one another. Infertility is another reason why couples get divorced. A woman's fertility plays an important role in communities in especially the

4 "O"'s, Okavango and Caprivi regions. In the Caprivi region for example, the *lobolo* given to the parents of a young bride is usually higher than the *lobolo* given to an older bride, because a young woman's ability to produce children is seen as much higher than that of an older woman. Financial problems experienced by couples and the high rate of unemployment in Namibia also play a considerable role in divorces.

Witchcraft can play a role in divorces, especially in some communities in the 4 "O"'s, Okavango and Caprivi regions. A male interviewee who comes from a village near Eenhana in the Ohangwena region said that he has divorced his wife after he developed a rash on his skin. He consulted a traditional doctor from his village who informed him that his wife has bewitched him because she suspected him of having extramarital affairs with other women while he is working in Windhoek. Because of the fact that he only goes back to his village about twice a year, his ex-wife stays in their house.

A marriage counsellor said that more people are getting divorced these days because of a lack of communication. Some of the interviewees stated that their spouses left them for other partners with more wealth. A village headman in the Oshana regions said that the involvement of in-laws in marital affairs plays an increasing role in causing divorces, because the in-laws think that the material benefits they could get in the past when a member of the family got married, no longer exist these days.

People working in different parts of the country away from their homes sometimes become involved in extra marital relationships. A male interviewee mentioned that he divorced his wife after he discovered that another man impregnated her while he was away from home, working as a seasonal worker. The village headman in the Oshana region said that migrant workers sometimes come back from their work after many months to find that other men have impregnated their wives. A female interviewee stated that she left her village for a town, because she could not find any work in her village. A few months after she left her village, her husband informed her that he wanted a divorce because he was involved with another woman.

A woman interviewed at Walvis Bay was of the opinion that some marriages founder because women no longer want to stay at home. "Women want to be more independent and achieve something with their lives." She stated that she divorced her husband because it is his belief that women should stay at home, while men should be the breadwinners.

A male community leader in the Omusati region blamed the high divorce rate on the influence educated people have in his village. He argued that this is the reason that people in the community are losing their traditional beliefs and values. (It should be noted in this respect that the rate of civil divorce in Namibia is not very high, but customary divorce is not registered or recorded and may well be "high" or on the increase.)

A headman in the area of Epukiro who on occasions acts as a mediator for couples in his community, said that once a couple has decided to divorce, he seldom can do anything to convince them not to do so. His advice to couples who have lost interest in one another is to go ahead and get divorced.

Other interviewees from the focus groups also felt that it is the best option for couples to get divorced once their marriages start to break down because they have lost interest in one another. One female interviewee stated: "Couples staying together despite the fact that they have lost interest in one another, just end up more unhappy with life and themselves..."

In almost all of the focus group discussions, some member of the group made the point that it has become too easy for people to divorce. One woman who was interviewed said that the

situation in the old days was much different than it is today. She feels that people have lost their sense of morality and belief in church values. It was mentioned in a focus group discussion in the South, that the Roman Catholic Church for instance has taken on a much more relaxed stance on the issue of divorce. "It is different these days than how it was in the old days. The church has become more sympathetic to women who find themselves in an abusive relationship with their husbands," a social worker from Windhoek said. Some women interviewed in Rehoboth and Karasburg also suggested that it should be more difficult to get a divorce. For example, some recommended a higher divorce fee. Others complained that it has become too easy to get married. Young people especially should be counselled before taking such a big step. One interviewee even suggested that the law should be rearranged to prevent people from getting divorced.

Some people who would like to divorce their spouses stay in the marriage because of fear. For example, in a focus group discussion held in Karasburg, one respondent said that some people would rather go through an abusive relationship than to go through a divorce, because they are afraid that they might get blacklisted or become outcasts in their communities and churches. A female respondent in the same focus group mentioned that some women are too afraid to divorce their husbands, because the husbands sometimes threaten that they will not pay maintenance once divorced.

GENERAL PROCEDURE FOR DIVORCE

A number of participants in the focus group discussions stated that they tried to reconcile their marriages before getting divorced, by consulting parents, family, friends, church leaders, social workers or the headman of their village.

Civil marriage

If attempts to reconcile the marriage fail, couples married under civil law often approach their local magistrate to file for a divorce. There they are informed about civil divorce procedure in the High Court.

Most people interviewed in the far northern and southern areas of Namibia complained about the long distances they had to travel to the High Court in Windhoek to get a divorce. (For example, a person living in Katima Mulilo has to travel nearly 1 300 km to get to the High Court in Windhoek). They also indicated that this obstacle caused divorce cases to continue for months if not years. In the far south one woman complained that her divorce case is still not settled after seven years. The cost involved in travelling to Windhoek and the expense of the divorce itself has forced many couples to separate informally rather than to divorce in court. A nurse from the Okavango region said people should be able to get divorced in their own regions. "Divorce courts should be brought down to our regions to make it accessible to our people." However, she also had her doubts about it. " Maybe if it (the divorce courts) are brought to our regions it will increase divorce cases. This is a tricky situation," she concluded.

In a focus group discussion held in Karasburg, a male respondent suggested that the divorce fee should be reduced to N\$200. He argued that most people separate from their partners informally because they cannot afford to get divorced. "After a while they go back to one another again, and the whole unpleasant situation starts all over again."

A social worker in Windhoek said that divorce procedures should be simplified. She suggested that traditional authorities should be given a mandate to handle divorce cases, but not before traditional leaders are properly informed and educated about divorce procedures. She also suggested that the existing divorce procedures should be changed in such a way that the restitution of conjugal rights period should be extended to eight months and should be enforced.

A social worker should continuously assess and report to the court, whether the couple is working on the restitution or not.

A legal practitioner from Mariental said that although it costs a lot to get divorce, it is better to get legal advice. According to him a divorce case can be solved within a year, where as if a person is not represented by a legal practitioner, it can take up to 4 years. He felt that financial hardship should not prevent people from getting divorced, noting that people with financial difficulties should consult Legal Aid.

A number of women who took part in the focus group discussions were strongly in favour of the appointment of more women judges to handle divorce cases. They argued that women judges have a better understanding of what women are going through in a divorce, which male judges are lacking. It must therefore be the duty of the government to appoint more women judges, they recommended. A social worker said that she is in favour of a more gender balanced court set-up, because women feel anxious and nervous if men dominate. A nurse from Nkurenkuru was also strongly in favour of gender restructuring in courts. "All our pastors are males. Whenever a problem is discussed, all males support the accused male. If a woman wants to talk about her problems, she will be stopped by saying that women can't say those things. Women are also intimidated when they appear in court. Her case will be postponed four times to frustrate her, but if a man is accused, he will become angry in court and the case won't last long."

But one male interviewee said that he strongly opposes the appointment of female judges. "If women are elected as judges, we will die. They do not have the knowledge." A male legal practitioner in Mariental is also against the idea that more women judges should be appointed to rectify the gender balance in divorce courts, saying that "a judge should be appointed on merit and experience not on any other criteria."

A king in the Oshana region mentioned that the church plays an important role in handling divorce cases, while traditional leaders do not. In the past it used to be easier to get a divorce. But nowadays the divorce procedure is very long and it depends very much on the availability of money. "In the past the truth played a much more important role than money, when divorce cases were settled," the king concluded.

A social worker from Ongwediva in the Oshana region is of the opinion that people in her region rarely divorce but rather separate temporarily. She argues that people are lacking information and knowledge on how to take the necessary steps to get a legal divorce. Women mostly want to divorce because of the bad behaviour of husbands. However, women find it very difficult to initiate divorce because they have no money to pay for the divorce procedures. The fact that civil divorce cases take place only in the Windhoek High Court adds another problem to getting a divorce, because of the costs of transport and lawyers fees: "The system as it is at the moment discriminates against poor people. Rich people can divorce as they want because they have no money problems," the social worker commented.

Another problem which was raised was the requirement that the couple's marriage certificates and the children's birth certificates must be presented in court. Some women report that their husbands take such certificates and put them away in a place that they cannot find, while others have experienced great inconvenience in trying to obtain duplicate copies or evidence statements from the marriage officer who performed the marriage ceremony. It was suggested that the law should set forth a clear procedure for what to do if the original certificates cannot be located, as in the case of voter registration.

It was also suggested by several interviewees that the divorce procedure should be made be made simpler, to facilitate self-representation, and less formal, to reduce trauma for the parties.

It was pointed out that even now after independence, some people still have an impression left over from the apartheid era that courts and official proceedings are threatening.

It was further suggested that there should be a remedy against a spouse who tries to dishonestly hide or sell family assets just prior to a divorce action. If an asset is sold, the other spouse may still be entitled to a share of the proceeds, but cash is much harder to trace than a car or a house.

Jurisdiction over civil divorces

Many of the interviewees were in favour of regular visits by the High Court divorce judges to regional courts. Others were strongly in favour of a decentralised High Court. Still others suggested that the magistrate courts throughout the country should be allowed to handle divorce cases. They felt that the High Court in Windhoek cannot deal with all the divorce cases of the country and that it takes too long to appeal against decisions.

A male interviewee in Keetmanshoop wanted to know why it is possible to get married in the magistrate's court, but not divorced in it.

A number of people in the far northern areas have indicated that they would welcome a stronger involvement of traditional leaders in divorce cases, since they play a trustworthy role in their communities. Most interviewees from the 4 "O", Okavango and Omaheke regions who took part in the focus group discussions, however, felt that it is better for the High Court to handle issues concerning custody and maintenance, because they are better equipped than traditional authorities to deal with such cases.

A community leader in the Karas region mentioned that more legal assistance should be given to illiterate people, because as he noticed, "even poor and illiterate people are getting divorced." He was of the opinion that the divorce procedures are too complicated for illiterate people and suggested that paralegals from all over the country should be given more encouragement to assist with poor and illiterate people's cases. However, a divorced female interviewee suggested that if a person wants to get divorced in the civil court, one should be allowed to do so without any legal representation.

In the communities of Tses and Berseba interviewees suggested that the person who wants to get a divorce should pay the entire cost of the divorce.

In both the Nama communities of the South and the Damara communities of Fransfontein and Khorixas, interviewees referred to a divorce term called "arm-skei" (literally meaning cheap divorce). This term refers back to the pre-independence days of Namibia, when black people were allowed to obtain a civil divorce free of cost in courts where magistrates were acting as "native commissioners", without the need for legal assistance. Only white and "coloured" people that had to file for divorce through the High Court, in which case a lawyer was needed. This "arm-skei" procedure was terminated prior to independence.

All divorce cases in Namibia since independence are now taking place in the High Court, and people who cannot afford to get divorced may apply for state legal aid. But only a number of people who were interviewed in the focus groups knew about legal aid or the availability of legal aid for divorces. For example, only some of the interviewees were aware that applications for legal aid are made by going in person to the head office in Windhoek or to any Magistrate's court, which will then liaise with the head office regarding the application. Most interviewees felt that they lacked information regarding the procedures for applying for legal aid. Some interviewees suggested that the government should cover the costs of poor people

who want to get divorced with the proof of the outcome of a social worker report, not realising that this is already the procedure which is used.

Informal advice and assistance

Sometime persons facing civil divorce cases, particularly women, look for informal advice and assistance from sympathetic individuals and organisations. This is often the case even if the divorcing parties have legal representation, as many people apparently do not understand what their lawyers tell them.

For example, the Namibian Women's Association (NAWA) in Windhoek regularly gives advice to women facing a divorce, accompanies them to court and sometimes even provides accommodation for women who have travelled from other places. Although many of these women have private lawyers, often appointed by legal aid, there are frequently communications problems. Sometimes the problem is language, suggesting that lawyers should be more sensitive to the need to arrange for interpreters to explain complex matters in the client's home language. NAWA members are willing to accompany women to meetings with their lawyers to facilitate communication, but some lawyers do not allow this.

A representative of NAWA as well as several other support persons who were interviewed had the impression that sometimes lawyers, particularly male lawyers, are not sympathetic to women's point of view and may even openly take the side of the husband. NAWA reports that complaints have been forwarded to the Law Society and the Legal Aid Board about certain lawyers, and that there has been good follow-up on these complaints.

Women are often particularly nervous about the court appearance, according to a NAWA representative, and they sometimes feel ashamed to be asked about such matters in front of other people. Many also fear that details about their cases will be reported in the newspapers (or in one particular newspaper).

NAWA finds that the women who approach them do not understand the grounds for divorce or the different property regimes. Most of the women they see are married in community of property, but the women themselves do not understand what this means. NAWA also finds that many of the women they assist are married both in church and under customary law, but they feel that one divorce is sufficient to dissolve the marriage.

NAWA established a "Divorce Club" in Windhoek in December 1998. This group is a forum where women who have been through divorces can assist others who are in the process of getting divorced. People hear about the help offered by NAWA on the radio, from other NGOs or by word-of-mouth.

It was suggested by another interviewee who often assists divorcing women that there should be more such support groups for divorced persons, especially women. In addition to fears and worries about the court procedure, women often face a number of daunting practical problems in the wake of a divorce, when they are emotionally vulnerable. For example, women may find themselves officially "invisible" after a divorce. If the couple's savings are in a bank account, this will often be in an account which is in the husband's name, which may leave the wife without direct access to cash. Important assets like cars are often in the husband's name, and even if these assets are given to the wife in terms of a divorce settlement she must face the burden of transferring registrations and insurance policies. Family medical aid schemes may need to be adjusted. It may be necessary to re-do wills which the spouses had made. These practical problems can seem overwhelming in the wake of a marital breakdown.

Customary marriage

In the Uukwaluudhi community in the Omusati region a couple can get divorced within a day if not hours. The junior headman explains that traditionally men are considered to be the heads of households. "If a man says something, it must be obeyed."

A divorced woman from Rundu reported that in the case of a customary marriage, it is the duty of the husband to inform the parents of his wife that he is no longer interested in the continuation of the marriage. In this interviewee's case, her ex-husband informed her that he wanted a divorce because he was living together with a new partner. He also gave her his consent to get remarried again if she wanted to do so.

In a focus group discussion held in Rundu, a male respondent stated that if one partner leaves the other, they are considered divorced, because this means that one of them has consulted the grandparents, who are seen as a sort of traditional tribunal.

Another interviewee from Rundu feels that laws should be put in place to consolidate marriages until death. He reckons that this will force people to save their marriages and give them respect in their communities.

Herero informants explained where a traditional Herero marriage comes to an end, headmen and family of the couple act as mediators in the divorce procedures. In the Herero community the price paid for a divorce is six cattle. Cattle are paid by the guilty party and are usually an indication of the damage that was caused by this party. The cattle are used for the future maintenance of the children or family. The ability to hand over the required amount of cattle determines whether a person can afford to get divorced or not. According to the King of the Mbanderus, Chief Munjuku, customary divorce in the Herero community can take as long as 3-5 years to finalise. In some cases it can even take up to 10 years, depending on how quickly the investigations are completed.

Asked whether customary law are biased against women making judgements in traditional court hearings, Chief Munjuku responded "I should say that both are just fine (women and men) and if it is to be that women should also be part of the this hearings we shouldn't refuse." The Chief is also of the opinion that customary law procedures are capable of handling divorces. No extra laws need to be introduced to handle divorce cases. The Chief further pointed out that couples are not allowed to have legal representatives during a trial. Each person is supposed to state his/her own case before the customary court of law. The couple is then judge by a group of customary law experts who form part of the customary court of law.

Headman Katjirua living on the farm Burma in the Omaheke region argues that traditional divorces must be recognised by civil law. However, cases of domestic violence such as wife battering, child abuse and rape are issues best dealt with by the police and civil law procedures.

Headman Katjirua also said that the reason why more people are getting divorced today is, because it was seen as a shame and a disgrace to one's own image and family in the old days to get divorced. "Customary law should do something about representation and the government should think of training traditional judges and councils at the traditional law and customs," the Headman stated.

In a number of interviews with divorced women in the Caprivi it was stated that women are sometimes too afraid to approach the Khuta (customary authority) for a divorce, because they

usually cannot pay the fine that the Khuta requires from them. They also feel that the customary divorce procedures are favouring men. It is sometimes much easier for men to get divorced through the customary system than it is for women. Sometimes men even when they are guilty can divorce from their wives without paying any fine, they complained.

In the Mafwe and Subiya customary law system, it is possible to appeal against the village Khuta's decision in a divorce case. The case is then referred to a higher Khuta at district level. If a case is still not solved at this level, it is referred to the main Khuta based in Bukalo for the Subiya and Linyanti for the Mafwe.

A Sister working at the Roman Catholic Mission in Katima Mulilo said that the customary law system in the Caprivi region makes it very easy for men to divorce. When a husband wants to divorce his wife he will write a letter to the parents of his wife stating the reasons why he wants to do so. If they accept the letter, the letter is taken to the Khuta (traditional court) to approve it by means of a stamp. This is then an indication that the wife is divorced from her husband and ready to get married again. If the parents do not accept the letter written by the husband, they will approach the Khuta. The Khuta will then investigate the case. Only men are allowed to function in the Khuta. As in the Herero customary law, under Mafwe and Subiya customary law, no legal representatives are allowed, but witnesses like family and friends, are allowed to make statements on behalf of the parties involved.

In a focus group discussion with a number of youths in Katima Mulilo, it was acknowledged that headmen and the Khuta fulfil an important cultural role in everyday life in the Caprivi. However, some of them felt that the customary law system should adjust to the changing political, social and economic circumstances and challenges that face Namibia today, such as gender empowerment.

CONSEQUENCES OF DIVORCE

Division of property

Most of the divorced people interviewed were confused about the term division of property. Usually under customary law, it is the duty of the husband to decide how property will be allocated. For example, in some Herero communities cattle belonging to the wife cannot be sold upon divorce without the husband's consent. According to a Pastor of the Evangelical Lutheran Church from a Herero community, if the wife is the guilty party, her family should pay back the cattle that were given as *lobolo*.

In an interview with the Silalo Induna (area headman) of Sukubi village in the Caprivi, he mentioned that the *lobolo* given to the wife's parents doesn't go back to the husband after a divorce. However, the Induna Mbango (village headman) said that if the wife divorces her husband the *lobolo* goes back to the husband and the wife is also paying something to the Khuta. If the man divorces the wife then the *lobolo* stays with her parents and the man then also has to pay something to the Khuta. Other belongings given to the wife during marriage can stay with her. In the case where a wife decides to divorce her husband she is not entitled to keep anything unless her husband is generous enough give her some belongings, the Silalo Induna said.

It is seen as tradition in Kwanyama communities that the woman should give the *lobolo* back to her ex-husband if no children were born during the period of marriage.

In most Herero rural communities where focus group discussions took place, it was mentioned that a couple must decide before marriage what will be bought for the house. "The things for the house mostly belong to the woman and the cattle and cars belong to the husband," an Otjiherero speaking woman from Gobabis said. In traditional Herero marriages it is accepted

that everything inside the house is the responsibility of the wife, where as everything outside the house falls under the authority of the husband. Property is also divided on these terms if the marriage comes to an end. If a party disagrees with the way property is divided, legal action is allowed, or otherwise the help of a third party from the community is called in. If the wife is the guilty party, her family should give back the cattle that were given to them as *lobolo*, though a number of interviewees agreed that this does not happen that often anymore. Marital property in Herero communities is divided on the basis that "everyone take what he or she came with before the marriage," the King of the Mbanderus said. "If there is any dispute between the two parties about the division of properties, they will approach the headman. If the woman is found guilty, she will pay six cows and take what she came with from her parents back to them and if the husband is a good man she might get some additional property from her husband," the King explained. The person who accepted the *lobolo* from the husband usually helps the woman to pay her fine if she is found guilty.

The question of who continues residence in the marital home differs in different Herero communities. For example in Okovimburu it is expected of the wife to leave the common home after a divorce, to return to her parents or family. But in the Herero community of Omitara the husband has to leave the house.

The Mbanderu marriage set-up, according to the King of the Mbanderus, is arranged and conducted within the community. It is their traditional belief that dividing the community's property through disputes is like destroying the homestead, which is hard to restore afterwards. The division of property is therefore handled with great caution and consideration. The person responsible for the division of property must in the first place be linked to a bloodline of the family, or be recognised by the community as a chief or headman, or have a wide range of knowledge concerning the community's traditions. An Otjiherero speaking male interviewee said that it is part of their culture and tradition that after a couple gets divorced, the woman automatically loses her right to cultivate the land she stayed on with her ex-husband.

According to the junior headman of a community in Uukwaluudi district, women do not have a lot of possessions. Once the wife has left the hut, it is up to the husband to decide what she will get after the divorce. Sometimes the wife will be left with the children, some goats and little or no mahango field to cultivate.

In the focus group discussion held at Rundu it was mentioned that it is usually the wife who leaves the common home. However, it is not uncommon for a man to leave the house in order to stay with his new partner. The husband also decides on the size of land his wife will get after the divorce.

In the communities of Tses and Berseba interviewees suggested that in a case where a couple cannot decide how to divide their property, it should either be sold to support their children or handed over to them.

A lawyer at the Legal Aid Board said that the problem with the division of property lies not with movable properties but with immovable properties, and suggests that the selling of properties and the division of the income from such properties would solve this problem. On the other hand, it was also noted that a spouse who receives half the proceeds from the sale of the marital home, which is in many cases still under a bond to the bank, may find it difficult to put together a deposit on a new house. It may also be difficult for the economically weaker spouse, who is often the woman, to qualify for a new bond on her own. These concerns argue in favour of considering a law reform which would give the custodial parent the right to continue residing in the matrimonial home, through deferred division of this asset or offsetting compensation from other assets.

A male interviewee suggested that if a couple decides to share their belongings equally after a divorce, no legal representation would be necessary.

In a focus group discussion held in Windhoek, some members stated that the options of getting married in or out of community of property should be explained more clearly to parties who marry in magistrate courts, as this could make divorce procedures much easier.

Custody, access and maintenance

It appears that children sometimes end up in the middle of a tug-of-war. Some key informants said that men will ask for custody when they have no interest in looking after the children, simply to avoid maintenance payments, while some women want custody so that they can get revenge on their ex-husbands by requesting high maintenance payments and trying to restrict access. In the wake of a bitter divorce, parents may find it hard to stay focussed on the needs of the children rather than on their feelings about each other. On the other hand, problems such as these should not obscure the fact that issues surrounding the children of the marriage are sometimes dealt with smoothly.

Custody

According to the junior headman in the Uukwaluudi district in the Omusati region, children in his community are seen as the assets of women and should stay with the mother after a divorce. In most cases when a woman divorces or separates from her husband, she will take the children with her. In cases where the relationship between the father and the children are not good, the children might be denied access to the mahango fields.

In the Mbanderu community it is the traditional Herero belief that the children should remain with the father after a divorce. According to Herero customary law, courts help to decide who should get custody over the children. "Traditional courts should also play an evaluating role after children were given custody to a parent," a divorced woman from Gobabis said. If for a good reason children have to stay with the mother, cattle are given to the mother to support them. In certain cases, however, some adjustments have to be made. Men usually migrate more than women do, which may make it impractical for them to take custody of the children. In cases where small children are involved, the mother usually looks after them. As children grow up, they are given a choice with which parent they want to stay.

In general it seems as if communities from the 4 "O", Okavango, Omaheke, Otjozondjupa and Caprivi regions deal with the issue of custody over children in a very informal manner. Usually there is no objection over which parent the children should stay with. The main issue seems to be that the children should stay with the parent with whom they will be best looked after. Under traditional law in the 4 "O", Okavango and Capri regions, interviewees indicated that smaller children usually stay with the mother while older children stay with the father. This was said despite the fact that children especially in the Okavango and Caprivi regions are seen as the responsibility of the father.

A spouse should only be awarded custody of children if he or she is responsible enough to take care of them. The mental health of a spouse should also to be considered when custody is awarded, an interviewee from Gobabis mentioned. A pastor from the Evangelical Lutheran Church is of the opinion that the court should not decide about the custody of children, but that it should rather leave this decision to the wife and husband. The term custody, he explains comes from Western culture: "To my culture a woman, man and child is one, even if the couple decide to get divorced. Children need not to be seen apart from their parents," he said.

It was mentioned in one case study interview that children should have the right to decide with whom they want to stay, and that children must also be allowed to have legal representation to protect their interests.

Access

In most focus groups, it was stated that both parties should have access to children, unless one party is found careless and irresponsible in the upbringing of the children.

None of the customary law systems examined during the survey restrict a parent from seeing his or her children. However, most interviewees agreed that access to children should be denied to a parent who has a history of alcohol and child abuse.

Maintenance

In most focus group discussions held during the survey, it was considered that both parties are responsible for the maintenance of their children. A female interviewee from Gobabis is of the opinion that although both parties should take care of the children, men should pay more maintenance because women usually take care of such daily tasks as washing and cooking for them.

In the Nama communities of Tses and Berseba, women interviewed said that the maintenance procedures in courts should be reviewed. According to them, there seems to be no clear procedure to ensure that men pay maintenance. They felt that the father should at least pay maintenance until the mother remarries.

Most interviewees agreed that with remarriage the new spouse should take on all the responsibilities of looking after the maintenance of the children. A legal practitioner from Walvis Bay said that stepparents should be legally obliged to support stepchildren, but some of the male interviewees in the focus groups felt that a new spouse should not be forced by law to support the stepchildren. They should only do so if they care for the children. "If a law is introduced to force the new spouse to support stepchildren, it will lead to situations where people would not want to get married again," a divorced female interviewee remarked.

Sometimes women feel too afraid and ashamed to take their ex-husbands to the maintenance courts. For example, a divorced woman from Rundu said that her ex-husband threatened her if she ever dares to take him to court to pay maintenance for her children.

A woman from Gobabis said that her ex-husband was ordered to pay maintenance for her children, but he has never done so, because he does not care about the children. She can hardly afford to maintain her children because the income she gets from being a domestic worker is not much.

A female interviewee, who is separated from her husband and married under customary law, feels that the government should acknowledge customary marriages because this will make it easier for especially women to claim for maintenance. (In fact, the procedures in the Maintenance Act already apply to both civil and customary marriages without distinction, and even unmarried parents have a responsibility to maintain their children.)

Some interviewees said that grandparents are often asked to look after their grandchildren. This often happens in cases where the husbands who are supposed to be the main supporters in the family, refuse to pay maintenance to their children. Sometimes grandparents find it very difficult to maintain the grandchildren, because of the poor state pension they receive.

A woman interviewed in the Okavango suggested that the government should play a stronger role in terms of supporting children whose parents cannot or do not want to support them financially, suggesting that special funds can be created to support children in need.

A number of divorced women interviewees complained that their ex-husbands did not pay maintenance to them or their children, even though they were ordered by the High Court to do so. Some interviewees suggested that the government should introduce new legislation, which will force ex-husbands to pay maintenance to their children

Men interviewed in Tses and Berseba stated that they could not afford to pay maintenance on their own. They felt that women should also work to support their children. The women reacted by saying that men get work more easily than women do, because women usually have less education than men do.

A social worker recommended that both parties should be responsible for the financial needs of the child, but the party who does not have custody over the child should make a bigger contribution. (She also felt that children should have the right to represent themselves in a divorce case, to put forward their feelings and interests.)

Interviewees throughout the country thought that church and social workgroups should get more involved with maintenance counselling in their communities.

8. CASE STUDIES

Illustrative case studies are grouped together here in one section because each case study is illustrative of a number of important issues, including reasons for divorce, procedure, involvement of other parties such as family members and social workers, division of property and maintenance. All of the names used are fictitious.

CASE STUDY # 1:

This is a story told by a woman who lives in Mariental. She is 43 years old, separated, has 4 children and works as a hospital cleaner.

I got married in 1980 and in 1981 I was pregnant with my first child. After the birth, I spend a week in the hospital and went back home during the weekend. My marriage problems started after I was released from hospital. It was the same Saturday that my husband wanted us to have sexual intercourse, but as I was torn after giving birth the wound was still sore. The stitches were still there and I did not see any chance to have sex. My husband started to assault me, tore my sleepwear and underwear off my body. Then he stretched my legs open and said that if I don't do it, he will tear the wound. Later on I gave in and we did it, although it was not my feeling.

When he was sober, he didn't assault me, even to have sexual intercourse, but once it was Friday and he was under the influence of alcohol, he wouldn't behave like a husband, he just assaulted me. This went on for a long time. One day I discovered that I was pregnant again. I didn't expect it to happen, although I didn't use any contraceptives. He kept on assaulting me every weekend. He kicked me in the stomach. I thought that he wanted to kill the baby.

I carried through under those circumstances for the nine months and delivered the baby. I talked to him and asked him whether we could use contraceptives. We were very poor and struggled financially to look after the two children. He didn't see any chance for it. He said that he didn't see any reason why I should take contraceptives while we are married. He accused me of trying to take another man. He assaulted me several times because of this. He left the house at 7:00 in the mornings saying that he was going to work. He usually arrived back at home around 12:00 in the evenings.

One night I was sleeping in the same room with our two children and his cousin whom we have visited in Keetmanshoop. He came home late and started to assault me, accusing me that I was sleeping around with other

men. He ripped off my sleepwear and demanded to have sexual intercourse with me. It was as if though he wanted to rape me whenever he demanded sexual intercourse. I jumped up and ran out naked of the room to call his uncle and aunt. They talked to him. I wanted to go back to Mariental but they convinced me to stay. Not long after this incident I discovered that I was pregnant again, expecting my third child.

He didn't change. He still left the house early in the morning and came back late at nights. I didn't see a cent. I don't know what or whom he worked for or whether he did work. He just told me he's going to work. I went from one house to the other to get something for the children to eat, because there was usually nothing in the house to eat. One weekend he assaulted me again. I decided that I couldn't take it anymore. I got hold of a knife and decided that if he assaults me again I will stab him to death. Unfortunately he didn't come home that night, he slept out. One Saturday morning my niece phoned me asked me why I don't come back to Mariental. I told her that I didn't have any money. She gave me money and I took the train to Mariental. This was in 1983.

I delivered my third child and soon after that, my second -born child passed away. I didn't want to tell my husband, but my mother called and told him about the death. He came to the funeral. I went to the priest and told him about the situation. He told me to reform our marriage and that it was God's reason why the child was taken away from us. I told the priest that I didn't see any reason to continue with the marriage, because my husband wants to kill me, and he assaults me a lot. He also accused me that he saw me with another man while in fact there was no one.

After the funeral I decided to stay in Mariental and he went back to Keetmanshoop. He visited on weekends. I feared him. I was afraid that he would assault me again. I was ready to defend myself. I couldn't share a bed with him.

He convinced me to go with him to Windhoek. He promised me he'd change. He didn't. We didn't have a normal life, there was always violence. I went back to Mariental again in 1984. He came to visit me on weekends. I lost my feeling for him. I only kept the marriage going because of the children. Later he stopped coming to see me. In 1985 I went to the police to ask them to look for him. He was nowhere to be found. After the third effort trying to find him, the police wrote a letter stating that they can't find him. The Welfare-Office helped me with the maintenance of my two children.

In 1994 I received a call and was told that he was very sick and wanted to see the children and me. He was staying in Keetmanshoop. This was the first time that his second eldest son has seen his father. His father left when he was only one year old. It was the last time that I have heard anything from him.

After I separated from him in 1984, I went to Windhoek to find work in 1986. I met someone else with whom I lived together and also got two children during that time. In 1988 I went back to Mariental and started working in the hospital. I applied for Legal Aid to get a divorce. I didn't understand the policies and procedures very well. I was concerned that if I died, he would come and take away my money. He was not concerned about the children at all. I wanted to get divorced to prevent those kinds of things. The last time I heard from Legal Aid was when they asked me to send N\$100 to settle the case, but I have not yet replied.

CASE STUDY # 2:

Maria is an office worker in Ongwediva. Her monthly income is approximately N\$2 500 a month. She was married in 1989 and is the mother of 5 children, all of whom have been staying with her ever since she divorced her husband. Employment conditions contributed to their marriage problems.

Her husband was working in Windhoek while she stayed in Ongwediva. He started to have extra- marital affairs with other women in Windhoek. The situation turned for the worse. Her husband started to invite other women to stay in his house, despite the fact that she has told him on occasions that she will be coming to Windhoek to visit him. On one occasion she informed him that she is coming to Windhoek to see him over a weekend. He was not there to see her the whole weekend, he did not inform her or talk to her about it. When she confronted him about his behaviour, he assaulted and threatened her.

She then consulted a priest in Ongwediva. The priest travelled all the way to Windhoek to talk to her husband. He stayed there for a week, but her husband did not bother to speak or see him. She also recalled an incident, a week after she delivered her baby, when she was severely beaten up by her husband and threatened with death. She lost two teeth during that incident. The whole situation nearly caused her to breakdown mentally.

She decided then to divorce her husband. A LAC lawyer represented her case. Custody of the children was rewarded to her and her husband was ordered to pay maintenance of N\$50 per month per child of which he has

failed to pay so far. She contributed financially to the renovations of the common home and also bought some of the furniture, but she has lost almost everything.

Maria is strongly in favour of a speedy divorce process. She feels this is necessary to protect women who find themselves in an abusive relationship while a divorce procedure is going on. Women, she said are physically vulnerable when it comes to marriage conflict.

CASE STUDY # 3:

Ruth is 27 years old. She is separated from her husband, is unemployed and has one child. She lives at Bagani. While she was still at school she started to have a love relationship with a teacher. She decided to tell her parents about this affair. Both their parents decided that she should get married. They got married under customary law. She acquired a piece of land to cultivate maize. She fell pregnant and left school.

When the baby was grown up, her husband told her to take the baby to his parents. Short after that his father died. She moved to the village to take care of her child. Her husband stayed behind to continue his work as a teacher. The husband then stopped visiting her over weekends. She later found out that he has married another woman without her knowledge. She tried to get in touch with him, but he avoided her. He refused to support her and their child. She consulted her parents for advice. They advised her to move to their home. She started feeling very depressed and disappointed about the whole situation. She also consulted the headman, so that she can get a divorce through the customary law court. The headman was not interested to help her. She left all her properties at their marital home.

Her experience concerning marriage is that properties should be returned to the woman whenever she separates from her husband. Men should maintain at least their children when they separate or divorce. She said that men in her community are always looking for young attractive ladies. They do not want "old ladies" in their lives.

CASE STUDY # 4:

Paulus is a 46-year-old man. He works as a community liaison officer in Rundu and earns around N\$ 3000.00 a month. He has two children, which he maintains. The children are in their mother's custody.

He got married to his wife in 1981 under civil law in community of property in Rundu. In 1983 his wife delivered their first born child in Finland while he was studying for his Master's Degree in Theology. That is according to Paulus when the problems started. They started to misunderstand each other. His wife started seeing other men in secrecy behind his back while he was busy attending classes or while working.

He consulted a bishop friend who visited him in Finland. He suggested that they should reconcile the marriage. The wife confessed to his bishop friend and agreed to reconcile. In 1984 the problems started again. This time he approached a Bishop who said that they should return to Namibia. He refused, because he was nearly finished with his studies. Only his wife returned then to Namibia.

He was contacted again by his church leaders in 1985, who asked him to return to Namibia, or otherwise his wife would have had to go back Finland. He became very confused, depressed and nearly turned insane because the elderly church people stated accusing him of having extra marital affairs. He dropped his studies to return to Namibia.

In 1986 his wife tried to poison him during sexual intercourse. His wife confessed to this. Their parents and church community urged them to reconcile again. He went to a doctor for a medical check-up. It was discovered that the poison nearly killed him. He decided then to get a divorce. He approached an attorney, whom he paid nearly N\$1 100. The court case took nearly 4 years (1986-1990).

During the division of property, the court ordered that the wife has forfeited the joint property, because she failed to turn up at the court hearings. However, she was given custody over the two children. Paulus was ordered to pay maintenance, N\$50 per child per month. In those days he only earned N\$400. He was given access to visit the children.

His opinion of the divorce procedures is that they are very complicated. Churches should be consulted for advice and counselling. Families can sometime contribute to the break-up of marriages. Costs of divorce procedures are increasing, and making it very difficult for people to get divorced. He recommends that a person who wants to get a divorce should get legal representation. People should be well prepared with their facts when they come to the divorce court. This will save them time and money, in his opinion.

CASE STUDY # 5

Katrina is a 45 year old divorced woman who does domestic work and earns N\$ 800 a month. She has two children aged 22 (disabled) and 17 years respectively. She also maintains her orphan grandchild aged 5 years.

When she was 15 years of age she had to leave school to babysit her 3-month-old sister, as her mother was critically ill. Two years thereafter, she went out to look for work, after her mother had recovered from her illness. Luckily she found a job in 1967 at a supermarket as a sales lady. In 1971 she married her husband. He told her to give up her work as a sales lady. She then became a housewife.

Everything went well in their relationship until 1986 when her husband started to accuse her of having extra-marital affairs. He started to assault her with objects like pangas, electrical wires, hot tea and food. This happened quite frequently especially over weekends when he was under the influence of alcohol. Katrina was at times so badly assaulted that she had to get medical treatment on various occasions.

Katrina decided to consult her pastor in 1987, who in turn counselled the couple together for advice. The counselling did not bring any change in their relationship. She then consulted her husband's parents. They did not listen to her or take any action by either giving her advice or talking to her husband.

Ultimately she consulted a social worker, in 1990. The social workers were really concerned about her situation and they tried their best to solve the problem. They counselled the couple and conducted home visits, but the reconciliation would usually last only a few weeks before the violence started again. Katrina always went to the social workers whenever there was domestic violence.

After the social workers did a thorough assessment of their domestic affairs in 1991, they advised her to file for a divorce. She was referred to the Legal Aid Board with a report from the social workers and the case was filed with immediate effect. During the period provided for restitution of conjugal rights, the couple reconciled and Katrina withdrew the divorce case. "Things went well for us, until one day I found my husband committing adultery in our common bedroom with a woman who was renting a room at our house for years." Katrina then decided to end their marriage.

She filed for a divorce in March 1992 and was legally divorced in January 1993 with the assistance of the Legal Aid Board. Because she had so many medical and social worker reports, the divorce procedures went smoothly. Her husband did not attend the final trial. When the judgement was made he did not want to divorce her.

She was unemployed at the time but was given custody of all their children. She had to move out of the house, because they were married out of community of property. She was literally left with only her clothes. Her ex-husband was ordered to pay maintenance of N\$225 per month per child and N\$225 per month for Katrina.

Her ex-husband has never paid maintenance as ordered by the court. "He always waits until she asks for it before he will give her any money," Katrina said. The divorce order is silent with regard to the access of the father to his children, but he sees them whenever he wants. Katrina does not mind because she has not got proper accommodation. Katrina's experience is that families should not get involved in divorce cases, because "they are rather useless," she said. She also feels that, even if people are married out of community of property, the estate that they build together should be divided somehow.

CASE STUDY # 6

Sara is a 35 year old divorced woman who is currently unemployed. She got married at the age of 26 and at her 4th month of marriage she fell pregnant with her first child. The marriage went well for 3 months after she discovered she was pregnant. Her husband started to abuse alcohol and he started to beat her. While being pregnant she became very short tempered. She thinks that because of this reason her husband started to drink. Once she got the child, her situation started to get worse. She got more children and with every child she got her situation just got worse.

She was almost always depressed. She started to abuse alcohol herself to forget about her sorrows. This made her husband even more furious so that he will beat her even more.

Her husband only gave her N\$100 a month to keep the household going. He was always in debt with liquor stores and refused to stop drinking. The few times he gave Sara N\$100 for the household, he sometimes borrowed it back from her to buy liquor.

The situation between Sara and her husband continued like this until 1992 when her husband filed a complaint against Sara with a social worker. Sara received help with her alcohol problem and after that she decided to file for a divorce. When her husband was notified of the divorce, he begged her to withdraw the case. She did not go back to the court and her case was thrown out.

At one stage they decided to move to Omaruru to try and save their marriage. Sara thought that living away from the family would be in the best interest of their marriage. Her husband's family interfered a lot with their marriage and always gave her husband money to buy liquor.

In 1993 Sara discovered that her husband was molesting their children. Sara then finally decided to file for a divorce. The divorce case took less than a year to be settled. She divorced through Legal Aid. She asked for N\$300 maintenance per child, but was granted only N\$150 per child. It was decided in the divorce case that the house should be sold and the money divided in half. The house was never sold and she and her 4 children are still living in it. Sara is unemployed due to illness. After the divorce the husband paid maintenance for her and the children, but now she receives an amount from Social Services for herself every month. Out of the allowance she pays for the house loan. The house is still in her husband's name.

Sara said that it was very difficult for her to get divorced. She has no education and her husband during marriage never allowed her to get work. The children miss their father, but because of the molesting incidents he is not allowed to see his children.

CASE STUDY # 7

John is a 46 year old male, currently separated from his second wife. He is a qualified fitter and turner and boilermaker who is unemployed and looking for a job. John left school after he has finished grade 9. He did his apprenticeship in Cape Town. In 1973 he met his first wife, also in Cape Town. She got pregnant and they decided to get married the same year. They married in community of property. Their baby daughter was born on 15 August 1974. Two years later they had another child, a boy this time.

Everything went well and the family was happy. In 1978 John was retrenched from his work and he decided to seek employment in Namibia with Rossing Uranium Mine. After he got employed with Rossing, he went back to Cape Town to fetch his family. They settled in Tamariskia, Swakopmund. At that time there were no English schools for coloured children in Swakopmund or Walvis Bay. They then sent their children back to Cape Town to attend an English school there. John and his wife stayed behind in Swakopmund. He worked very hard and long shifts to provide the best he could for his family. After being married for 7 years the problems started. His wife complained that he was working too hard and did not spend enough time at home. When he tried to do less overtime at work, she told him to do more overtime. John knew something was wrong, but he could not put his finger on it.

One Saturday he was supposed to work late, but because of a change in work schedule, he arrived home earlier than expected. He found the house in an untidy state and his wife was not at home. She only came back the next day when she was dropped off by a stranger who kissed her good bye. John confronted her about what had happened, but she did not want to talk about it. She ended up in hospital with a nervous breakdown. When John went to fetch her on the day of her release, he found out that she had left with a strange man.

His wife then stayed with the new boyfriend. One day in December 1980, he arrived home from work to find the house empty. He discovered that his wife and her boyfriend have taken everything from the house. She later moved to Cape Town to stay with her parents. John paid maintenance of N\$800 every month for his two children. He went to Cape Town in 1981 in a last attempt to save his marriage. He discovered that his wife had a baby from the boyfriend she was seeing in Swakopmund and that she was seeing a new boyfriend at the time.

In 1982 he finally decided to file for a divorce. When his wife received the divorce order she wanted to reconcile but he refused. John consulted a lawyer in Swakopmund and paid approximately N\$2000 for the divorce procedure. His wife applied for legal aid, but it was denied and he had to pay half of her expenses of the lawyer's fees. He received custody of the children because his wife did not oppose the claim. In November 1984, two years after the divorce was filed, he was legally divorced.

In 1990 John remarried in Walvis Bay. His new wife was also divorced with one child. At that time his two children from the previous marriage had become teenagers, the eldest having finished school. He and his new wife moved to Arandis. A baby girl was born out of the wedding and everything went fine for 5 years.

In 1995 his wife started to accuse him of treating her child unfairly. They started to fight, and the marriage started to break down. His wife left the marital home in January 1997. She filed for a divorce in February 1997 when she told him that the situation between him and her son has not changed.

They have decided that the house will be sold and each one will get an equal share. They have decided that the contents of the house will be allocated to the person to whom they belong.

John tried to save the marriage, but his wife was not prepared to have counselling or any kind of mediation. John went to see a lawyer in Swakopmund to gain advice. The lawyer advised him of his rights towards the child and property. John is seeing his child every weekend. This was negotiated between him and his wife.

John does not feel like fighting anymore. He said that he just wants everything to settle so that he can sort out his life. The divorce procedures had not yet been finalised when this interview with John took place.

CASE STUDY # 8

Gisela is 49 years of age. She is a divorced housewife and is living with 2 of her children in Walvis Bay.

She received only primary education and she had her first child at the age of 17. She became pregnant after she was raped. She never finished her school education. She grew up in a broken family and her parents divorced a few years after she has left home. She never experienced real love except the love she has for her children. In 1972 she became pregnant with her second child. Her mother forced her to get married. She and her husband got married in community of property.

Her husband never wanted her to seek employment, because he was a very jealous and possessive man. He would always accuse her of sleeping around and having affairs with other men. He also beat and abused her on occasions. She became very depressed because of his abusive behaviour towards her. This continued for 20 years. She considered at one stage to commit suicide. He also reflected his anger towards her first born child, by beating and abusing him. He later stopped supporting his family. The two eldest children were forced to leave school to support the household.

Gisela went to talk to church leaders about her situation. They advised her to seek help from a social worker. The social worker helped her to file for a divorce. She divorced through Legal Aid with no costs involved. The divorce procedures took nearly 2 years. She could not claim maintenance, because her husband was unemployed most of the times and he abused alcohol.

The house was sold and the money was divided between the two of them. Gisela was left with only a bed and one cupboard. The rest of the furniture she left for her husband. He nearly sold everything for alcohol. Gisela is currently staying with her two youngest children. Her two eldest children take care of her and the two young ones. They pay her rent and buy food and clothes for them. Gisela describe her life at the moment as "being free at last."

CHAPTER 3

COMPARATIVE DIVORCE LAW REFORM

1. INTRODUCTION

This chapter provides an overview of what other countries have done in the last thirty years in terms of divorce law reform. Since the 1960s, many countries around the world have amended laws that provided for divorce only on fault-based grounds (like Namibia's current law) to allow for divorce on the ground that the marriage had broken down beyond repair, either in place of or in addition to the traditional grounds. At the same time, these countries typically also made reforms to the provisions of their laws governing the economic consequences of divorce, which generally had determined the parties' financial positions after a divorce based on fault.

This chapter first discusses Western Europe and the United States. Professor Mary Ann Glendon of the Harvard Law School in the United States has written two excellent comparative law studies of divorce law reform in these countries.¹ The first section of the chapter heavily relies upon Professor Glendon's analysis, which led her to develop useful categories for analysing divorce laws. These categories are useful tools for considering what Namibia's new divorce law should provide. This discussion is followed by an examination of the position in Canada.

The chapter then discusses in detail the current divorce law of Namibia's neighbours, South Africa and Zimbabwe. In 1979 and 1985, respectively, South Africa and Zimbabwe replaced fault-based divorce laws with laws allowing for divorce on two non-fault grounds: the irretrievable breakdown of the marriage or the mental illness or continued unconsciousness of a spouse. In addition, both of these countries have made customary law marriages subject to the same grounds and similar procedures for divorce as civil law marriages.

This chapter's final section contains brief descriptions of a number of other countries' divorce laws, or aspects thereof. Although we were unable to obtain such complete or detailed information on these countries' laws as for South Africa and Zimbabwe, we believe that this section provides an instructive overview of a variety of approaches to issues relating to divorce.

2. WESTERN EUROPE AND THE UNITED STATES

Between 1969 and 1985, many Western countries reformed their divorce laws, recognising or expanding non-fault grounds for divorce and accepting or simplifying divorce by mutual consent.² At the same time, these countries revised their old rules dealing with the economic consequences of divorce, which generally determined the parties' financial positions after divorce in large part on the basis of marital fault.³ These two subjects are discussed in turn in more detail below.

¹ MA Glendon, *Abortion and Divorce in Western Law* (Harvard University, 1987) (hereinafter "Glendon, *Abortion and Divorce*"); MA Glendon, *Transformation*.

² Glendon, *Abortion and Divorce* at 66; Glendon, *Transformation* at 149.

³ Glendon, *Abortion and Divorce* at 82.

GROUND S FOR DIVORCE

In most of the 20 countries that Professor Glendon analyzed, divorce reform involved the addition of non-fault grounds (such as mutual consent, separation or marriage breakdown) to the traditional fault-based grounds (adultery, desertion, and/or cruelty). These countries can be categorised as “*mixed ground*” jurisdictions. Most reformed laws in these countries also provide safeguards for dependants and waiting periods ranging from several months to several years. In addition, several countries allow a court to deny a unilateral no-fault divorce (where one spouse wants the divorce but the other does not) if divorce would cause exceptional unfairness or hardship to the non-consenting spouse.

Three countries (the Netherlands, Sweden and West Germany) and 19 American jurisdictions eliminated fault grounds completely, and so can be categorised broadly as providing “*divorce-on-demand*”. Sweden and the 19 American jurisdictions afford each spouse an absolute individual right to a divorce. The laws in the Netherlands and West Germany, however, still permit a judge to deny a divorce on hardship grounds.⁴ Canada (after its 1986 reforms) and 22 American jurisdictions also come close to the right-to-divorce principle, allowing divorce on the ground of marital breakdown after a waiting period of one year or less and affording courts no discretion to deny a divorce on hardship grounds.⁵

Mixed ground jurisdictions

The laws that Professor Glendon characterises as “mixed ground statutes” seek to accommodate “the desire to wind up dead marriages without appearing to endorse the view of marriage as existing only for individual self-fulfilment.”⁶ In England, for example, the Divorce Reform Act of 1969 made irretrievable breakdown of the marriage the sole ground for divorce, but provided that breakdown is shown only by proving one or more of five facts, three of which (adultery, desertion, unreasonable behaviour) involve fault.⁷ The remaining two grounds are based on separation. Mutual consent divorce is available after a two-year separation.⁸ Unilateral no-fault divorce is allowed after the spouses have lived apart for at least five years, although such a divorce may be denied if the court is convinced that divorce would result in “grave financial or other hardship” to the non-consenting spouse or the couple’s children and that it would “in all circumstances be wrong” to dissolve the marriage.”⁹

Where a mutual or unilateral “no fault” divorce is sought based on a two- or five-year separation, an English court can refuse to issue a final divorce decree until it is satisfied that the financial provision, if any, for the respondent spouse is “reasonable and fair, or the best that can be made under the circumstances.” No matter what the grounds for the divorce, the court cannot make a final decree unless it has made an order regarding arrangements for any children of the marriage.¹⁰ In addition, the English reformed statute originally made divorce unavailable during the first three years of marriage unless “the case is one of exceptional

⁴ Id at 67.

⁵ Id at 69.

⁶ Id at 75.

⁷ Glendon, *Abortion and Divorce* at 69-70; Glendon, *Transformation* at 152-53.

⁸ Glendon, *Abortion and Divorce* at 70; Glendon, *Transformation* at 153.

⁹ Glendon, *Abortion and Divorce* at 70; Glendon, *Transformation*, at 154.

¹⁰ Glendon, *Transformation* at 154.

hardship suffered by the petitioner or of exceptional depravity on the part of the respondent.”¹¹ In 1984, however, the law was amended to substitute a one-year mandatory bar for this three-year discretionary one.¹²

It is interesting to note that the fault-based grounds remain the most-commonly used, with this popularity “apparently attributable to the fact that they offer the quickest and easiest path to divorce.”¹³ (The same pattern is evident in West Germany, and in France – the choice of the ground for divorce seems to be determined more by the simplicity of the procedure and the time period involved than anything else.¹⁴)

It should also be noted that the “hardship clauses” which give courts discretion to deny divorces (such as those which exist in England and West Germany) have not been a success. They have been eliminated in some jurisdictions which originally tried them (such as Australia), and are seldom invoked in the jurisdictions where they have been retained. Commentators have pointed out that a more sensible way to deal with issues of hardship is not to deny divorces, but to make appropriate financial adjustments.¹⁵

In the 1970s, England’s court rules were amended to allow a simplified procedure for uncontested divorces. In such cases, the parties do not have to appear in court; instead, a magistrate reviews and certifies the parties’ affidavits and then forwards the file to a judge for automatic issuance of a divorce decree.¹⁶ In 1977, this procedure was extended to all undefended cases, even those where a notice of intention to defend was received but no answer was ever filed.¹⁷ This summary procedure is not typical of other mixed-ground jurisdictions, however. For example, France in its 1975 reform imposed additional procedural steps in divorce cases such as requiring a series of meetings between the parties and the presiding judge, and the French tendency is to take this judicial supervision very seriously.¹⁸

¹¹ Glendon, *Transformation* at 153.

¹² Id at 157.

¹³ Id at 154.

¹⁴ Id at 171,181.

¹⁵ Hahlo and Sinclair at 17-ff. The Scottish Law Reform Commission made several cogent arguments in rejecting the idea of a “hardship clause”: (1) It would be difficult for courts to balance society’s interest in the stability of marriage and its interest in seeing that dead marriages are not maintained, in addition to taking into account the interests of the applicant in obtaining his or her freedom and possibly the interests of a second family in subsequently legitimizing their status. This would mean that a hardship clause would rarely be invoked, and then only to mark the court’s disapproval of the conduct of the spouses. This should not be the role of the court in a divorce action. (2) The introduction of this kind of discretion would add an unnecessary element of uncertainty to the divorce law. (3) It would be inconsistent to simultaneously introduce irretrievable breakdown as a ground for divorce and at the same time make provisions for the preservation of a marriage which has admittedly broken down. Scottish Law Reform Commission, *Divorce: The Grounds Considered* (1967), paragraph 49, quoted in Hahlo and Sinclair at 17-18.

¹⁶ Id at 156-57, Glendon, *Abortion and Divorce* at 70-71.

¹⁷ Glendon, *Transformation* at 157. In 1985, the Matrimonial Cases Procedure Committee recommended to Parliament that registrars be permitted to grant divorce decrees, rather than sending cases on to a judge, in undefended cases which did not involve minor children. Glendon, *Transformation* at 157.

¹⁸ Glendon, *Abortion and Divorce* at 73.

The 1969 mixed-ground divorce law in England was amended after Professor Glendon's study by the Family Law Act of 1996, although this act has not yet been fully implemented.¹⁹ The new law retains irretrievable breakdown as the ground for divorce, but no longer requires the establishment of fault to show irretrievable breakdown. Rather, the law provides for divorce over a period of time (at least one year) to allow the parties a chance to reflect on their position and to consider their future arrangements.²⁰

The Act specifies a new procedure that must be followed in divorce cases, which is similar to the procedural requirements in the 1975 French law.²¹ First, the parties must attend a mandatory information session, in which they are told about matters that may arise during a divorce proceeding.²² This must be done not less than three months before the statement of marital breakdown (which commences the divorce case) is made. The statement of marital breakdown may be made by one or both spouses. In it, the person(s) making the statement must state that he/she/they are aware of the purpose of the period for reflection and consideration, that he/she/they wish to make arrangements for the future, and whether he/she/they have made any attempt at reconciliation since the information session. The Act provides for the issuance of regulations enabling eligible couples to obtain marriage counselling funded by the state during the period for reflection and consideration. It also allows the court, after a statement of marital breakdown has been filed, to direct the parties to attend a meeting with a mediator to give them the opportunity to agree to mediation.²³

Once the statement of marital breakdown is filed, the couple must observe a nine-month period of reflection and consideration (beginning on the 14th day after the day on which the court receives the statement). This period can be extended under certain circumstances, but it cannot be shortened. After this period, one or both parties may apply for a divorce order, along with which he/she/they must submit a declaration stating that having reflected on the breakdown and having considered the parties' arrangements for the future, the marriage cannot be saved. However, an application for a divorce order cannot be made if a period of more than one year has passed since the end of the reflection period.²⁴

The court cannot grant a divorce order under the new law unless the parties' financial arrangements have been resolved. This is a change from the 1969 Act, which allowed for a preliminary order of divorce (decree nisi), but not the final, absolute order, to be issued before financial matters were resolved. The court may also delay issuance of the divorce order if it determines that it needs to exercise any of its powers under the Children Act of 1989 in favour of any children of the marriage under the age of 16 years.²⁵

¹⁹ Wragg, *Family Law in a Nutshell*, (Sweet & Maxwell, 4th edition, 1998) at 15.

²⁰ Id.

²¹ Id at 16; see Glendon, *Transformation* at 162-70 (describing French procedure).

²² Wragg at 16-17. Regulations will set forth the details of what information must be provided.

²³ Id at 16-18.

²⁴ Id at 19-21.

²⁵ Id at 20-23. Among other things, the Children Act allows courts to make a variety of financial and property orders against a parent, such as ordering periodic payments, a lump sum payment, or a transfer of property, for the benefit of his or her children. Id at 56-57.

The new Family Law Act also provides that a divorce order can be denied in certain circumstances where only one of the parties to the marriage has applied for a divorce. In such cases, the other party may request an “order preventing divorce.” Such an order may be issued only if the court is satisfied that “dissolution of the marriage would result in substantial financial, or other hardship to the [non-consenting spouse] or to a child of the family” and that “it would be wrong, in all the circumstances (including the conduct of the parties and the interests of any child of the family) for the marriage to be dissolved.”²⁶

When the Family Law Act was enacted, it was envisioned that it would be implemented, at the earliest, in the summer of 1999 due to the fact that a number of programs and regulations had to be developed. However, in June of 1999, the Lord Chancellor announced that part two of the new law (containing the new requirements of the information session and waiting period) was being “put on the back burner,” following “disappointing” results from pilot schemes. Fourteen pilot schemes in eleven areas, involving nearly 9000 people, indicated that only 10 percent of divorcing couples were interested in attending the preliminary information sessions that would be made compulsory by the new act. In addition, of those people who did choose to attend the information session, only seven percent opted for mediation and only thirteen percent agreed to see a marriage counsellor. The Lord Chancellor indicated that a final assessment of the pilot projects, and a determination of when and if implementation would proceed, would be made sometime in 2000.²⁷

Divorce on demand

In contrast to the so-called “mixed ground” statutes is Sweden’s reformed law, which Professor Glendon characterizes as allowing “divorce on demand.” In 1973, Sweden replaced a mixed-ground divorce law with a law permitting either spouse to terminate a marriage without stating a reason, without the other spouse’s consent, and without a long period of separation. If the other spouse opposes or if there are children under 16, a six-month “period of consideration” must be observed, but if the petitioner still desires a divorce after that period, the court must grant it. The six-month waiting period need not be observed, however, if the parties have already been separated for two years.²⁸ According to Sweden’s Committee on Reform of Family Law, the reformed law was based on the principles that, “not only entry into marriage, but also its continued existence, should be based on the free will of the spouses,” and that “the wish of one of the spouses to dissolve the marriage should always be respected.”²⁹

Other Nordic countries follow approaches similar to Sweden’s. For example, Finland’s 1988 divorce law also makes divorce available without reasons or judicial enquiry, although it requires a six-month period of consideration in all cases.³⁰

Divorce in the United States is a matter of state law, and divorce laws vary from state to state. California, which eliminated fault grounds completely in 1969, was the first American state to reform its divorce law. Within 16 years, all American states had reformed their divorce laws. Many eliminated fault completely, but many more added non-fault grounds to the traditional

²⁶ Id at 22-23.

²⁷ “No Fault Scheme Shelved,” Daily Telegraph, June 18, 1999, available at <http://www.familylaw.co.uk>.

²⁸ Glendon, *Abortion and Divorce* at 75-76; Glendon, *Transformation*, at 186-87.

²⁹ Glendon, *Transformation*, at 185.

³⁰ Id at 187.

fault grounds. By the time of Professor Glendon's study in the late 1980s, 40 states and the District of Columbia allowed non-fault divorce over the opposition of one spouse after a year or less of separation. This is vastly different from the European laws, which generally allow such a divorce only after a long separation. In addition, no American state's divorce law has anything similar to the European statutes' hardship clauses. But divorce reform in the United States did not go as far as the Swedish law – most states still require the statement of a reason for the divorce, if only the irretrievable breakdown of the marriage, and most still require some form of judicial inquiry into whether the marriage has actually broken down.³¹

Even so, in the years that followed some Americans have come to believe that divorce law reform has gone too far and made divorces too easy to obtain.³² One US state, Louisiana, even passed a law in 1997 creating a new and more binding form of marriage called "covenant marriage." Under the new law, a couple who choose to enter a covenant marriage must undergo professional marriage counselling before the marriage and prior to filing for divorce. No-fault divorce is only available after the husband and wife have been separated for two years; to obtain a divorce before the expiration of the two-year separation one spouse must prove that the other has committed adultery, a felony, or physical or sexual abuse, or has moved out for a year and refuses to return.³³

CONSEQUENCES OF DIVORCE

Division of property, spousal support and child maintenance

Professor Glendon devised three models to describe the ways countries reformed their laws' provisions governing economic issues in divorce. Two of these models -- referred to by Glendon as the "*Romano-Germanic model*" and the "*Nordic model*" -- are found in continental European laws. In both, the spouses' community property is generally divided equally between them, unless they have agreed otherwise in a ante-nuptial contract or a divorce settlement, and child support is calculated based on prescribed formulas or tables. The main difference between these two models is their treatment of the issue of spousal support. Briefly, in the Romano-Germanic model, which is the predominate one, considerations of fault remain relevant and an emphasis is placed on the continuing financial obligations of the former provider, supplemented if necessary by state benefits. In the Nordic model, the role of fault is minimised, spousal self-sufficiency is emphasised, and the state provides generous public benefits to families with children. The third Glendon model is the "*Anglo-American model*", found in English and US laws. In this model, judges have great discretion to reallocate spouses' property and assess support obligations, and spouses have a great deal of freedom to make their own agreements concerning financial arrangements including child support.³⁴ Each model is discussed in more detail below.

The Romano-Germanic model

In the Romano-Germanic model, the parties' marital fault is considered to some extent in determining spousal support.³⁵ In addition, the spouses' freedom to make their own financial arrangements in connection with a divorce is limited by the requirement of active judicial

³¹ Glendon, *Abortion and Divorce* at 67, 77-78..

³² See eg, "Is Divorce Too Easy?" *Health*, September 1999, Volume 13, Issue 7, at 122.

³³ Id. "Louisiana Says 'Yes' to Stronger Marriages," *Human Events*, 22 August 1997, Volume 53, Issue 32, at 11. Margaret Carlson, "Till Depositions Do Us Part", *Time Magazine*, 7 July 1997.

³⁴ Glendon, *Abortion and Divorce* at 82.

³⁵ Id at 83.

supervision of these arrangements, to protect the parties' dependants.³⁶ In general, under this model it is "quite difficult for either spouse to rid himself [or herself] of family economic responsibilities."³⁷ West German and French divorce law provide examples of this model.

The West German law demonstrates how fault remains a consideration in spousal support issues. The 1976 West German law provided that an otherwise valid claim for spousal support could be denied only in specified, limited cases of "gross unfairness" such as where the marriage was of short duration, or the spouse claiming support had committed a crime against the other spouse, or the spouse claiming support had deliberately brought about his or her own state of neediness. But in 1986 this provision was broadened to provide that spousal support (to a spouse not caring for a child of the marriage) could be denied or reduced not only in the above-listed cases, but also if the claimant deliberately undermined important financial interests of the obligor; grossly neglected his duty to contribute to the support of the family for a lengthy period prior to separation, or was responsible for "obvious and serious misconduct" toward the other spouse. So, even though fault was completely eliminated from West Germany's divorce grounds, it remains a key component of spousal maintenance issues.³⁸

Although the 1975 French law in theory eliminated the obligation of spousal support, it provides that one spouse can be required to make payment, in either a lump sum or in periodic instalments, to the other spouse "to compensate, so far as possible for the disparity which the disruption of the marriage creates in the conditions of their respective lives." This payment clearly serves the same function as spousal support in all but name. Under French law, a mutual consent divorce can only be granted if the judge finds that the spouses' agreement on the compensatory payment is equitable. Where a divorce is granted on fault grounds, the compensatory payment is available to the plaintiff but not the defendant, and the plaintiff may also recover damages for any "material and moral prejudice" resulting from the dissolution of the marriage. French law provides even stricter rules for unilateral no-fault divorce – not only must the plaintiff wait six years for the divorce, but he or she must also assume all of the costs of the proceeding and after the divorce "remains completely bound to the duty of support."³⁹

With respect to child support, however, fault plays no role in either West Germany or France. West Germany established realistic tables (which are regularly revised) to serve as guidelines on child maintenance. Both France and West Germany have relatively efficient enforcement mechanisms, in which the state undertakes to collect unpaid child support and advances payments from state funds in the meantime.⁴⁰

The Nordic model

Under the Nordic Model, marital fault is irrelevant or less relevant to the determination of economic issues in a divorce. Community property is equally divided, and spousal support is rare. However, if there are children of the marriage, both parents assume a fair share of their support. The parents have some freedom to agree on child support, but cannot agree to less

³⁶ Id. Glendon, *Transformation* at 236.

³⁷ Glendon, *Abortion and Divorce* at 84.

³⁸ Id at 83. It appears that West German divorce law has been adopted for unified Germany, although detailed information on this question (in English) could not be located.

³⁹ Id at 83-85.

⁴⁰ Id at 89; Glendon, *Transformation* at 216, 223. France relies heavily on direct deduction from wages.

than a fixed minimum amount.⁴¹ For example, under Swedish law, the division of the marital estate settles the property issues between the parties; spousal support is available only in exceptional cases and is rarely granted. Professor Glendon characterises Sweden's law as epitomising the principle that there should be a "clean break" between spouses upon a divorce. Swedish law does provide, however, that regardless of what marital property regime the spouses have chosen or how title is held, the marital home and household goods should be awarded to the party that needs them most, which usually is the custodian of the parties' minor children, if this is reasonable in all the circumstances. However, if this results in one spouse receiving more than what he/she would otherwise be due, he/she may have to pay compensation to the other spouse.⁴²

With respect to child support, Swedish law makes clear that both parents remain responsible, based on their needs and resources, for the support of their children.⁴³ Sweden uses formulas to determine the amount of child support (which is indexed to the rate of inflation), has a very efficient child-support collection system, and provides generous public benefits to one-parent families.⁴⁴

The Anglo-American model

In Professor Glendon's Anglo-American model, judges have broad discretion to reallocate the spouses' property, regardless of what they agreed upon prior to their marriage, and to assess spousal and child support.⁴⁵ For example, in England, under the Matrimonial Proceedings and Property Act of 1970, the court was initially authorised to order one spouse to make "financial provision" for the other, by way of periodic payments, a lump sum payment, the transfer or settlement of property, or various combinations thereof. In making such orders, the court could disregard who actually held the title to particular assets; it also could disregard the distinction between support and property division. Before 1984, the court was to exercise its discretion in a way that would place the parties, as far as possible and with regard to their conduct, in the financial position they would have been in had the marriage not broken down -- a standard which proved to be impossible to meet. In 1984, the Act was amended to discard the previous unrealistic standard, substituting it with a directive that the court must give "first consideration" to the welfare of any minor children of the marriage. Also, new provisions were added directing the court to make awards in a way that would recognise and promote both spouses' potential for independence and self-sufficiency, allowing awards to be made for periods of limited duration, and permitting the court to dismiss spousal support petitions where necessary in terms of the obligation to consider the children's interests first.⁴⁶

At the time of Professor Glendon's study, she found that judges in England and the United States in practice routinely approved divorcing spouses' agreements as to spousal and child support. As a result, there were no clear legal standards that spouses and their lawyers could apply in negotiating such agreements. Although the laws in these countries stated that parents must share, according to their abilities, in the support of their children, Professor Glendon's research revealed that the cost of raising children after a divorce fell disproportionately on the custodial parent, usually the mother. This problem was compounded by the fact that the

⁴¹ Glendon, *Abortion and Divorce* at 85.

⁴² Glendon, *Transformation* at 224.

⁴³ *Id* at 225.

⁴⁴ *Id* at 226-27; Glendon, *Abortion and Divorce* at 85.

⁴⁵ Glendon, *Abortion and Divorce* at 86.

⁴⁶ Glendon, *Transformation* at 199-203.

public assistance in England and the United States is less generous than that available in France, Sweden or West Germany.⁴⁷ In addition, at the time of Professor Glendon's study, the countries in the Anglo-American model, particularly the U.S., had less effective mechanisms for collecting delinquent child support than did the European countries and did not provide for automatic cost-of-living increases in child support amounts, as did many European laws.⁴⁸

However, England's Child Support Acts of 1991-95 have now placed child support within the jurisdiction of the Child Support Agency, which has the power to trace absent parents, investigate their means, and assess (on the basis of rigid formulas), collect and enforce child support payments.⁴⁹ Thus, in England, the amount of child support is no longer within the court's discretion; indeed, such issues are generally no longer the province of the courts.⁵⁰ Similarly, in the United States, federal law in the 1980s required states to establish guidelines for determining child support.⁵¹ This law was a response to concerns that many child support awards were too low and that there was too much variation between awards in similar cases.⁵² The guidelines vary from state to state, but in general are based on the income of the parents, the number of children, and the amount families ordinarily spend on raising children; in many states additional factors are specified upon which a court may base increases (for example, a child's special medical or educational needs) or decreases (for example, the high income of the custodial parent or the non-custodial parent's duty to support

⁴⁷ Glendon, *Abortion and Divorce* at 86-87. Glendon's view of the practical realities is reinforced by a much-discussed 1985 book by Lenore Weitzman called *The Divorce Revolution*, which found that the reformed divorce law in California was less effective than the previous law in protecting the economic interests of women and children, despite its commitment to principles of equality. Weitzman's research found that on average, divorced women in California and their children experienced a 73% decline in their standard of living, while their former husbands in contrast enjoyed a 42% rise. The main reason for this situation seems to be that an equal division of the marital estate is not adequate to provide for the expenses of the parent who has custody of the children – usually the mother – even if maintenance payments are awarded. Another problem was that equal division of property sometimes forced the sale of the family home, dislocating women and children from their normal environment. See Martha Minow, "Review of the Divorce Revolution" in Martha Minow, ed, *Family Matters: Reading on Family Lives and the Law* (1993) at 329-ff; "Review Symposium on Lenore J Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*" in Harry D. Krause, *Family Law*, Volume II, 1992 at 125-ff.

⁴⁸ Glendon, *Abortion and Divorce* at 88-89. In addition to efficient collection mechanisms (such as garnishing the wages of a parent in default), a number of European countries – France, West Germany, the Nordic countries, Austria, Luxembourg and many Swiss cantons – have a "maintenance advance" system. In such systems, where the non-custodial parent is in default on child support, the custodial parent can receive the amount in default, up to a maximum set by law, from a public agency, which then tries to collect the amount from the non-custodial parent. Glendon, *Abortion and Divorce* at 89.

⁴⁹ Wragg, at 29, 51.

⁵⁰ After the Child Support Acts, courts retain jurisdiction to issue orders dealing with child maintenance in certain situations, such as where the non-custodial parent is wealthy enough to be able to afford to pay more than the maximum amount allowed under the Child Support Act, or where payment for additional expenses, such as school fees or a disabled child's care, is necessary. Id.

⁵¹ Glendon, *Transformation* at 87; *The American Bar Association Guide to Family Law* (ABA 1996) at 106 (hereinafter "ABA Guide"); Martin Guggenheim et al, *The Rights of Families* (ACLU 1996) at 31.

⁵² ABA Guide at 106, Guggenheim at 31.

other families).⁵³ A US law passed in 1984 required the states (as a condition for eligibility to receive federal welfare funds) to provide for automatic wage withholding where there is a default in child support payments of a month or more.⁵⁴

In addition, since 1994 all new child support orders are required by law to provide for an automatic deduction from the obligor's wages and, in cases of default, the state can attach federal and state income tax refunds and place liens on property, such as real estate and automobiles.⁵⁵ Some US states have also made the granting or renewing of certain licenses (for example, drivers' or professional licenses) contingent on the payment of child support.⁵⁶ As a result of these reforms, the child support regime in the United States and England has become more like those of the European countries surveyed by Professor Glendon.

Custody and access

With respect to child custody, in England such issues are governed by the Children Act of 1989. Under that act, a court can make four specific types of orders: a residence order (deciding with whom the child will live), a contact order (providing for visitation with a person with whom the child does not live), a prohibited steps order (forbidding a person from taking specified actions regarding the child without court approval), and a specific issues order (determining any other specific issue regarding an aspect of parental responsibility). In making any such order, the court's foremost consideration must be the welfare of the child. The court is to determine what is in the child's welfare based on a number of factors, including the child's wishes and feelings, if ascertainable; his or her physical, emotional and educational needs, the likely effect on the child of any change in his or her present circumstances; the child's age, sex, background and any other characteristic the court considers relevant; any harm the child has suffered or is at risk of suffering; the capability of each parent of meeting the child's needs; and the range of powers the court has under the act. The court cannot make an order under the Children Act unless it determines that doing so would be better for the child than making no such order. The court also must exercise its powers in light of the principle that any delay in the resolution of the issues is likely to be prejudicial to the child. Orders under the Children Act cannot be made once the child has reached the age of 16 or extend beyond his or her 16th birthday unless there are exceptional circumstances, and they cease automatically when the child reaches the age of 18.⁵⁷

In the United States, the laws governing child custody vary from state to state. In general, these laws require that custody arrangements (whether agreed to by the parents or ordered by the court) be based on what is in the best interests of the child.⁵⁸ In making this determination, the following factors are generally relevant: the child's emotional ties with each parent; whether one parent has taken on greater parenting responsibilities in the past;

⁵³ *ABA Guide*, at 106-10; see Guggenheim at 34-36 (describing different types of formulas that are used).

⁵⁴ Glendon, *Abortion and Divorce* at 88.

⁵⁵ *ABA Guide* at 120-21.

⁵⁶ *Id* at 125.

⁵⁷ Wragg, at 77-83.

⁵⁸ Guggenheim, at 6; *ABA Guide* at 127. Consistent with Professor Glendon's Anglo-American Model, several books written years after Professor Glendon's study have noted that in most U.S. divorce cases, the parents still agree between themselves as to custody and visitation and the courts still generally accepted these agreements. Guggenheim at 4; *ABA Guide* at 127 (noting that fewer than 5 % of divorcing parents have their child's custody decided by a judge).

each parent's potential for future performance of parenting functions; the emotional needs and development of the child; the child's other relationships; the wishes of the child, if ascertainable; the parents' wishes; the amount of time each parent will be able to spend with the child after the divorce; and which parent, if given custody, will be more likely to foster a loving relationship between the child and the other parent.⁵⁹ Some states' laws also allow consideration of a parent's non-marital sexual relationships or homosexual relationships if such relationships have or are likely to adversely affect the child.⁶⁰ Many states place great importance in custody determinations on the question of who has been the child's "primary caretaker," in the belief that awarding custody to the primary caretaker will promote stability and continuity in the child's life and thus promote the child's well-being.⁶¹ A court may award sole custody (where the child resides with one parent and that parent determines the child's upbringing), joint legal custody (where both parents determine the child's upbringing but the child resides with one parent) or joint physical custody (where both parents determine the child's upbringing and the child lives with each for a portion of the year).⁶² In the 1980's, joint custody became the preferred custody arrangement in many US states; by 1996 over forty states had laws authorising joint or shared custody.⁶³ In all US states, a non-custodial parent is entitled to visitation rights. A custodial parent who opposes visitation must prove that visitation would seriously endanger the mental, physical, moral or emotional health of the child; otherwise, visitation is presumed.⁶⁴

3. CANADA ⁶⁵

Prior to 1968, Canadian divorce law varied from province to province. Adultery was the sole ground for divorce in most provinces, except in Nova Scotia where cruelty was an additional ground.⁶⁶ At that time, spousal support was typically only an obligation that could be imposed on a guilty husband, in favour of his innocent wife. However, the Divorce Act of 1968 introduced nation-wide no-fault grounds (in addition to fault grounds) for divorce, and established equality in support rights and obligations between men and women.⁶⁷

Canada's current divorce law came into effect on 1 June 1986. This federal law sets forth the grounds for divorce (which are both non-fault and fault based) and the criteria for spousal and

⁵⁹ Guggenheim at 7-8; see *ABA Guide* at 127-35.

⁶⁰ Guggenheim at 12-13; *ABA Guide* at 132-34.

⁶¹ Guggenheim at 7-8; *ABA Guide* at 131-32.

⁶² Guggenheim at 4; *ABA Guide* at 127.

⁶³ Guggenheim at 5.

⁶⁴ Guggenheim at 8.

⁶⁵ This section is primarily based on Julien D. Payne & Marilyn A. Payne, *Introduction to Canadian Family Law* (1994) (hereinafter "Payne, *Introduction to Canadian Family Law*"). The following works were also consulted: Julian D. Payne, *Payne on Divorce* (4th ed. 1996) (hereinafter "*Payne on Divorce*"); Berend Hovius, *Family Law: Cases, Notes and Materials* (4th ed. 1996); Malcolm C. Kronby, *Canadian Family Law* (7th ed. 1997).

⁶⁶ Moreover, at that time, divorce was available in Quebec and Newfoundland only by private Act of Parliament, not by judicial decree. Payne, *Introduction to Canadian Family Law* at 6-8.

⁶⁷ *Id.*

child support and custody of and access to children on or after divorce that apply throughout Canada.⁶⁸ The standards for property distribution upon divorce fall outside of the Divorce Act, however, and are regulated by provincial or territorial legislation.⁶⁹

GROUND FOR DIVORCE

Under the 1986 law, there is one ground for divorce in Canada: "breakdown of marriage." This ground is established if (1) the spouses have lived apart for at least one year immediately preceding the divorce judgement, (2) the defendant spouse has committed adultery, or (3) the defendant spouse has treated the plaintiff spouse with physical or mental cruelty of such a kind as to render continuation of the marriage intolerable.⁷⁰ The first criterion is a non-fault one and may be invoked by either or both spouses. It should be noted that a divorce action may be commenced before the one-year period has run, but the divorce judgement cannot be granted until it has elapsed.⁷¹ The second and third criteria, which allow a quicker divorce (without the one-year waiting period) are fault-based and are available only to the "innocent" spouse.⁷² This combination of no-fault and fault grounds puts Canada in the category of a "mixed-ground jurisdiction".

Canadian divorce law seeks to encourage reconciliation. The 1986 Act (as did the 1968 Act) requires divorce lawyers to discuss the possibility of reconciliation and to inform clients of available counselling or guidance facilities. The 1986 Act further requires lawyers to promote negotiated settlements and mediation of support and custody disputes.

The 1986 Act (again, like its predecessor) also requires that the court, before considering the evidence in a divorce case, must be satisfied that there is no possibility of reconciliation between the spouses, unless it would not be appropriate to do so under the circumstances. Moreover, the court must adjourn the proceedings if at any stage it sees a possibility of reconciliation, to give the parties the opportunity to attempt to reconcile. The court, either on its own motion or on request of the parties, may appoint a qualified person or agency to assist the parties in this attempt. However, once 14 days have passed from the date of the adjournment, the court must resume the proceeding on the application of either or both spouses. The 1986 Act and its predecessor make clear, however, that any person nominated to assist the parties in a reconciliation attempt cannot testify in any subsequent divorce proceeding, nor is evidence of any admission or communication made in a reconciliation attempt admissible in such a proceeding.⁷³

⁶⁸ However, provincial legislation governs questions of child custody and access when the parents are separated but not divorced, or if the parents have never been married.

⁶⁹ Payne, *Introduction to Canadian Family Law* at 6-8. The various provinces and territories also have legislation regulating spousal and child support which apply to claims that arise independently of divorce; such legislation may also be relied upon as corollary relief in divorce cases. See id. at 135-149.

⁷⁰ *Id.* at 111.

⁷¹ The 1968 law, by contrast, required a separation period of not less than three years immediately preceding the filing of the petition. If the petitioner was the deserting spouse (i.e. had left without the agreement of the other spouse), then a divorce petition could not be filed until after a period of at least five years had elapsed. Hovius at 160

⁷² Payne, *Introduction to Canadian Family Law* at 112-13.

⁷³ *Id.* at 103-06.

The 1986 Act sets forth four bars to divorce: collusion, connivance, condonation, and the absence of reasonable arrangements for child support. Collusion, which is an absolute bar, exists where the parties have agreed to subvert the administration of justice, for example by fabricating or suppressing evidence. Agreements between the spouses that regulate the economic and child-related consequences of a separation are not collusive, however. Connivance and condonation apply only in cases based on adultery or cruelty, and are not an absolute bar (which means that a court may grant a divorce regardless of connivance or condonation if it believes doing so is in the public interest.) Connivance occurs where the plaintiff has actively promoted or encouraged the defendant's commission of the act that is being relied upon. Condonation occurs where the plaintiff, knowing of his or her spouse's adultery or cruelty, forgives the offence and continues or resumes marital cohabitation with the spouse. However, consistent with its aim of encouraging spousal reconciliation, the Act provides that the resumption of cohabitation during a time period (or periods) totalling less than 90 days will not be considered condonation. Finally, in all types of divorce cases the court must satisfy itself that reasonable arrangements, in light of the circumstances of the case, have been made for the support of any children of the marriage. If such arrangements are not present, the court cannot grant a divorce until they are made.⁷⁴

CONSEQUENCES OF DIVORCE

Division of property

As mentioned above, questions of the division of property upon divorce in Canada are governed by provincial and territorial law. Every province and territory in Canada has legislation establishing property sharing rights between spouses upon divorce. The statutes vary widely, however, and it is beyond the scope of this project to analyze all of them. For our purposes, it is sufficient to state that these laws were passed to ameliorate the hardships arising from the doctrine of separate property (whereby each spouse retained his or her own property in a divorce) and to ensure that each spouse would receive a fair share of the assets accumulated during the marriage. In general, the statutes address the questions of what property is subject to division, how that property is to be valued, and how it is to be shared. Some distinguish between "family" assets used by both spouses and "business" or "commercial" assets used by one. Most of these laws exclude pre-marital assets and certain post-marital assets (such as third party gifts or inheritances) from division. Most give the court the power to divide specific assets, although in at least one province (Ontario) it is the value of the property, as opposed to the property itself, that is shared. In general, under these statutes, the division of property upon divorce is not dependent on which spouse owned or acquired the assets.⁷⁵

Custody and access

Under the 1986 Act, a court may grant "custody of, or access to, any or all children of the marriage to any one or more persons." As a result, split custody and joint custody are options, as is awarding custody of or access to the children to third parties, such as grandparents. However, third party applications for custody or access can only be brought with permission from the court.⁷⁶

The 1986 Act provides that decisions as to custody or access must be based on the best interests of the child. The court has broad discretion to grant custody or access for a definite

⁷⁴ Id at 113-116.

⁷⁵ Id at 151-52. Canada does not appear to utilise marital property concepts which are analogous to the Roman-Dutch notions of in or out of community of property.

⁷⁶ Id at 125-26.

or indefinite period and subject to whatever terms, conditions or restrictions it thinks are appropriate given this standard.⁷⁷ The court cannot, however, take into consideration the past conduct of a person unless the conduct is relevant to that person's ability to act as a parent.⁷⁸ According to one Canadian commentator, the best interests of the child standard is "an all-embracing concept that encompasses the physical, emotional, intellectual and moral well-being of the child. The court must look not only at the day to day needs of the child but also to the longer term growth and development of the child."⁷⁹ Three factors have been identified as important in Canadian cases where either parent is capable of raising the child (which is probably true in most cases): (1) a desire to preserve the status quo when the children are living in a stable home environment; (2) a strong inclination to grant custody to the mother in circumstances where she was the primary caregiver during the marriage; and (3) a disinclination to split siblings between the parents.⁸⁰

In addition, in making a custody or access decision, the court is required under the 1986 Act to "give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child, and for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact." In a similar vein, the Act entitles a spouse who is granted access to a child to make enquiries and to be given information concerning the health, education and welfare of the child, unless the court orders otherwise. The purpose of this is to facilitate the non-custodial parent's meaningful involvement in the making of decisions concerning the child.⁸¹

The Act provides that a court may require the person granted custody of a child to give at least thirty days advance notice of any change of residence to any person who has been granted access to the child.⁸²

As of May 1999, a parliamentary committee had recommended reforms to the custody and access provisions of the 1986 Divorce Act, but the Minister of Justice had postponed the amendments for three years to allow for a new round of public consultations.⁸³ According to newspaper reports, the reforms proposed by the committee would replace the concept of one parent with sole custody with the idea of "shared parenting" and would amend the act to specify that both parents are entitled to a close and continuing relationship with their children after a divorce. Shared parenting would entail giving divorced mothers and fathers equal legal right to be involved in the raising of their children, although not necessarily through a 50/50 time split. The government, according to the Minister of Justice, also seeks to move

⁷⁷ Id at 126-27.

⁷⁸ Id at 128.

⁷⁹ Id at 127.

⁸⁰ Id.

⁸¹ Id at 125-26.

⁸² Id at 126. Orders as to custody or access may be modified or terminated by the court in the event of a material change of circumstances. Id at 128-29.

⁸³ See "Ontario: Ottawa threatened with lawsuit over Divorce Act," *The Globe and Mail*, 20 July 1999; Tyler McMurchy, "NSPA turning up heat seeking changes to the Divorce Act," *Leader-Post*, 17 May 1999; Chris Cobb, "Group lobbies for speedy divorce reform," *Saint John Times Globe*, 17 May 1999; Sheldon Alberts & Richard Foot, "Ottawa buries plan for equal parenting rights," *National Post*, 11 May 1999; Robert Fife, "Liberal MPs lash back at divorce law 'attack': Minister's Op-Ed article," *National Post*, 21 November 1998.

child custody law away from outdated concepts of "child ownership," but does not endorse the term "shared parenting." The Minister also expressed concern that any amendments to the custody provisions in the federal Divorce Act be made in tandem with amendments to the provincial laws governing custody in cases where the parents are separated pending divorce or were never married, so that all laws relating to custody are consistent. The Minister also stated that the government would consider whether to strengthen Criminal Code penalties to discourage false allegations of abuse during custody proceedings and whether the reformed legislation should specify a role for grandparents.

Child maintenance

Child support may be ordered in a lump sum or in periodic payments, for a definite or indefinite period or until the occurrence of a particular event. The 1986 Divorce Act sets forth the following factors that a court must consider in determining whether to award child support (or spousal support): "the condition, needs, means and other circumstances of each spouse and of any child of the marriage for whom support is sought, including (a) the length of time the spouses cohabited; (b) the functions performed by the spouses during cohabitation; and (c) any order, agreement or arrangement relating to support of the spouse or child." Moreover, the Act expressly provides that, in determining support, "the court shall not take into consideration any misconduct of a spouse in relation to the marriage."⁸⁴

A divorcing spouse may be ordered to pay child maintenance even if he or she is not the child's biological parent, if he or she stands "in the place of a parent."⁸⁵ Maintenance may be ordered in favour of an adult child who is not self-sufficient because of "illness, disability or other cause."⁸⁶

Under the 1986 Act, child support orders have the following objectives: they should recognize (1) that the spouses have a joint financial obligation to support their children and (2) that this obligation should be apportioned between the spouses in accordance with their respective abilities to contribute to the children's support.⁸⁷

The enforcement of a child support order is governed by provincial and territorial legislation, as discussed above. Enforcement of spousal support orders, even those granted in a divorce action, is a matter governed by territorial and provincial legislation, not by the Divorce Act. Generally, the enforcement of such orders is not by the spouse or parent to whom the money is payable. Rather, support and maintenance orders are registered with a provincial or territorial agency which monitors the payments and enforces orders that are in default. At least one province also has a system whereby spousal and child support payments are deducted by the employer from the employee's paycheque and forwarded to the relevant enforcement office.⁸⁸

A child support order (or an order for spousal support) may be varied or terminated, upon application of either former spouse, upon a showing that there has been a substantial, unforeseen change of circumstances that renders the continued operation of the order unfair or unreasonable. In making the initial order, the court may provide that the payments are to be

⁸⁴ Payne, *Introduction to Canadian Family Law* at 117.

⁸⁵ Id at 121.

⁸⁶ Id at 120.

⁸⁷ Id.

⁸⁸ Id at 122.

adjusted annually in accordance with a designated cost of living index, to avoid the need for variation applications on the basis of increased costs of living.⁸⁹

Recently, the Canadian federal government promulgated guidelines to be used in the calculation of child support payments. These guidelines came into effect on 1 May 1997, and were intended to ensure greater consistency in awards of child support. The guidelines contain a chart for each Canadian province. The charts specify amounts of child support, based on the number of children being supported and the income range of the family. In addition to the amount specified, a judge may consider adding on additional amounts for childcare expenses, extraordinary medical or health-related expenses, extraordinary private school expenses or other education-related expenses, post secondary education expenses, and/or extraordinary expenses for extracurricular activities. The guidelines will not apply, however, if their application would cause undue hardship, if one spouse earns over Can\$150,000 per year, if custody of the children is shared, or if the child being supported is over 18 years of age.⁹⁰

Spousal maintenance

Spousal support is available to either spouse, regardless of gender. The 1986 Act provides that spousal support, like child maintenance, may be made either in a lump sum or through periodic payments. Spousal support, if ordered, is usually ordered on a periodic basis. The Act further provides that the court may grant a support order for either a definite or indefinite period, or until the happening of a specified event, such as the remarriage of the recipient.⁹¹ The court's decision to award spousal support, or to vary or terminate such orders, is based on the standards that are applicable to child maintenance orders (discussed above).

The 1986 Act specifies four objectives for spousal support orders: (1) to recognize any economic advantages or disadvantages arising from the marriage or its breakdown; (2) to apportion between the spouses any financial consequences arising from child care; (3) to relieve any economic hardship arising from the marriage breakdown; and (4) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.⁹²

Like orders of child support, the enforcement of a spousal support order is governed by provincial and territorial legislation, as discussed above.

PROCEDURE

Affidavit evidence in uncontested cases

Section 25(2)(b) of the 1986 Divorce Act allows the judicial rule-making body for the federally-appointed court in each province to make rules "respecting the conduct and disposition of any proceeding under this Act without an oral hearing."⁹³ Pursuant to this

⁸⁹ Id at 119-120.

⁹⁰ See generally <http://www.extension.ualberta.ca/legalfaq/nat/>.

⁹¹ Payne, *Introduction to Canadian Family Law* at 116-117.

⁹² Id at 118-19.

⁹³ Since the Divorce Act is a Canadian federal law, only federally appointed courts have jurisdiction over divorce matters. These courts are as follows: in the provinces of Alberta, New Brunswick, Manitoba, and Saskatchewan, the Court of Queen's Bench; in Newfoundland, Prince Edward Island, Nova Scotia, British Columbia, and the Yukon and Northwest Territories, the Supreme Court trial division; in Ontario, the Ontario Court (General Division); and in Quebec, the Superior Court. Canada also has "family courts," but these are divisions of courts set up and administered by the

authorization, the courts hearing divorces in several provinces have allowed the use of affidavit evidence instead of oral testimony, in uncontested cases. This is a major change from the Divorce Act of 1968, which required a trial before a judge in all divorce cases.⁹⁴ For example, since 1988, the Alberta Court of Queen's bench has allowed applications for divorce in uncontested proceedings without appearance by parties or counsel (referred to as "desk divorces.") Such applications are made to judges of the court, who may grant or deny the application, request further information, or require appearances in chambers.⁹⁵ By 1991, the federal courts in all provinces except Newfoundland had adopted rules allowing for "desk divorces."⁹⁶

4. SOUTH AFRICA

Like the countries discussed above, South Africa reformed its old, fault-based divorce law to allow for non-fault divorce in 1979. However, unlike the countries discussed above, but like Namibia, South Africa is a country in which civil law marriages and customary law marriages co-exist.

In 1998, South Africa legally recognised customary law marriages⁹⁷ and made them subject to the same grounds and procedures for divorce as apply to civil marriages. The Recognition of Customary Marriages Act 120 of 1998 states that "[a] customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage."⁹⁸ It also provides, however, that nothing in this rule "may be construed as limiting the role, recognised in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by a court."⁹⁹

Before 1 July 1979, South African divorce law was almost identical Namibia's current divorce law. Divorce was permitted on four grounds: adultery, malicious desertion, incurable insanity for not less than 7 years, and imprisonment for at least 5 years after the defendant spouse has been declared a habitual criminal.¹⁰⁰ To obtain a divorce under the old South

provinces which do not have jurisdiction over divorce matters. See <http://www.extension.ualberta.ca/legalFAQs/nat/di-act07.htm/>

⁹⁴ The 1968 Act stated that a divorce decree could be granted only "after a trial which shall be by a judge, without jury." The 1986 Act, by contrast, states that divorces shall be granted only "by a judge of the court without a jury," thus eliminating the requirement that a trial be held. Hovius at 166.

⁹⁵ *Payne on Divorce* at 530-31.

⁹⁶ Hovius at 166.

⁹⁷ The Recognition of Customary Marriages Act "requires" that customary marriages be registered, but imposes no penalty for the failure to do so. The Act states that "[t]he spouses of a customary marriage have a duty to ensure that their marriage is registered" within a certain time period either after the commencement of the act or after the marriage takes place, Recognition of Customary Marriages Act 120 of 1998, sections 4(1) & (3), but also states that "[f]ailure to register a customary marriage does not affect the validity of that marriage." *Id.*, Section 4(9).

⁹⁸ *Id.*, section 8(1).

⁹⁹ *Id.*, section 8(5).

¹⁰⁰ Cronje at 252; Wille's *Principles of South African Law* (8th edition, 1991) (hereinafter "Wille's Principles") at 183; Hahlo, *The South African Law of Husband and Wife* (5th edition, 1985) at 330.

African law, one party had to prove that the other party was at fault.¹⁰¹ Upon the divorce, in the absence of a maintenance agreement between the parties only the innocent spouse could seek a spousal maintenance order from the court, and if the innocent spouse applied for a forfeiture order, the guilty spouse forfeited all the benefits of the marriage.¹⁰²

In its 1978 report on divorce law reform, the South African Law Reform Commission stated that “the law of divorce should make it possible for a marriage that has failed to the extent that it no longer exists as a marriage in the true sense of the word, to be dissolved in such a way as to result in the minimum of disruption for the parties and their dependants and to ensure that the interests of minor children are put first.”¹⁰³ In the Commission’s opinion, the object of divorce law reform should be “to lay down realistic rules for the dissolution of marriages. By realistic rules is meant rules which are in keeping with present-day needs, which take due account of the interests of all those involved and of society, and which do not lose sight of society’s conception of what is reasonable and just”.¹⁰⁴

In 1979, based on the Commission’s recommendations, South Africa’s divorce law was amended to allow for divorces to be granted based on two grounds: the irretrievable breakdown of the marriage, or the mental illness or continued unconsciousness of a party to the marriage.¹⁰⁵ Adultery, malicious desertion and imprisonment as a habitual criminal were thus abolished as separate divorce grounds, although, as discussed below, such conduct or occurrences still may constitute evidence of irretrievable breakdown. In addition, the rules regarding the division of property, maintenance and the interests of children were revised. All of these changes are discussed in detail below.

GROUND FOR DIVORCE

Irretrievable breakdown

In 1978, the Law Reform Commission identified a number of reasons that warranted reform of South Africa’s divorce law, most of which were objections to the guilt principle. First, fault-based divorce law unrealistically assumes that only one spouse is to blame for the marriage breakdown, when the reality is that in most cases both are to blame. Also, requiring one spouse to prove the guilt of the other often increases the bitterness between them, and requires the disclosure of intimate details of the marriage that can be humiliating to the spouses and harmful to their children. Such a requirement also results, in cases where the marriage breakdown is not due to either spouse’s guilt, in the spouses’ colluding to fabricate evidence on which a divorce action can be based. Furthermore, the guilt principle conflicts with the idea of reconciliation. The Commission also believed that the law was too rigid, in that it gave a court no discretion to either refuse a divorce where the court believed reconciliation was possible, or to grant a divorce where fault were not proved if the court believed that further cohabitation would be intolerable or dangerous to the plaintiff. Also, in fault-based divorce, only the “innocent” spouse may sue for divorce, which means that some marriages which are in fact dead are not dissolved.¹⁰⁶

¹⁰¹ Cronje at 253; Wille’s Principles at 184.

¹⁰² Id.

¹⁰³ South African Law Commission, *Report on the Law of Divorce and Matters Incidental Thereto*, RP 57/1978 (hereinafter “SALC”) at 3.

¹⁰⁴ Id at 4, 35.

¹⁰⁵ Divorce Act 70 of 1979, section 3; see Hahlo 5th edition at 330-31.

¹⁰⁶ SALC at 6-10.

In determining what should replace the guilt principle, the Commission considered whether mutual consent of the spouses should be a ground for divorce.¹⁰⁷ Most respondents to the Commission's questionnaire on divorce reform did not believe that consent should be a ground for divorce, and the Commission agreed. The Commission stated:

*The objections that are levelled against the granting of divorce on the ground of the consent of the spouses are, in the first place, that this would detract from marriage as a social institution. Marriage is not just a private contract between two persons which contract is capable of being terminated by mutual agreement. If this were so, many people would contract trial marriages. Society, however, has an interest in the stability of marriages and must ensure that marriages are not dissolved for insufficient reasons. It would, moreover, be extremely difficult to determine whether a spouse's consent to the dissolution of a marriage has been given voluntarily. Finally, it must be pointed out that in countries where the consent of a spouse is a ground of divorce, the divorce rate is much higher than in the countries where consent is not recognised as a ground for divorce.*¹⁰⁸

In recommending the adoption of the irretrievable breakdown of the marriage as a ground for divorce, the Commission argued that this is "a more realistic and valid basis for the dissolution of a marriage" than the existing grounds, explaining that adultery and malicious desertion are only symptoms of marriage break-down and do not on their own prove that the marriage relationship cannot be restored. The Commission elaborated:

On the one hand, irretrievable breakdown as a ground of divorce meets the need that exists for dead marriages to be dissolved, but, on the other hand, the idea that a marriage that is still viable should not be dissolved is implicit in this ground of divorce. It is not aimed at making divorce easier; rather it is aimed at restricting divorce to those cases where divorce is necessary. The accent is placed on the irretrievability of the marriage relationship and, for this reason this ground of divorce holds greater possibilities of the spouses' being reconciled than the existing grounds of divorce.

The main consideration in favour of irretrievable marriage break-down as a ground of divorce is that it is not dependent upon the guilt of a spouse. If it is evident that a marriage is no longer viable, such a marriage can be dissolved at the request of either of the spouses, regardless of whether one of them was more to blame or less to blame for the marriage breaking down. The elimination of the element of guilt creates a climate favourable to the dissolution of marriage in a more peaceable manner. Furthermore, the

¹⁰⁷ Id at 9-10.

¹⁰⁸ Id at 9. The assertion that "lenient divorce laws" lead to an increased divorce rate is contradicted by other sources. See, for example, Glendon, *Transformation* at 16 (referring to research by Max Rheinstein and others).

It should also be noted that even pre-1979 South African divorce law was criticized by commentators as having devolved in practice to allowing divorce by consent. As stated by Professor Hahlo, "the guilt principle has long been little more than polite fiction. The vast majority of all divorce actions, though dressed up as actions for divorce on the grant [sic] of malicious desertion or, more rarely, adultery, were in fact based on consent. . . . In the words of the late Professor Max Rheinstein (*Marriage Stability, Divorce and the Law* (1972) at 254), 'the strict divorce law of the books [had] become transformed into the consent divorce law of judicial practice.'" Hahlo, 5th edition, at 330 note 4. The Commission did not address whether or how this could be avoided under its proposed revised law.

*consequences of the dissolution of the marriage as regards property and the arrangements relating to the children of the marriage can be dealt with in a calmer atmosphere and in a more satisfactory manner.*¹⁰⁹

Irretrievable breakdown is defined in the 1979 Divorce Act as the situation when “the marriage relationship between the parties to the marriage has reached such a state of disintegration that [in the opinion of the court] there is no reasonable prospect of the restoration of a normal marriage relationship between them.”¹¹⁰ The Act provides three examples of situations where a court could find irretrievable breakdown: (1) if “the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;” (2) if “the defendant has committed adultery and . . . the plaintiff finds it irreconcilable with a continued marriage relationship;” or (3) if “the defendant has in terms of a sentence of a court been declared a habitual criminal and is undergoing imprisonment as a result of such sentence.”¹¹¹ These are not, however, the only situations in which a court could find that an irretrievable breakdown has occurred: the Act precedes the three examples with the phrase “without excluding any facts or circumstances which may be indicative of the irretrievable breakdown of a marriage.” Indeed, commentators have noted that South African courts have placed very little reliance on the three examples set forth in the Divorce Act in determining whether a marriage has irretrievably broken down in a particular case.¹¹²

Moreover, a court is not required to grant a divorce if one of the listed situations exists.¹¹³ In fact, the Act specifically states that “[i]f it appears to the court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings in order that the parties may attempt a reconciliation.”¹¹⁴ However, as Hahlo points out, “unlike some other legal systems, South Africa has no compulsory reconciliation procedures, nor does [its] law empower the court to

¹⁰⁹ SALC at 11.

¹¹⁰ Divorce Act 70 of 1979, section 4(1). Section 8 of the Recognition of Customary Marriages Act provides:

- (1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.
- (2) A court may grant a decree of divorce on the ground of the irretrievable breakdown of the marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

The wording of this section does not make clear whether the mental illness or unconscious ground applies separately, or as part of the concept of irretrievable breakdown.

¹¹¹ Divorce Act 70 of 1979, section 4(2); see Cronje at 258-62; Hahlo, 5th edition, at 334-42.

¹¹² Cronje at 256; Wille’s Principles at 187.

¹¹³ Cronje at 258; Hahlo, 5th edition, at 335. This does not necessarily mean, however, that a court has the discretion to deny a divorce on the ground of hardship or otherwise, even where it is satisfied that the marriage has irretrievably broken down. See Hahlo, 5th edition, at 345-47. As Corbett, J.A. stated in *Schwartz*, 1984 (4) SA 467 (A), “[i]t is difficult to visualize on what grounds a court, so satisfied [that the marriage has irretrievably broken down], could withhold a decree of divorce. Moreover, had it been intended by the legislature that the Court, in such circumstances, would have a residual power to withhold a decree of divorce, one would have expected to find in the enactment some more specific indication of this intent and of the grounds upon which this Court might exercise its powers adversely to the plaintiff.” Quoted in Hahlo, 5th edition, at 346.

¹¹⁴ Divorce Act 70 of 1979, section 4(3).

order the parties to a divorce action to submit to the ministrations of a marriage counsellor before they can proceed to divorce.”¹¹⁵ Indeed, the Law Commission expressly rejected ideas such as requiring that the parties must have been married for a certain period of time before a divorce action can be commenced, requiring a “cooling-off period” between the date of the summons and the date of divorce, or requiring the parties to prove that they have tried in earnest to reconcile.¹¹⁶

The Law Commission also specifically refused to recommend the adoption of a clause, like those found in some European countries’ divorce laws, allowing a court the discretion to deny a divorce, despite the irretrievable breakdown of the marriage, on the ground of hardship where dissolution of the marriage is against the wishes of the defendant.¹¹⁷ The Commission stated that “neither the parties concerned nor society can benefit by continuing a marriage which exists only in name and which, as a marriage in the true sense of the word, is dead. . . . [A] person should not be kept shackled to a marriage as a form of punishment for his own misconduct or because of the other party’s religious beliefs.”¹¹⁸

Mental illness or unconsciousness

In its report, the Law Commission recognised that irretrievable breakdown is a broad enough ground to include cases where the marriage has failed due to the mental illness or unconsciousness of one of the spouses. However, because it was of the opinion that such cases require special rules, it recommended that these grounds for divorce be dealt with separately – although, with respect to the ground of mental illness, the Law Commission found the pre-1979 requirements too strict.¹¹⁹

The 1979 Divorce Act sets forth specific standards that a person seeking a divorce based on his or her spouse’s mental illness or unconsciousness must meet. To obtain a divorce because of the defendant’s *mental illness*, the plaintiff must prove: (1) that the defendant has been admitted to an institution as a patient pursuant to a reception order under the Mental Health Act 18 of 1973, or is being detained as a state patient, or as a mentally ill convicted prisoner at an institution or hospital prison for psychopaths; (2) that he or she has not been unconditionally discharged from the institution or place of detention for a continuous period of at least two years immediately prior to the institution of the divorce action, and (3) that there is no reasonable prospect that he or she will be cured of his or her mental illness.¹²⁰ This last element must be proved by evidence from at least two psychiatrists, one of whom must be appointed by the court.¹²¹ The old requirement “that the plaintiff, if he is the husband of the defendant, must have been in no way to blame for the condition of the

¹¹⁵ Hahlo, 5th edition, at 343.

¹¹⁶ SALC at 19-22.

¹¹⁷ Id at 17.

¹¹⁸ Id at 34.

¹¹⁹ Id at 18-19.

¹²⁰ Divorce Act 70 of 1979, section 5(1); see Cronje at 262-63; Wille’s Principles at 189. Prior to 1979, the defendant had to be institutionalized for not less than 7 years for this ground to apply (as is still the case at present in Namibia). Hahlo, 5th edition at 349.

¹²¹ Divorce Act 70 of 1979, section 5(1)(b); Cronje at 262-63; Wille’s Principles at 189. The pre-1979 law required proof by three medical practitioners, two of whom had to be court appointed. Hahlo, 5th edition, at 350.

defendant (no doubt based on the assumption that a husband can drive his wife mad but not a wife her husband) has, commendably, been dropped.”¹²²

To obtain a divorce because of the defendant’s *continuous unconsciousness*, the plaintiff must prove: (1) that the defendant is in a state of continuous unconsciousness caused by a physical disorder; (2) that this state has lasted for a period of at least six months immediately prior to the institution of the divorce action; and (3) that there is no reasonable prospect of the defendant regaining consciousness.¹²³ Again, the last element must be proved by evidence from at least two doctors, one of whom must be a neurologist or neurosurgeon appointed by the court.¹²⁴

The Divorce Act provides special protections for persons against whom a divorce is sought on the grounds of mental illness or unconsciousness. The court may appoint an attorney to represent the defendant in the divorce proceeding, and may also order that the plaintiff pay the costs of the defendant’s legal representation.¹²⁵ The court also may require the plaintiff to provide security to protect any property or benefits to which the defendant may be entitled if the marriage is dissolved.¹²⁶ The Act also provides that an order forfeiting the benefits of the marriage cannot be entered against the defendant if a divorce is granted on the basis of mental illness or continued unconsciousness.¹²⁷

However, if a spouse is mentally ill or continuously unconscious, it is also likely that the marriage has irretrievably broken down within the meaning of the Divorce Act, a fact which has been recognised by the Law Commission and the South African courts.¹²⁸ This, in turn, has a consequence that the Law Commission certainly did not intend: a plaintiff can avoid the special provisions as to representation, security and forfeiture discussed above, and also can avoid the requirements for proving his or her case under section 5 (mental illness or continuous unconsciousness), by basing the divorce action instead on section 4 (irretrievable breakdown).¹²⁹

CONSEQUENCES OF DIVORCE

While fault is no longer relevant to a South African court’s determination of whether a divorce should be granted under the 1979 Divorce Act, the court may take the spouses’ conduct into account in determining how to divide the marital property and whether to award spousal maintenance.¹³⁰ However, fault is much less important than it was under the pre-

¹²² Hahlo, 5th edition, at 350.

¹²³ Divorce Act 70 of 1979, section 5(2).

¹²⁴ Id, section 5(2)(b); Cronje at 263; Wille’s Principles at 189.

¹²⁵ Divorce Act 70 of 1979, section 5(3); Cronje at 264; Wille’s Principles at 189; Hahlo, 5th edition, at 350-51.

¹²⁶ Divorce Act 70 of 1979, section 5(4); Cronje at 264; Wille’s Principles at 189; Hahlo, 5th edition, at 350-51.

¹²⁷ Divorce Act 70 of 1979, section 9(2); Cronje at 164; Wille’s Principles at 189; Hahlo, 5th edition, at 350-51.

¹²⁸ South African courts have held that even where the marriage breakdown was due to mental illness or continuous unconsciousness, a divorce decree can be granted on the ground of irretrievable breakdown.

¹²⁹ Hahlo, 5th edition, at 351.

¹³⁰ Cronje at 265.

1979 law; it is now only one of many factors that is considered in determining the financial consequences of a divorce.

Division of property

Marital property regimes in South Africa

In South African law, the way property is divided in divorces where the parties have not come to a written agreement on the subject depends on whether the marriage was in or out of community of property and, if the latter, whether the accrual system applies.¹³¹ The default system for all marriages in South Africa is in community of property, and marriages which are out of community of property automatically apply the accrual system unless there is an express agreement between the parties not to do so. Most civil law marriages in South Africa are in community of property, which means that the husband and wife are co-owners of undivided half-shares of all the assets they possess when they are married and all the assets they acquire during the marriage.¹³² When the marriage ends, all liabilities are settled from the joint estate and the remainder is then distributed equally between the spouses.¹³³

If, however, the parties have entered into an ante-nuptial contract stating that there will be no community of property or if certain other circumstances exist, the marriage will be out of community of property.¹³⁴ While the specifics may vary depending on the ante-nuptial contract, generally in a marriage that is out of community of property, the husband and wife each retain the separate estate they possessed before the marriage, as well as everything each acquired individually during the marriage.¹³⁵ However, if the accrual system applies to a marriage that is out of community of property (and it applies to most such marriages since 1984), then upon dissolution of the marriage both parties will share in assets that were amassed due to their mutual industry during the marriage.¹³⁶ The purpose of the accrual system is to eliminate the unfairness that can arise in an out of community of property marriage where one spouse does not work outside the home during the marriage and thus does not accumulate an estate of his or her own, and then upon a divorce has no claim to a portion

¹³¹ Cronje at 265; Wille's Principles at 196.

¹³² Cronje at 201-02. The marital power that used to be exercised by the husband in marriages in community of property was abolished in South Africa by the Matrimonial Property Act 88 of 1984, (as was done in Namibia by the Married Persons Equality Act 1 of 1996).

¹³³ Id at 202.

¹³⁴ Community of property will not arise if: (1) there is a valid ante-nuptial contract excluding community of property, (2) there is a valid notarial contract entered into under the authority of the supreme court doing the same, (3) at the time of the marriage the husband was domiciled in a country where marriage in community of property is not recognized or is unknown, or (4) the marriage was between blacks and occurred before 2 December 1988 (the date of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988) and the spouses did not declare jointly in writing before a magistrate, commissioner or marriage officer within one month prior to the marriage that they wished to marry in community of property. Cronje at 203.

¹³⁵ Cronje at 238.

¹³⁶ Cronje at 240. The accrual system applies to all out of community of property marriages that were concluded after the commencement of the Matrimonial Property Act 88 of 1984 (which occurred on 1 November 1984), unless the parties' ante-nuptial contract expressly provides that the accrual system shall not apply. Cronje at 239-40.

of the other spouse's estate, despite the direct or indirect contributions she or he made to its growth.¹³⁷

Pursuant to the Recognition of Customary Marriages Act, the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law.¹³⁸ However, a customary marriage entered into after the commencement of the Act in which a spouse is not a partner in any other customary marriage will be in community of property, unless the spouses expressly agree otherwise in an ante-nuptial contract.¹³⁹ If, after the commencement of the Act, a husband already in a customary marriage wishes to enter into another customary marriage with another woman, he must apply to the court for approval of a written contract regulating the future matrimonial property system of his marriages.¹⁴⁰ Finally, the Act provides that if two spouses already in a customary law marriage contract a civil law marriage with each other, their marriage will be in community of property unless they specifically agree otherwise in an ante-nuptial contract.¹⁴¹

Forfeiture of benefits

South African courts have the power to affect the distribution of property upon divorce by a forfeiture order. Under the Divorce Act, when a divorce is granted on the ground of irretrievable breakdown, the court may order that one party forfeit all or some of the benefits that he or she has derived from the marriage in favour of the other, if the court is satisfied that the forfeiting party would otherwise be unduly benefited at the other's expense.¹⁴² The old law, by contrast, provided that the court had no discretion to deny a forfeiture order if the

¹³⁷ Cronje at 239-40.

¹³⁸ Recognition of Customary Marriages Act, Section 7(1). However, spouses in a customary marriage entered into before the Act may jointly apply to a court to change the matrimonial property regime applicable to their marriage. *Id.*, section 7(4).

¹³⁹ *Id.*, section 7(2). The Act expressly provides that the provisions of the Matrimonial Property Act of 1984 abolishing the husband's marital power apply to any customary law marriage which is in community of property. *Id.*, section 7(3).

¹⁴⁰ *Id.*, section 7(6). The Act provides that if the existing marriage is in community of property or is subject to the accrual system, the court must terminate that property system and effect a division of the property. *Id.*, section 7(a)(i). In determining whether to approve a written contract submitted under section 7(6), the court must "ensure an equitable distribution of the property" and must "take into account all the relevant circumstances of the family groups which would be affected if the application is granted." *Id.*, section 7(a)(ii) & (iii). The court also may "allow further amendments to the terms of the contract," "grant the order subject to any condition it may deem just," or "refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract." *Id.*, section 7(b). The Act provides that "all persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings. . . ." *Id.*, section 7(8). If the application is approved, each spouse must be supplied with the court order, including a certified copy of the agreement, and it must also be filed with the registrar of deeds. *Id.*, section 7(9).

¹⁴¹ *Id.*, section 10. However, the Act does not provide for the reverse – it states that "no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage." *Id.*, section 10(4).

¹⁴² Divorce Act 70 of 1979, section 9(1); Wille's Principles at 197; Cronje at 268; Hahlo, 5th edition, at 372-73. This power also exists in proceedings to dissolve a customary law marriage. Section 8(4)(a) of the Recognition of Customary Marriages Act 120 of 1998 provides that "[a] court granting a decree for the dissolution of a customary marriage has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984. . . ."

innocent party requested one, and that the forfeiture had to be total.¹⁴³ As the Law Reform Commission recognised in 1978, this rule was too rigid and failed to take into account the fact that both spouses might be to blame for the breakdown of the marriage.¹⁴⁴ However, the Commission refused to recommend scrapping the forfeiture concept altogether, although it suggested that fault be only one of several factors taken into account in forfeiture decisions, rather than the sole factor.¹⁴⁵

In determining whether to enter a forfeiture order under current law, the court must consider the duration of the marriage, the circumstances giving rise to the breakdown, and any substantial misconduct by either party, and may consider factors such as the means, financial needs and obligations of the spouses.¹⁴⁶ An order of forfeiture does not, however, mean that a spouse loses the assets which he or she brought into the marriage, but rather that he or she loses any claim that he or she has to the assets of the other spouse.¹⁴⁷ Thus, the effect of a forfeiture order depends upon the marital property system that applies to a particular marriage. For example, if the marriage was in community of property and a total forfeiture order is entered, the estate will be divided into equal shares if the forfeiting spouse has contributed more than half the joint estate, or will be divided in proportion to the parties' respective contributions if the forfeiting spouse has contributed less than the spouse in whose favour the order is made.¹⁴⁸ If the marriage is out of community of property without the accrual system, the only benefits that can be forfeited are those which have accrued or are still to accrue in terms of the parties' ante-nuptial contract.¹⁴⁹ If the marriage is out of community of property and the accrual system applies, the right to share in the accrual of the estate of a spouse is a benefit which may on divorce be ordered forfeited, either in whole or in part.¹⁵⁰

Redistribution of property

Under the Divorce Act, a court granting a divorce also has the power, upon application of one of the parties, to redistribute property between the parties in certain cases. Redistribution can only be requested if (1) the marriage either (a) occurred prior to 1 November 1984 (the effective date of the Matrimonial Property Act) and the parties' ante-nuptial agreement excludes community of property and the accrual system or (b) was entered into under section 22(6) of the Black Administration Act 38 of 1927 before the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, and (2) the parties have not entered into an agreement concerning the division of their assets.¹⁵¹

¹⁴³ Wille's Principles at 197.

¹⁴⁴ SALC at 8.

¹⁴⁵ Id at 31-32.

¹⁴⁶ Divorce Act 70 of 1979, section 9(1); Wille's Principles at 197; Cronje at 267; Hahlo, 5th edition, at 374. It should be noted that this provision provides that only "substantial misconduct" may be taken into account when considering forfeiture, whereas any conduct relevant to the breakdown of the marriage may be considered in determining maintenance. See Hahlo, 5th edition, at 358.

¹⁴⁷ Cronje at 266.

¹⁴⁸ Wille's Principles at 198; Hahlo, 5th edition, at 379, 383.

¹⁴⁹ Wille's Principles at 198; Hahlo, 5th edition, at 383.

¹⁵⁰ Wille's Principles at 198; Hahlo, 5th edition, at 384-85.

¹⁵¹ Divorce Act 70 of 1979, section 7(3); Cronje at 269-70; Wille's Principles at 198-99. As explained above, civil marriages between blacks that were entered into before 2 December 1988 were out of community of property unless the parties jointly declared in writing to an official within a month before the marriage that they wished to marry in community of property.

In such cases, the court may order that all or part of one spouse's assets be transferred to the other spouse if the applicant spouse contributed directly or indirectly during the marriage to the maintenance or increase of the other party's estate, and if the court is satisfied that, because of this contribution, redistribution would be just.¹⁵² This contribution may have been made by the rendering of service, the saving of expenses which would otherwise have been incurred, or in any other manner.¹⁵³ In determining whether to order a transfer, the court must also consider, in addition to the applicant's contribution to his or her spouse's estate, the means and obligations of the parties, any donations made by one spouse to the other during the marriage or still owing under a ante-nuptial contract, any forfeiture order that has been made, or any other factor which the court deems relevant.¹⁵⁴

A 1992 amendment to the Divorce Act provides that where a court is dissolving a marriage in which the property distribution issue is governed by the law of a foreign state, the court may order the transfer of assets from one spouse to the other if the court of the foreign state has that power.¹⁵⁵

Alternatively, the divorcing parties, may agree in writing as to the division of the property and such an agreement may be made a court order by the court granting the divorce.¹⁵⁶ If such an order is made, it supersedes any prior agreement or order.¹⁵⁷ Such an order may be modified by the court if the parties agree to modify their arrangement; however if the parties do not so agree the court has no power to vary the order.¹⁵⁸

Guardianship, custody and access

One major flaw of pre-1979 law identified by the Law Reform Commission was that it did not adequately protect the interests of the children affected by divorce. To remedy this, the Commission made the following recommendations: First, it suggested the enactment of a rule that no decree of divorce could be granted until the court is satisfied that the arrangements made for the children are satisfactory or the best that can be made under the circumstances. It also recommended that courts be given the power to order, if they deem it necessary, that there be an investigation in order to establish what is in the best interests of the children or that the children be separately represented in the proceeding. The Commission, however, rejected the idea that welfare investigations into the children's interests should be made compulsory in all cases.¹⁵⁹

¹⁵² Divorce Act 70 of 1979, section 7(4); Cronje at 269-70.

¹⁵³ Divorce Act 70 of 1979, Section 7(4); Cronje at 271; Wille's Principles at 199.

¹⁵⁴ Divorce Act 70 of 1979, section 7(5); Cronje at 271; Wille's Principles at 200.

¹⁵⁵ Divorce Act 70 of 1979, section 7(9), as amended by the Divorce Amendment Act 44 of 1992; Cronje at 273.

¹⁵⁶ Divorce Act 70 of 1979, section 7(1); Hahlo at 385. Because the court's power to make the agreement between the parties into an order of court is discretionary, it could presumably refuse to do so if the agreement was unconscionable in some respect.

¹⁵⁷ Hahlo, 5th edition, at 386.

¹⁵⁸ Id.

¹⁵⁹ SALC at 37; see also id at 28-30.

Following on the Commission's recommendations, under current South African law a divorce decree dissolving either a civil or a customary marriage may not be granted unless the court is satisfied that a satisfactory arrangement, or at least the best possible arrangement under the circumstances, has been made for the welfare of any minor or dependent children of the marriage.¹⁶⁰ The court may make whatever order it deems appropriate, or it may make an agreement of the parties into a court order if it finds the agreement to be in the best interests of the children. To assess the best interests of the children, the court may cause any investigation it deems necessary to be carried out, may order any person to appear before it and may order a party or the parties to pay the costs of the investigation and appearance.¹⁶¹ The court also may appoint a lawyer to represent a child in the divorce proceedings, and may order a party or the parties to pay for the cost of this representation.¹⁶²

Either at the time of the divorce or thereafter, the court may award guardianship or sole guardianship to either one of the parents upon a showing that it is in the best interests of the child.¹⁶³ Under the Guardianship Act 192 of 1993, both parents have equal guardianship of their children; therefore guardianship is commonly awarded to both parents.¹⁶⁴

Under the Divorce Act, the court may also award custody or sole custody of a minor child to one of the parents if it is shown that it is in the child's best interests to do so.¹⁶⁵ The court usually will specify in the divorce order when the non-custodial parent will be entitled to visit with the children; if, however, the court does not do so the non-custodial parent has a right under common law to visit the children at reasonable times and places.¹⁶⁶ The court may also order that the custodial parent is forbidden to remove the child or children from the court's jurisdiction.¹⁶⁷ Alternatively, the court may award joint custody to both parents.¹⁶⁸

¹⁶⁰ Divorce Act 70 of 1979, section 6(1); Recognition of Customary Marriages Act 120 of 1998, section 8(3). Hahlo notes that "[t]he inclusion of dependent children is an innovation. Satisfactory arrangements must be made not only for minor children but also for major children who, on account of invalidity, chronic illness or unemployability, remain dependent on parental support." Hahlo, 5th edition, at 348.

¹⁶¹ Divorce Act 70 of 1979, section 6(2); Wille's Principles, at 201; Cronje at 292.

¹⁶² Divorce Act 70 of 1979, section 6(4); Wille's Principles, at 201; Cronje at 292.

¹⁶³ Divorce Act 70 of 1979, sections 6(3) and 8(1); Cronje at 293; Hahlo at 387; Recognition of Customary Marriages Act 120 of 1998, sections 8(4)(a) & (d). In addition, the court may order that on the death of the parent awarded sole guardianship, a person other than the surviving parent shall be the child's guardian (either jointly with the surviving parent or to the exclusion of him or her). Divorce Act 70 of 1979, section 6(3); Hahlo, 5th edition, at 387-88.

An order regarding guardianship or custody made under section 6(3) of the Divorce Act may be rescinded or varied at any time by the court that granted the order, or another court with jurisdiction under the Divorce Act, upon a showing of sufficient reason for the change. Wille's Principles at 204-05; Hahlo at 403-04. An order as to custody or guardianship terminates when the child concerned reaches majority or dies, or when the spouse with custody or guardianship dies or is deprived of custody or guardianship by a court order. Hahlo, 5th edition, at 405.

¹⁶⁴ Cronje at 293.

¹⁶⁵ Divorce Act 70 of 1979, section 6(3); Cronje at 293; Hahlo at 387. See *McCall v McCall* 1994 (3) SA 201 (C) for criteria.

As noted above, *Ex Parte Critchfield and Another* 1999 (3) SA 132 (WLD) and *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O) address the issue of "maternal preference".

¹⁶⁶ Cronje at 294; Wille's Principles at 205; Hahlo at 397-98.

¹⁶⁷ Cronje at 294; Hahlo, 5th edition, at 400-01.

However, recent South African cases show that this is still a fairly controversial approach.¹⁶⁹ In exceptional cases, the court may deprive both parents of custody, and place the children in the custody of a third party.¹⁷⁰

Family Advocates

The procedure for deciding upon issues relating to children in divorce cases were supplemented in 1990 with the introduction of the Family Advocate, a position created by the Mediation in Certain Divorce Matters Act 24 of 1987 (which came into force only in 1990). Either party or the court may request that a Family Advocate conduct an inquiry and furnish a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage.¹⁷¹ The Family Advocate may also apply to the court for permission to make such an inquiry if he or she has not been requested to do so. If the Family Advocate has made an inquiry, the court cannot grant the divorce decree until it has considered the family advocate's report.¹⁷²

One or more Family Advocates have been appointed for each division of the Supreme Court. According to a study by Felicity Kaganas and Debbie Budlender of the Law, Race and Gender Research Unit of the University of Cape Town, Family Advocates are usually qualified advocates with experience in family disputes who are drawn from the public service.¹⁷³ The Family Advocates are assisted by Family Counsellors, most of whom are experienced social workers. Some retired teachers and ministers also are part-time Family Counsellors.

According to Kaganas and Budlender, the Family Advocate and Family Counsellor "work as an interdisciplinary team to promote the welfare of children whose parents divorce: In essence they are the child's legal team. The Family Advocate is thus the child's advocate and the Family Counsellor is the Family Advocate's expert witness who would appear as such should the matter go to trial."¹⁷⁴ Kaganas and Budlender describe the family advocate as having three roles: (1) to monitor all cases involving children to determine whether an inquiry is necessary (even if one has not been requested by a party or the court); (2) to evaluate what is best for the children and advise the court accordingly; and (3) to seek to settle cases on the terms most favourable to the children's welfare.¹⁷⁵

¹⁶⁸ Cronje at 293.

¹⁶⁹ As noted above, relevant sources for this point are *Corris v Corris* 997 (2) SA 930 (WLD) and *V v V* 1998 (4) SA 169 (CPD) (both of which include surveys of recent South African decisions); see also B Clarke and B van Heerdan, "Joint Custody: Perspectives and Permutations" 112 *SALJ* 315 (1995); ID Schäfer, "Joint Custody", 104 *SALJ* 149 (1987).

¹⁷⁰ Cronje at 293; Wille's Principles at 204.

¹⁷¹ Cronje at 289. The Recognition of Customary Marriages Act provides that the Mediation in Certain Divorce Matters Act applies to the dissolution of customary law marriages. Recognition of Customary Marriages Act 120 of 1998, section 8(3).

¹⁷² Divorce Act 70 of 1979, section 6(1); Cronje at 292.

¹⁷³ Kaganas & Budlender, *Issues in Law, Race and Gender 1: Family Advocate* (Law Race and Gender Research Unit, UCT, 1996).

¹⁷⁴ Id at 3-4 (quoting J. McCurdie "The Interface Between the Legal and Mental Health Professions with Particular Reference to the Office of the Family Advocate", 6 *Southern African Journal of Child and Adolescent Psychiatry* 12 (1994) at 13).

¹⁷⁵ Id at 4-5.

Kaganas and Budlender's study revealed a number of criticisms of the Family Advocate system, however.¹⁷⁶ They noted that it is difficult for Family Advocates to determine, from simply reviewing the papers in divorce cases, whether the proposed arrangements are consistent with or contrary to the children's best interests. They also noted that there were cases in which inquiries were not undertaken despite the presence of identified risk factors such as drug or alcohol abuse or domestic violence.¹⁷⁷ This was attributed to the fact that such allegations are common and the Family Advocate lacks sufficient resources to allow for inquiries in all such cases. They also expressed concern that the Family Advocates were not adequately examining arrangements for childcare proposed by parents, although they noted that, given widespread poverty and lack of day care facilities, in many cases there would be little point in investigating since there might well be no alternative to the arrangement proposed.

Kaganas and Budlender also noted that Family Advocates' inquiries and reports were often superficial, which they attributed to lack of necessary skills and lack of resources. They also criticised the Family Advocates for tending to resort to stereotypical ideas of mothers and fathers, as well as conservative ideas of worthiness such as religious observance, to assess parenting capabilities.

In addition, Kaganas and Budlender expressed concern that the family advocates' view of themselves as mediators and settlement facilitators, and their position as an advisor to the court, tends to increase their power over family members and to deny inequalities in power within the family. The fear is that the parties are likely to feel pressured to enter into negotiations, to reach a settlement, and to make their settlement agreement acceptable to the Family Advocate. And, as Kaganas and Budlender explain, "neither the procedure for assessment nor the process of mediation undertaken by the Family Advocate's office includes any systematic mechanism for detecting or redressing the imbalance of power that frequently exists between the protagonists in the breakdown of a relationship. The parties, without the safeguards of legal procedure and legal representation, may be left to present their case to the professionals, or to negotiate with each other, as if they are equals, while, in reality, they are not."¹⁷⁸ As Kaganas and Budlender further note, problems arising from an imbalance of power can be particularly acute in cases where there has been domestic violence (which the family advocate may not even be aware of, since allegations of violence are often not included in the pleadings). Indeed, in some cases the imbalance may be so extreme that a neutral third party such as a Family Advocate will be unlikely to be able to redress it.¹⁷⁹

In addition, Kaganas and Budlender criticise the Family Advocate's preference for giving "reasonable" (but otherwise undefined) access to the non-custodial parent as potentially dangerous to a victim of domestic violence and her children, given studies showing that the

¹⁷⁶ Id at 10-18.

¹⁷⁷ The case of *Van Vuuren v. Van Vuuren* 1993 (1) SA 163, 166 (T) identified the following factors as indicating that the Family Advocate should institute an inquiry: the form and particulars of claim suggest that there are serious problems in connection with access to the children; there is an intention to place young children under the custody and control of someone other than the mother; there is an intention to separate siblings; there is an intention to award the custody and control of a child to someone other than a parent; and/or there is an intention to make an arrangement that appears to be contrary to the child's interests. See Kaganas & Budlender at 7.

¹⁷⁸ Id at 14.

¹⁷⁹ In this vein, Kaganas and Budlender note American, British and Australian views that mediation is inappropriate in cases of prior or present domestic violence, at least in cases where the victim's ability to negotiate or assert her point of view is impaired.

time when children are handed over from one parent to the other is a particularly dangerous time.

In another study, Sandra Burman and Fiona McLennan of the Centre for Socio-Legal Research, University of Cape Town, also noted problems with the operation of the Family Advocate.¹⁸⁰ Attorneys practising in the family law area complained about delays in obtaining reports (an average wait of between 3.5 and 5.5 months) and about the inconsistent quality of the investigations that were done. The reasons given for these problems included a lack of personnel and resources, problems in office administration, and a need for on-going training in the Family Advocate office itself, as well as larger societal problems, such as the difficulty in contacting the office's many poor, rural clients. Attorneys also complained that there was neither a procedure for re-opening an enquiry if the parties disagreed with the Family Advocate's report nor a follow-up mechanism to ensure that the eventual court order is properly implemented.¹⁸¹

In addition, Burman and McLennan's interviews with Family Advocates themselves revealed their view that they were making "innovative" and "creative" custody and access recommendations, but this approach was strongly criticised by many of the family law attorneys. For example, the Cape Town Family Advocate's office is of the view that even an extremely unsuitable parent, such as a sexual abuser, should not have access to his or her children withheld completely, but rather should have visits that are supervised by family members or the welfare services. This was objected to for several reasons: the lack of a mechanism to ensure that the access was in fact being supervised; the fact that, if the other parent were to be the supervisor, the situation was no different than that in which the original abuse took place; the argument that supervised access was artificial and not conducive to the child's development of a normal relationship with the parent; and finally, the view that access should not be granted under any conditions to child abusers.¹⁸²

Interestingly, the Burman and McLennan study discovered that the Cape Town Family Advocate was involved in investigating custody matters arising from customary marriages and unrecognised religious marriages even before customary marriages were recognised in South Africa, although they could only assist in such matters on a *pro amico* basis if their time permitted.¹⁸³ (Now that such marriages are legally recognised, these cases have been added to the Family Advocate's already large statutorily-mandated caseload.) Burman and McLennan also discovered that the office was becoming involved in disputes relating to access by a father to his illegitimate child, even though the Mediation of Certain Divorce Matters Act does not provide for this, and was "playing a facilitating role in assisting the courts to change the common law" rule that such fathers do not have access rights.¹⁸⁴

Another commentator, Anne Palmer, complains that in many cases only lip service is paid to the work of the Family Advocate. The relevant regulations require that parties to a divorce must fill out a questionnaire for the use of the Family Advocate. However in practice, only the barest minimum of information is provided in many cases. For example, the plaintiff in a divorce action will be asked to state where the children are to live, to furnish particular of the

¹⁸⁰ Sandra Burman and Fiona McLennan, "Providing for children? The Family Advocate and the legal profession", *Acta Juridica* 1996 at 69.

¹⁸¹ *Id* at 76-78.

¹⁸² *Id* at 75.

¹⁸³ *Id* at 73.

¹⁸⁴ *Id* at 75.

accommodation, to explain what other person are living there and to give details about the persons who will actually look after the children. The answer to this compound question may be given in summary fashion, such as “with the mother” on ‘in the matrimonial home’, leaving the Family Advocate in the dark about relevant details. Since the defendant in a divorce action is usually not present in court and it not required to file any reply to the questionnaire filled out by the plaintiff, the information provided by the plaintiff may be uncontradicted.¹⁸⁵

In an effort to grapple with some of the shortcomings of the present procedure, one court case has expanded on the provisions of the legislation concerning the Family Advocate by outlining the circumstances where an investigation should be instituted: (a) where the questionnaire filled in by the plaintiff indicates that there are problematic issues; (b) where there is an intention to place young children in the custody of someone other than their mother; (c) where there is an intention to separate siblings; (d) where there is an intention to place children in the custody of someone other than their parents; (e) where any proposed custody or access arrangement appears on its face not to be in the best interests of the children.¹⁸⁶

Child maintenance

The principles governing child maintenance in South Africa are virtually identical to those in Namibia. Even after a divorce, both parents still have a duty to support their children according to their respective means.¹⁸⁷ A court granting a divorce may make any order it deems appropriate regarding the maintenance of children of the marriage, or it may incorporate an agreement as to maintenance between the parties into its order of divorce if the court determines that the agreement is in the children’s best interests.¹⁸⁸ In determining the amount to be paid, usually by the non-custodial parent to the custodial parent, the court considers the child’s age, state of health, and educational and other needs, and the financial and social positions of the parents.¹⁸⁹ If the non-custodial parent does not have the means to support the child, however, the custodial parent will not be entitled to maintenance.¹⁹⁰ Unlike the case with spousal maintenance, the failure to seek or receive maintenance for children when the divorce is granted does not preclude a subsequent order.¹⁹¹

In line with international trends, a new Maintenance Act which was recently passed in South Africa strengthens enforcement mechanisms considerably. Maintenance orders can be accompanied by orders for the attachment of wages from the beginning. Non-compliance can be dealt with civilly by means of execution against property or attachment of wages or debts, as well as through criminal prosecution.¹⁹²

¹⁸⁵ Anne Palmer, “The best interests criterion: An overview of its application in custody decision relating to divorce in the period 1985-1995”, *Acta Juridica* 1996 at 104-105.

¹⁸⁶ *Van Vuuren v Van Vuuren* 1993 (1) SA 163 (T) at 166F-H.

¹⁸⁷ Cronje at 295; Wille’s Principles at 206.

¹⁸⁸ Wille’s Principles at 206; Cronje at 296.

¹⁸⁹ Wille’s Principles at 207; Cronje at 295.

¹⁹⁰ Cronje at 295.

¹⁹¹ Hahlo, 5th edition, at 408.

¹⁹² Maintenance Act 99 of 1998, section 16(2), 26-30, 40.

Spousal maintenance

A divorce ends the former spouses' reciprocal duty to support one another, and also terminates any existing court order requiring that maintenance be paid to one of the spouses.

¹⁹³ Prior to the 1979 reforms, only the "innocent" spouse was entitled to maintenance which, as the Law Commission recognised in 1978, unfairly "mean[t] that a single misstep can deprive a party of all rights to maintenance, regardless of the duration of the marriage, the need for maintenance or the contribution which such party has made toward increasing the prosperity of the other party."¹⁹⁴

Under both the Divorce Act and the Recognition of Customary Marriages Act, a court granting a divorce may make part of its order a written agreement between the divorcing spouses regarding the payment of maintenance, if there is such an agreement, or may enter an order requiring one spouse to pay maintenance to the other.¹⁹⁵ If the parties have not agreed as to spousal maintenance, the court may order any arrangement that it determines is just for any period until the death or remarriage of the spouse receiving the maintenance, whichever occurs first.¹⁹⁶ The maintenance order must, however, provide for periodic payments; it cannot order the payment of a lump sum.¹⁹⁷

The Divorce Act specifies the following factors that a court must consider in determining whether, to which party, and in what amount, to award maintenance:

- (a) the existing or prospective means of the parties;
- (b) the earning capacity of each spouse;
- (c) the financial needs and obligations of the spouses;
- (d) the age of each spouse;
- (e) the standard of living of the spouses prior to the divorce;
- (f) the conduct of each spouse insofar as it is relevant to the breakdown of the marriage;
- (g) any order made for the redistribution of assets between the parties; and
- (h) any other factor which in the court's opinion should be taken into account.¹⁹⁸

¹⁹³ Wille's Principles at 191; Hahlo, 5th edition, at 354.

¹⁹⁴ SALC at 7.

¹⁹⁵ Divorce Act 70 of 1979, section 7(2); Recognition of Customary Marriages Act 120 of 1998, section 8(4)(a).

¹⁹⁶ Divorce Act 70 of 1979, section 7(2); Wille's Principles at 192; Cronje at 280.

¹⁹⁷ Wille's Principles at 192; Hahlo, 5th edition, at 357.

¹⁹⁸ Divorce Act 70 of 1979, section 7(2); Cronje at 280; Wille's Principles at 193-94. If a maintenance order in favour of a spouse is entered when the divorce is granted, it may be rescinded, varied or suspended by the court at any time, upon application of either ex-spouse, if sufficient reason for the change is shown. Divorce Act 70 of 1979, section 8(1); Wille's Principles at 191. The provisions of Section 8 of the Divorce Act also apply in divorces of customary law marriages. Recognition of Customary Marriages Act 120 of 1998, section 8(4)(a). This can be done by a court other than the one that granted the order, if the parties are domiciled in the area of such court or the applicant is so domiciled and the respondent consents. Divorce Act 70 of 1979, section 8(2); see Hahlo, 5th edition, at 355.

In addition, a court dissolving a customary law marriage “may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law” -- which is apparently a reference to the payment of *lobolo*.¹⁹⁹

A spousal maintenance order *must* be coupled with the divorce decree; it cannot be granted later, after the marriage is already dissolved.²⁰⁰

A spousal maintenance order that is not complied with can be enforced by proceedings under the Maintenance Act, by a contempt of court proceeding, or by writ of execution.²⁰¹

PROCEDURE

Jurisdiction

The Divorce Act came into operation on 1 July 1979, and applies to all divorce proceedings after that date.²⁰² The Act expressly provided, however, that it would not apply in divorce proceedings commenced before that date.²⁰³ The Recognition of Customary Marriages Act is expected to come into operation soon.

Under the Divorce Act, the “court” with jurisdiction over divorce actions is any High Court (as contemplated in section 166 of the 1996 Constitution) or a divorce court established under Section 10 of the Administration Amendment Act, 1929.²⁰⁴ In terms of the Recognition of Customary Marriages Act, “court” is defined to mean “a High Court of South Africa, or a family court established under any law, or for purposes of section 8 [the provision on dissolution of customary marriages], a Divorce Court established in terms of section 10 of the Administration Amendment Act, 1929 (Act No. 9 of 1929).”²⁰⁵

Family Courts

South Africa currently is studying the possible establishment of Family Court Centres through pilot programs in five areas nationwide. One of these pilot Family Court Centres was

¹⁹⁹ Recognition of Customary Marriages Act 120 of 1998, section 8(4)(e). The possibility of drawing a connection between *lobolo* and maintenance has been criticised, since *lobolo* usually goes to the family of the bride rather than to the bride herself. See, for example, Sharita Samuel, “Women married in customary law: no longer permanent minors”, 40 *Agenda* 23 (1990) at 29.

²⁰⁰ Cronje at 281; Hahlo at 356, 363. A maintenance order in favour of a spouse ceases at the time fixed in the order or, at the latest, upon the death or remarriage of the spouse, whichever occurs first. Hahlo, 5th edition, at 370-71.

²⁰¹ Wille’s Principles at 207.

²⁰² Divorce Act 70 of 1979, section 19.

²⁰³ Divorce Act 70 of 1979, section 15.

²⁰⁴ Divorce Courts Amendment Act 65 of 1997. The Administration Amendment Act, 1929, (which used to be called the Black Administration Act) had established special courts with jurisdiction over divorce cases (or cases involving the nullity of a marriage) between black persons. In 1997, the Divorce Courts Amendment Act amended the Black Administration Act to allow these courts to hear such cases involving parties of any race.

The Divorce Act also provides that, with respect to an order made pursuant to its terms, a court other than the one that issued the original order may have jurisdiction to rescind, suspend or vary the order. Divorce Act 70 of 1979, section 8(2)-(3). Under pre-1979 South African divorce law, only the court that made the original order possessed jurisdiction to amend it. Cronje at 298 note 270.

²⁰⁵ Recognition of Customary Marriages Act 120 of 1998, section 1(i).

established in Cape Town in January 1999. This Centre consists of a Divorce Court and a Maintenance, Family Violence and Children's Court. Information about the Cape Town Centre available on the Internet states that its aim is to "provide inexpensive, simple, easily accessible and user friendly services with the necessary support services such as mediation and counselling."²⁰⁶ The performance of the Centre is being monitored by the University of Cape Town's Centre for Socio-Legal Research. According to our information, other such pilot centres are also being established in Durban and Port Elizabeth.

PRIVACY

One proposal suggested to the Law Reform Commission during its study of divorce law reform was that, to better safeguard the interests of children, divorce proceedings in which children are involved should be conducted *in camera*.²⁰⁷ The Commission agreed that publicity about divorces harms the parties involved and is not in the public interest, and recommended "that only the fact that a divorce suit between certain persons is pending or that their marriage has been dissolved by divorce may be published for the information of the public."²⁰⁸ The Commission believed that if there were such a restriction, there would be no need for a requirement of conducting divorce proceedings *in camera*.

The Divorce Act accordingly places limits on what can be published or revealed about a divorce proceeding. Section 12 of the Act provides:

(1) Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgement or order of the court, no person shall make known in public or publish for the information of the public or any section of the public any particulars of a divorce action or any information which comes to light in the course of such an action.

(2) The provisions of subsection (1) shall not apply with reference to the publication of particulars or information –

- (a) for the purposes of the administration of justice;*
- (b) in a bona fide law report which does not form part of any other publication than a series of reports of the proceedings in courts of law;*
- (c) for the advancement of or use in a particular profession or science.*

(3) The provisions of subsections (1) and (2) shall mutatis mutandis apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry instituted by a Family Advocate in terms of the Mediation in Certain Divorce Matters Act, 1987.

*(4) Any person who in contravention of this section publishes any particulars or information shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.*²⁰⁹

²⁰⁶ See <http://www.legalfirms.co.za/family-court.htm>.

²⁰⁷ SALC at 30.

²⁰⁸ Id at 39.

²⁰⁹ The Recognition of Customary Marriages Act does not expressly state whether the privacy provision applies in proceedings to dissolve customary law marriages. However, it would seem that in making divorces of customary law marriages subject to the grounds and procedures set forth in the Divorce Act, the privacy provision would also be applicable.

The South African Law Commission is presently working on a paper which will examine potential reforms to this provision, but the paper was not yet published at the time of writing.²¹⁰

5. ZIMBABWE

Zimbabwean law recognises two types of marriages: (1) a monogamous civil marriage solemnised and registered pursuant to the Marriage Act,²¹¹ and (2) a potentially polygamous customary law marriage solemnised and registered pursuant to the Customary Marriages Act (or its predecessors).²¹² Unlike in South Africa, an unregistered customary law marriage is not valid in Zimbabwe, except for certain purposes relating to the status and rights of children.²¹³ Since 1987, *all* valid marriages, whether civil law or customary law, have been subject to the civil divorce law contained in the 1985 Matrimonial Causes Act.²¹⁴ As a result, the grounds for dissolving customary law marriages and civil law marriages in Zimbabwe are the same: the irretrievable breakdown of the marriage and the incurable mental illness or continuous unconsciousness of one of the spouses. The only difference is procedural: civil law marriages can only be dissolved by the High Court, while customary law marriages are dissolved by magistrates' courts.²¹⁵

GROUNDS FOR DIVORCE

When Roman-Dutch common law was adopted as the general law of what is now Zimbabwe in 1891, it recognised only two grounds for divorce: adultery and malicious desertion.²¹⁶ Three additional grounds were recognised in 1943: cruelty, incurable insanity, and long term imprisonment.²¹⁷ In 1985, these five grounds were replaced with the two grounds for divorce that exist in Zimbabwe today: the irretrievable breakdown of the marriage and the incurable mental illness or continuous unconsciousness of one of the spouses.²¹⁸ However, as is

²¹⁰ South African Law Commission, *Project 114: Publication of divorce proceedings: Section 12 of the Divorce Act 70 of 1979* (researcher: M Kganakga).

²¹¹ Chapter 5:11. However, Africans who wish to contract a civil marriage under the Marriage Act must, pursuant to Section 12 of the Customary Marriages Act, first obtain a certificate from a magistrate stating that there is no bar to such marriage by reason of the lack of consent of the woman's parents or guardian and giving details about the marriage consideration.

²¹² Chapter 5:07. The Customary Marriages Act's most recent predecessor was the African Marriages Act.

²¹³ Section 3(5) of the Customary Marriages Act provides that "[a] marriage contracted according to customary law which is not a valid marriage in terms of this section shall, for the purposes of customary law and custom relating to the status, guardianship, custody, and rights of succession of the children of such marriage, be regarded as a valid marriage."

²¹⁴ Chapter 5:13; see also generally Welshman Ncube, *Family Law in Zimbabwe* (Legal Resources Foundation 1989) at 208. Section 2(1) of the Matrimonial Causes Act defines the term "marriage" as including "a marriage solemnized in terms of the Customary Marriages Act."

²¹⁵ Matrimonial Causes Act, section 2(1).

²¹⁶ Ncube at 200-01.

²¹⁷ *Id.*

²¹⁸ *Id.*

discussed below, virtually all of the old grounds are still used as ways to prove that a marriage has irretrievably broken down.²¹⁹

Much of Zimbabwe's reformed law is borrowed from South Africa's 1979 Divorce Act. Both laws provide the same two grounds for divorce: irretrievable breakdown of the marriage and mental illness or continuous unconsciousness of a spouse.²²⁰ The Zimbabwean law sets forth essentially same test for determining whether a marriage has irretrievably broken down as does the South African law: the court must be "satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage between them."²²¹ Like the South African law, the Zimbabwean law provides that, "if it appears to [the court] that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings to enable the parties to attempt a reconciliation."²²²

Also like the South African law, the Zimbabwean law sets forth an non-exclusive list of ways that a court may determine that irretrievable breakdown has occurred. The lists in the two laws are similar, but not identical. Zimbabwe follows the South African Act exactly on the points of one-year separation and adultery, adds more detailed and broad requirements on imprisonment of a spouse as evidence of irretrievable breakdown (specifying specific periods of imprisonment *or* the declaration of a person as a habitual criminal²²³), and adding one additional indication of irretrievable breakdown analogy in the South African Divorce Act:

the defendant has, during the subsistence of the marriage—
 (i) *treated the plaintiff with such cruelty, mental or otherwise,*
 or
 (ii) *habitually subjected himself or herself, as the case may be, to*
 the influence of intoxicating liquor or drugs to such an extent;
*as is incompatible with the continuation of a normal marriage relationship.*²²⁴

However, since the South African examples are (like the Zimbabwean ones) a non-exhaustive list, a South African court certainly could consider cruelty or alcohol or drug abuse as evidence of irretrievable breakdown.

²¹⁹ Id.

²²⁰ Matrimonial Causes Act, section 4; Ncube at 211.

²²¹ Matrimonial Causes Act, section 5(1); Ncube at 212..

²²² Matrimonial Causes Act, section 5(3); Ncube at 213.

²²³ The Zimbabwe provision on this point reads as follows:
Subject to the provisions of subsection (1) and without derogation from any other facts or circumstances which may show the irretrievable breakdown of a marriage, an appropriate court may have regard to the fact that ...the defendant has been sentenced by a competent court to imprisonment for a period of at least fifteen years or has, in terms of the law relating to criminal procedure, been declared a habitual criminal or has been sentenced to extended imprisonment and has, in accordance with such declaration or sentence, been detained in prison for a continuous period of, or for interrupted periods which in the aggregate amount to, at least five years, within the ten years immediately preceding the date of commencement of the divorce action.

In contrast, the analogous provision in the South African Divorce Act provides for the situation where "the defendant has in terms of a sentence of a court been declared a habitual criminal and is undergoing imprisonment as a result of such sentence."

²²⁴ Matrimonial Causes Act, section 5(2); Ncube at 213-14.

The circumstances under which incurable mental illness or continuous unconsciousness warrants a divorce are set forth in section 6 of the Zimbabwean Act. The standards are similar to those used in South Africa except that the Zimbabwean Act requires a longer time period of care or treatment for a mental defect (five years versus two years in the South African Act) and a greater number of medical opinions (three doctors versus two in the South African Act).²²⁵

CONSEQUENCES OF DIVORCE

Division of property

Civil marriages in Zimbabwe, whether contracted pursuant to the Zimbabwean Marriage Act or some foreign marriage law, are governed by Zimbabwean civil law, which provides that a marriage entered into without an ante-nuptial contract will be out of community of property. Until recently, however, this was not the case if the civil marriage was between blacks. Until 1997, the proprietary consequences of a *civil* marriage between Africans was governed by *customary* law.²²⁶ This meant in practice that all property acquired during the marriage came under the ownership and control of the husband.²²⁷

Now the Married Persons Property Act applies to “any marriage solemnized between spouses whose matrimonial domicile is in Zimbabwe”.²²⁸ This apparently covers both civil marriages and registered customary marriages, as the laws governing the recognition of these respective types of marriage refer to “solemnization” as the operative action for validity.²²⁹ For all solemnized marriages entered into after 1 January 1929, the default property regime is *out* of community of property unless there is an ante-nuptial agreement to the contrary.²³⁰ (This is the reverse of the default position which applies in South Africa and to most Namibians).

The Matrimonial Causes Act, 1985, gave Zimbabwean courts the power to redistribute property equitably upon divorce. Specifically, section 7(1)(a) of the Act allows a court to “make an order with regard to . . . the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other.”²³¹

²²⁵ Matrimonial Causes Act, Section 6; Ncube at 221-22.

²²⁶ African Marriages Act, section 13, repealed by Act 6 of 1997 with effect from 1 November 1997. See also Ncube at 133. Section 13 of the African Marriages Act provided that “the solemnization of a marriage between Africans in terms of the Marriage Act shall not affect the property of the spouses, which shall be held, may be disposed of and, unless disposed of by will, shall devolve according to African law and custom.” Ncube at 164-65. The Customary Marriages Act, which replaced the African Marriages Act, does not contain such a provision.

²²⁷ Ncube at 170. Under Zimbabwean customary law, almost all property is owned and controlled by the husband during the marriage and is retained by the husband upon divorce. Minor exceptions exist: for example, a woman can keep the portion of the bridewealth that, upon the marriage of her daughter, is payable to her as the mother of the bride. A woman also can keep property that she acquires through her own skills or labours. Id at 170-72.

²²⁸ Married Persons Property Act, section 2(1).

²²⁹ Marriage Act, sections 8, 31; Customary Marriages Act, section 3.

²³⁰ Married Persons Property Act, section 2. This was previously the automatic property regime for civil marriages between non-Africans only. Ncube at 168.

²³¹ Matrimonial Causes Act, section 7(1)(a).

Because the Act defines the term “marriage” as including “a marriage solemnised in terms of the Customary Marriages Act,” this redistributive power can be used regardless of whether the marriage being dissolved is a civil law or a customary law marriage.²³² Like a maintenance order, an order of redistribution can be made at the time of the divorce decree *or at any time thereafter*.²³³ This extended time frame for redistribution is an unusual divorce law feature.

In determining whether to redistribute property, the court must consider “all the circumstances of the case,” including the following factors:

- (a) *the income, earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;*
- (b) *the financial needs, obligations and responsibilities which each spouse and each child has or is likely to have in the foreseeable future;*
- (c) *the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;*
- (d) *the age and physical and mental condition of each spouse and child;*
- (e) *the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home, caring for the family and other domestic duties;*
- (d) *the value to either of the spouses or to any child of any benefit, including a pension or gratuity which such spouse or child will lose as a result of the dissolution of the marriage; and*
- (e) *the duration of the marriage.*

The goal of the redistribution is “*as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.*”²³⁴

The Act, however, specifically excludes certain types of property from the court’s redistributive power: (a) property acquired by way of an inheritance; (b) property which is in terms of any custom is intended to be held by the spouses personally; and (c) any property which has particular sentimental value to the spouse concerned.²³⁵ The spouse seeking

²³² Matrimonial Causes Act, section 2(1); Ncube at 173.

²³³ Matrimonial Causes Act, section 7(1)(a).

²³⁴ Id, section 7(4). These same factors apply to the determination of whether to award maintenance to the spouse or the children, discussed below.

The text of this section is identical to section 25 of the English Matrimonial Causes Act 1973, except for references to children in each paragraph. Ncube at 175 note 37. Unlike the Zimbabwean law, the English law makes redistribution of marital property second to the interests of minor children by requiring that the court have first consideration for the children’s interests. Id.

²³⁵ Matrimonial Causes Act, section 7(3).

particular property's exclusion from redistribution bears the burden of proving that it falls within one of the listed categories.²³⁶

The section of the Zimbabwe Matrimonial Causes Act, 1985 which set forth the goals and factors to be applied in respect of distribution (section 7) is identical to that of the English Matrimonial Causes Act, 1973 (section 25) prior to its amendment by the Matrimonial Family Proceedings Act, 1984.²³⁷ As Professor Ncube points out, however, laws such as this that leave property redistribution up to the unfettered discretion of judges have been subject to criticism.²³⁸ For example, the English Law Commission reported in 1971 that “. . . what woman are saying and with considerable male support is: We are no longer content with a system whereby a wife's rights in family assets depend on the whim of her husband or on the discretion of a judge at divorce. We demand definite property rights, not possible discretionary rights.”²³⁹

Guardianship, custody and access

Guardianship

The question of guardianship of the children born of a civil law marriage is determined under Zimbabwean civil law.²⁴⁰ Guardianship under Zimbabwean civil law is governed partly by Roman-Dutch common law and partly by the Guardianship of Minors Act.²⁴¹ Under Roman-Dutch common law the father is the guardian of his legitimate children; however, pursuant to the Guardianship of Minors Act, the father's right of guardianship must be exercised in consultation with the child's mother.²⁴² This is true both during the marriage and after divorce, unless the father has been awarded sole guardianship by a court pursuant to the Guardianship of Minors Act.²⁴³

Customary law determines the guardianship of children born to parents married in accordance with customary law. Under customary law, a father is the natural guardian of all children born of the marriage if *lobolo* has been paid. If *lobolo* has not been paid, then the mother's father or guardian would be the guardian of the children. Prior to the enactment of the Legal Age of Majority Act, courts could not award guardianship of a child to a woman who was in terms of customary law herself a minor, subject to the guardianship of her husband. After the Legal Age of Majority Act came into force, granting legal majority to all persons over the age

²³⁶ Ncube at 182.

²³⁷ Id at 174.

²³⁸ Id at 185.

²³⁹ Id.

²⁴⁰ Id at 114. Guardianship means the power to represent or assist the child in the performance of juristic acts and the administration of his or her property and business affairs. Id at 105.

²⁴¹ Id at 114.

²⁴² Id (citing section 2 of the Guardianship of Minors Act).

²⁴³ Id. Section 3(1) of the Guardianship of Minors Act allows the High Court, upon application, to grant sole guardianship to either parent if it is proved that it would be in the interests of the child to do so.

or 18 “for the purpose of any law, including customary law”²⁴⁴, community courts began awarding guardianship of children to African women for the first time.²⁴⁵

However, the applicability of the Legal Age of Majority Act to women who are subject to customary law has recently been undermined by the widely-criticised decision in the case of *Magaya v. Magaya*²⁴⁶, which held that the discrimination against women in customary law did not stem from their perpetual minority but from more fundamental tenets of customary law. Commentators have stated that this decision effectively repeals the Legal Age of Majority Act insofar as it applies to customary law.²⁴⁷ If this is true, then guardianship of the children born of a customary marriage will once again only be awarded to the father.

It should be noted that it is unclear whether the Guardianship of Minors Act applies to couples married in accordance with customary law.²⁴⁸ Assuming that the Guardianship of Minors Act does apply to valid customary law marriages, it would alter the customary law rule to the same extent it altered the general common law rule, discussed above.²⁴⁹

Custody

Questions of the custody of children of civil law marriages are determined under Zimbabwean civil law, which consists of both statute law and common law. Old Roman-Dutch common law provided that, upon divorce, custody (which was shared by both parents during the marriage) was to be awarded to the “innocent” spouse. The common law rule, however, gradually evolved through court cases to provide that the question of the custody of minor children should be determined according to the best interests of the children concerned.²⁵⁰ This rule is also embodied in Zimbabwean statute law.²⁵¹

²⁴⁴ The Act is now section 15 of the General Law Amendment Act [Chapter 8:07]. See section 15(3).

²⁴⁵ Ncube at 116-118.

²⁴⁶ Civil Appeal No. 635/92, S.C. 210/98.

²⁴⁷ See *Women and Law in Southern Africa Research Trust Newsletter*, June 1999 at 5, reprinting a protest letter signed by seven women’s groups in Zimbabwe.

²⁴⁸ Id at 116-117. As a result of a provision in the then-existing African Law and Tribal Courts Act stating that guardianship statutes would only affect the application of customary law if the statute expressly provided that it applied to Africans (which the Guardianship of Minors Act does not), the Guardianship of Minors Act did not apply to customary law marriages during the colonial period. This statute was repealed at independence, and was replaced with a statute that contains no provision limiting the application of any statute to any group of Zimbabweans. As a result, Professor Ncube has concluded, although no court has decided the issue, that the Guardianship of Minors Act should apply to valid customary law marriages, as there is no longer any legislation in effect providing that guardianship disputes between Africans must be determined in accordance with customary law.

²⁴⁹ Id. As Professor Ncube also points out, it is clear that the Guardianship of Minors Act would not apply to unregistered customary law marriages, because the Act presumes a valid marriage and such unions are not valid under the civil law. Questions of the guardianship of the children of such marriages therefore would be governed solely by customary law.

²⁵⁰ Id at 122.

²⁵¹ Id. For example, the Guardianship of Minors Act provides that the High Court may grant sole guardianship or sole custody to either parent if it is in the interest of the minor child to do so. Id. The Matrimonial Causes Act likewise requires that the court in a divorce action must investigate the question of custody to determine that proper provision for the children has been made, and may “commit the children into the custody of such of the parties or such other person as the court may deem best fitted to have such custody.” Id. The Customary Law and Local Courts Act also provides that “in

In determining the best interests of the child, the court is to consider all of the circumstances of the case, including the child's sex, age, health, and educational and religious needs, and each parent's social and financial position, character, temperament, and past behaviour toward the child.²⁵²

The old customary law position as to custody was that, upon divorce, legitimate children belong to the father if *lobolo* was paid, and the mother has no right to custody.²⁵³ But since 1969, statute law changed this rule to provide that the paramount consideration is to be the interests of children regardless of which law or principle is being applied.²⁵⁴ As a result, in questions of custody it does not matter whether the parties are governed by customary law or civil law, since the best interests of the child standard is to be applied in all cases.²⁵⁵

In terms of the Guardianship of Minors Act, interim custody in any situation where either parent of a minor leaves the other and the parents live apart goes to the mother of the child until and order concerning custody is made by a court.²⁵⁶

Access

Under both Roman-Dutch common law and customary law, a non-custodial parent is entitled to reasonable access to his or her children. What constitutes "reasonable" access is determined based on the facts of the particular case and based on what is in the best interests of the child.²⁵⁷

Child maintenance

Under the Matrimonial Causes Act, a Zimbabwean court has the power to require that either party in a divorce case produce evidence so that the court can determine whether or not proper provision has been made for the custody and maintenance of any children to the marriage before it grants a divorce.²⁵⁸

Zimbabwean law likewise provides for the granting of an order, either at the time of the divorce or thereafter, for the payment of maintenance in favour of any child of the marriage.²⁵⁹ Under both Zimbabwean civil and customary law, both spouses have a duty to maintain

any case relating to the custody of children the interests of the children concerned shall be the paramount consideration irrespective of which law or principle is applied." Id.

²⁵² Id at 123.

²⁵³ Id at 126.

²⁵⁴ Id. This rule was initially embodied in the African Law and Tribal Courts Act, then in its replacement, the Primary Courts Act, and now in the Customary Law and Local Courts Act.

²⁵⁵ Id.

²⁵⁶ *Tawadzana v Mussa*, Judgement S.C. 14/97.

²⁵⁷ Ncube at 127-28.

²⁵⁸ Matrimonial Causes Act, section 10.

²⁵⁹ Matrimonial Causes Act, section 7(1)(b).

the children of the marriage according to their respective means.²⁶⁰ Divorce does not terminate this duty under either the civil or the customary law; rather, it continues as long as the children are minors or are unable to support themselves. The cause of the divorce and the conduct or respective blameworthiness of the parents is irrelevant to the question of the maintenance of the children.²⁶¹

A maintenance order in favour of a child made upon his or her parents' divorce automatically terminates when the child dies, marries, is adopted by another person, attains the age of 18 years (unless he or she is a student beyond that age or special circumstances exist), or becomes self-supporting, whichever occurs first.²⁶²

Spousal maintenance

Since 1985, the Zimbabwean Matrimonial Causes Act has allowed a court "in granting a decree of divorce, judicial separation or nullity of marriage, *or at any time thereafter*, . . . to make an order with regard to . . . the payment of maintenance . . . in favour of one or other of the spouses . . ."²⁶³ This was a change from the previous Matrimonial Causes Act, which, like current Namibian law, provided that if a spouse did not obtain a maintenance order at the time of the divorce, he or she could not later sue for maintenance.²⁶⁴

In determining whether to award maintenance, a Zimbabwean court is to consider factors such as the income, assets, financial needs and obligations of the spouses, the standard of living of the family, the age of the spouses and the children, the duration of the marriage, and the direct or indirect contributions of the spouses to the family, among others.²⁶⁵ The court also is supposed to try, as far as is possible and just to do so in light of the conduct of the parties, to put the parties in the same financial position as they were in prior to the breakdown of the marriage.²⁶⁶ Maintenance can be awarded as a lump sum, or in periodic payments.²⁶⁷ Under the Matrimonial Causes Act, an order of maintenance made upon divorce in favour of a spouse automatically terminates when that spouse dies or remarries.²⁶⁸

²⁶⁰ Ncube at 85. If the marriage is in community of property, however, the maintenance duty falls on the husband, as he is administrator of the joint estate. If the marriage is out of community of property, then the wife must contribute to the children's' maintenance according to her means.

²⁶¹ Matrimonial Causes Act at 87-88.

²⁶² Id, sections 8(2) and (3).

²⁶³ Id, section 7(1)(b) (emphasis added).

²⁶⁴ Ncube at 160.

²⁶⁵ Matrimonial Causes Act, section 7(4) The complete list of factors contained in Section 7(4) is set forth above in the discussion of division of marital property.

²⁶⁶ Id.

²⁶⁷ Id, section 7(1)(b).

²⁶⁸ Id, section 8(1). An order for spousal maintenance made pursuant to a decree of judicial separation terminates when that decree is set aside or a divorce decree is granted. Id.

6. OTHER COUNTRIES

These examples are included to give a better sense of the range of international approaches, even though most of these would be inappropriate for the Namibian social and constitutional setting. Nevertheless, despite the cultural differences, it is interesting to note the many common threads.

CHILE

As of late 1997, divorce was illegal in Chile. At that time, legislation to legalise divorce was pending in the lower house of the Chilean parliament. Although this legislation was reported to have strong bipartisan support in the lower house, it was not expected to pass the more conservative upper house of the parliament and therefore was unlikely to be enacted into law.

²⁶⁹

CHINA

In 1998, the Chinese government, concerned by the country's rising divorce rate, proposed legislation that would make divorces more difficult to obtain. China's existing divorce law, which was passed in 1980, allows divorce, after the payment of 50 yuan (about US\$4) and a waiting period of two weeks, "when husband and wife both desire it" or, even if one spouse objects, where "mutual affection" is gone. Although a complete picture of the potential changes is not available (the government has designated the proposed law "not for open publication"), some aspects have leaked out. The proposed new law apparently would only allow divorce where the couple have lived apart for three years, or in the case of adultery, spousal abuse, or one party's alcoholism, mental illness or "incurable physical defects." It would also make adultery illegal and subject adulterers (both the adulterous spouse and the third party) to penalties.²⁷⁰ As of January 1999 the proposed legislation had not yet been enacted into law. We have been unable to determine what has happened since then.

IRELAND

The predominately Catholic country of Ireland was the last of the European Union countries to permit divorce. In February 1997, an amendment to Ireland's constitution legalising divorce (which had been completely illegal since the country's independence from Great Britain in 1921) took effect. The amendment passed in a 1995 by a very narrow margin, having received only 50.23 percent of the vote. (A similar amendment was defeated by a 2 to 1 ratio in 1986.) The amendment allows divorce if the couple have "no reasonable prospect of a reconciliation" and have been separated for four of the five previous years. However, the new law apparently is procedurally complicated and requires a great deal of paperwork, which likely will discourage many of the long-separated but still legally married couples in Ireland (estimated by the government to amount to 80 000 people) from using it.²⁷¹

²⁶⁹ "Chile May Allow Divorce to Snip those Ties that Bind," *Christian Science Monitor*, 30 December 1997, Volume 90, Issue 24, at 6.

²⁷⁰ "China: As Divorce Increases, More Discussion of New Rules," *Christian Science Monitor*, 19 January 1999, reprinted in *Women's International Network News*, Spring 1999, Volume 25, Issue 2, at 82; "China: New Divorce Legislation Debated," *The New York Times*, 18 November 1998, reprinted in *Women's International Network News*, Winter 1999, Volume 25, Issue 1, at 58; "China Takes a New Look at Divorce," *The Economist*, 31 October 1998, Volume 349, Issue 8092, at 46; "China's New Family Values," *Newsweek*, 24 August 1998, Volume 132, Issue 8, at 36.

²⁷¹ "Divorce Becomes Legal in Ireland," *Christian Century*, 7 May 1997, Volume 114, Issue 15, at 445; "Ireland: First Divorce Law Takes Effect," *The New York Times*, 28 February 1997, reprinted in *Women's International Network News*, Spring 1997, Volume 23, Issue 2, at 73.

EGYPT

Egypt made headlines recently when it passed a new law allowing women to seek divorces unilaterally, for any reason, thus putting them on an equal footing with men for the first time. Previously, divorce law was based on the Islamic legal code and provided that while a man could get a divorce on request, a woman could get a divorce only if she could prove that her husband beat her, was a drug addict, was sterile or did not support the family. In practice, judges were often reluctant to find that such grounds existed, and husbands could stop the divorce by making indefinite appeals. There are reports of women spending up to 15 years in court trying to obtain a divorce under the old system.

This basic set of rules on divorce was supplemented in 1979 by a Presidential decree which gave a woman the right to divorce her husband if he took a second wife over her objections, but this decree was later found unconstitutional.

The law requires court-supervised mediation before a divorce can be granted at the wife's request. A wife who wants a divorce must return any money or property that he paid her upon the marriage, but she can ask the government to attach a portion of her ex-husband's wages for maintenance payments. If he disappears or is unable to pay maintenance, she can draw a living allowance from a special state fund.

The new law makes Egypt the second Muslim country (after Tunisia) to grant women divorce rights which are roughly equivalent to those of men. Lebanon is reportedly considering similar reforms.²⁷²

ETHIOPIA

Like some of the countries discussed above, both civil marriages and customary marriages exist in Ethiopia. Ethiopia's Civil Code, which was enacted in 1960, provides for uniform legal provisions governing all personal matters and invalidates customary law in the areas covered by the Code. Thus, under the Code, all marriages are subject to the same divorce laws.²⁷³ However, Ethiopia's 1995 Constitution revived the possible applicability of customary law to divorces. It provides that disputes concerning personal and family law matters may be resolved according to customary or religious rules if the parties to the dispute agree to the applicability of that law.²⁷⁴

"Family arbitration"

Under the Civil Code, petitions for divorce are made to a traditional body called "family arbitrators." Family arbitrators are empowered both to dissolve marriages and to decide the consequences of the dissolution (i.e., division of property, maintenance, and custody of children).²⁷⁵ They also have jurisdiction over disputes concerning betrothals and disputes

²⁷² Howard Schneider, "Women in Egypt Gain Broader Divorce Rights", Washington Post Foreign Service, 14 April 2000; Susan Sachs, "Egypt's Women Win Equal Rights to Divorce", The New York Times on the Web, 1 March 2000.

²⁷³ Hillina Taddesse, "Discriminatory Norms and Application against Women in Ethiopian Family Law," Project Identification No. 100R:LR 1 (Ethiopian Women Lawyers' Association Sponsored Research November 1996), at 26 (citing Civil Code Art. 662(1)).

²⁷⁴ Id (citing Article 34(5) of the 1995 Constitution).

²⁷⁵ However, only a court has the power to decide whether a divorce was granted or not. Id at 26 (citing Civil Code Art. 729).

arising between the spouses during a marriage. The family arbitrators are typically the persons who were the witnesses to the betrothal or marriage, or they may be any other persons chosen by the parties to arbitrate the dispute.²⁷⁶

The purpose of the family arbitrator system is said to be that, by keeping family disputes out of court, it helps to protect family secrets and encourages reconciliation. It is also said that family arbitration preserves long-standing Ethiopian tradition, that family arbitrators are better qualified to deal with family matters than judges are, and that it reduces court congestion.²⁷⁷ But, the system has also been criticised as not in keeping with Ethiopian tradition in which arbitration was voluntary, for allowing persons who do not know the law to decide a legal question, and for actually increasing court congestion because the family arbitrators have no enforcement powers.²⁷⁸ It also has been noted that, since the law does not require people to be arbitrators, it is sometimes difficult for the parties to find a willing arbitrator, particularly in urban areas. In addition, although the Civil Code does not mention payment for family arbitrators, the Ethiopian Civil Procedure Code provides that where a fee has not been fixed, an arbitrator shall fix a “reasonable fee.” This has resulted, in practice, in family arbitrators showing favouritism and deliberately postponing their decision in order to obtain as large a fee as possible, and sometimes a fee much higher than that payable in similar court cases. Studies have also revealed that in many cases, the payment is made by the spouse who prevailed in the arbitration, which presents a risk of the payment becoming a bribe. Finally, it has also been noted that very few family arbitrators are women.²⁷⁹

Grounds for divorce

The Civil Code provides for two types of grounds for divorce, “serious” grounds and “other” grounds. “Serious” grounds are further divided based on whether they are “due to a spouse” or “not due to a spouse.” Serious grounds that are due to a spouse are (1) adultery and (2) desertion of the marital residence where the deserted spouse does not know the whereabouts of the deserter for at least two years.²⁸⁰ Serious grounds that are not due to a spouse are (1) the confinement of a spouse to a lunatic asylum for at least two years, (2) the judicially declared absence of a spouse, and (3) the annulment of a religious marriage by a religious authority. Any other grounds are non-serious grounds.²⁸¹

Where a serious cause exists, the family arbitrators must grant the divorce within three months. Where there is no serious cause a divorce may still be granted, but the family arbitrators first must attempt to get the couple to reconcile. If reconciliation fails, then the arbitrators must grant the divorce within one year, unless the period is extended (to up to five years) by agreement of the spouses.²⁸²

²⁷⁶ Id at 26-27.

²⁷⁷ Id at 27.

²⁷⁸ Id at 27 – 28 (discussing views of Aklilu Wolde Ammanuel).

²⁷⁹ Id at 28-30.

²⁸⁰ When the Civil Code was being drafted, the drafters initially included crimes by one spouse against the other as a serious ground for divorce. This ground was not, however, enacted into law. This omission has been criticized as detrimental to women. Id at 33.

²⁸¹ Id at 31-32.

²⁸² Id at 32.

Division of property

Under Ethiopian law, if the contract of marriage or another valid contract specifies how the couple's property is to be divided upon divorce, the property will be divided according to the contract. If no such contract exists, the property is divided according to the provisions of the Civil Code. Generally, under the Civil Code, each spouse receives his or her own personal property, and common property is divided equally between the spouses.²⁸³

However, the above rule may vary depending on whether a serious cause is present and whether it is due to one of the spouses. A spouse to whom a serious cause is due, or a spouse who petitions for a divorce without having a serious ground, is subject to a penalty of property loss. This penalty may involve ordering the faulty spouse to return presents given to him or her, giving the faulty spouse a smaller share of the common property, or depriving the faulty spouse of any common property as well as up to one-third of his or her personal property. Although as a rule family arbitrators are required to apply this penalty, which is said to be intended to discourage spouses from seeking a divorce without a serious cause and also to prevent spouses from committing acts that constitute a serious cause, they do have the discretion to consider the circumstances of the case.²⁸⁴

Spousal maintenance

Apparently it is common in Ethiopia that when spouses quarrel, the husband will evict the woman from their home and retain control of the common property.²⁸⁵ Family arbitrators do have the power to make decisions with respect to maintenance, the management of property, and residence, although in practice apparently usually only provide some maintenance for the wife, leaving the property, including the home, to the husband. For this reason it has been argued that such questions would be better left to the courts.²⁸⁶ It also has been noted that if a divorce case drags on for some time, the wife may be prejudiced because she may have no maintenance, and no access to the property or the marital home.²⁸⁷

Custody and maintenance of children

Again, these questions are decided by the family arbitrators. The family arbitrators are to decide issues of custody and maintenance based solely on the interests of the children. There is, however, a presumption that children up to the age of five are to be placed with their mother, unless there exists a serious reason for doing otherwise.²⁸⁸

²⁸³ Id at 34.

²⁸⁴ Id at 32, 34.

²⁸⁵ Id at 29.

²⁸⁶ Id at 37.

²⁸⁷ Id at 29.

²⁸⁸ Id at 37.

CHAPTER 4

DIVORCE MEDIATION

1. THE THEORY OF DIVORCE MEDIATION

Definition of divorce mediation

Divorce mediation refers to a process whereby spouses who intend to divorce, or are in the process of divorcing, attempt to reach agreement on practical issues relating to the divorce, such as the division of property, custody and access to children and maintenance.

One commentator defines divorce mediation as “a process in which divorcing spouses negotiate some or all of the terms of their settlement agreement with the aid of a neutral and trained third party”.¹ Another defines it as “the process by which disputants attempt to reach a consensual settlement of issues in dispute with the assistance and facilitation of a neutral resource person or persons. At the very least, the process consists of systematically isolating points of agreement and disagreement, developing options, and considering accommodations.”² Mediation is thus essentially a process through which a mediator (or a team of mediators) intervenes in a conflict with the aim of assisting the parties to the conflict to make their own decisions.³

Divorce mediation, as an informal process, is an instrument for the application of equity rather than the rule of law. It allows for the consideration of the social and cultural contexts of the relationship, and for the emotional aspects of the situation.

¹ Kenneth Kressel, “Divorce Mediation: A Critical Overview” in Martha Minow, ed, *Family Matters: Readings on Family Lives and the Law* (1993) at 384.

² Jay Folberg, “A Mediation Overview: History and Dimensions of Practice” in Harry D Krause, ed, *Family Law, Volume II* (1992) at 8 (re-printed from the first issue of *Mediation Quarterly*).

³ Section 1115 of the California Evidence Code, defines mediation as “a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.” In Australia, the Family Law Rules provide that mediation must be conducted “as a decision-making process in which the approved mediator assists the parties by facilitating discussions between them so that they may: (1) communicate with each another regarding the matters in dispute; and (2) find satisfactory solutions which are fair to each of the parties and (if relevant) the children; and (3) reach agreement on matters in dispute.” (Rule 10(1) (a)).

A common definition encountered is that of Folberg and Taylor: “mediation is the process by which participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict without Litigation* (1984) at 7). Moore defines mediation as “the intervention in a negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.” (C Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (2nd edition, 1996) at 15). In the South African context Burman perceives mediation as “a social process of conflict resolution where the mediator is a selected third party who, while remaining neutral, facilitates the achievement of a mutually satisfying agreement by utilising specific techniques.” S Burman (1993), at 456.), while Boulle and Rycroft define mediation as “a decision-making process in which the parties are assisted by a third party, the mediator;” who “attempts to improve the process of decision-making and to assist the parties reach an outcome to which each of them can consent.” (L Boulle and A Rycroft, *Mediation: Principles, Process, Practice* (1997) at 1.)

Divorce mediation has emerged as a viable complement to adversarial divorce proceedings in various parts of the western world, especially since the 1970s. The movement toward divorce mediation has been prompted in part by increasing rates of divorce which place strain on legal systems, but also by the recognition that an adversarial court process is not an appropriate forum for resolving disputes in the highly-charged and emotional atmosphere of a divorce.⁴

Mediation should not be confused with marriage counselling. Divorce mediation does not preclude reconciliation between the parties, but this should not be understood as its primary aim.

Mediation should also not be confused with arbitration. In arbitration, the parties to the dispute authorise a neutral third person or a panel of persons to make a binding decision on the dispute after hearing both sides. Arbitration is more like a court in which the parties choose their own judge. In contrast, in mediation, the parties may choose the mediator, but they do not authorise the mediator to make decisions for them.⁵

Mediation furthermore differs from the current negotiation process which sometimes takes place around divorce. Such negotiations do not utilise any established framework (other than the dictates of the divorce law), and they are more likely to take place between the lawyers than the spouses. This kind of negotiation outside the courtroom does not involve a neutral party, and it is rooted in the adversarial model which governs court proceedings.⁶

Description of divorce mediation

Mediation can be provided in a number of ways. A broad distinction can be drawn between public and private mediation. Public mediation is promoted by laws or rules of court which mandate an attempt at mediation as a precondition to divorce. Private mediation is a voluntary private arrangement made by the parties, and may be carried out by bodies such as NGOs or customary law institutions, or by private individuals,

Mediation is a process which usually involves a number of steps or stages. The structure of the process will depend on the mediation model which is adopted. A very general description of a typical divorce mediation process in the US is as follows:

Some of the negotiating sessions may involve separate meetings between the mediator and each of the parties, but the emphasis tends to be on face-to-face sessions in which the parties deal with each other directly. The mediator's overarching objective is the establishment and maintenance of a co-operative, problem-solving orientation between the spouses (as opposed to the competitive "I win-you lose" orientation said to surround the adversary use of lawyers). Within this broad objective the mediator's attention is directed to two principal areas: establishing a productive negotiating climate and addressing the substantive issues...

Typically, lawyers are not directly involved in the negotiating sessions but serve the parties as consultants. This may occur in the form of a single advisory attorney who serves both spouses and the mediator as a source of neutral legal expertise, or each party may be encouraged to retain outside legal counsel.

⁴ For a good introduction to the concept which underlie divorce mediation, see Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce", 88 *Yale Law Journal* 950 (1979).

⁵ Folberg at 8-9.

⁶ Id at 9.

particularly for final advice regarding the settlement document drawn up by the mediator.⁷

The mediator must be acceptable to the parties. Although mediators normally mediate on their own, co-mediation is common in divorce mediation. This allows for gender neutrality, and makes it possible to draw on the expertise of the mental health and legal professions simultaneously. Some community centres use a panel of three mediators who pool their strengths and work together as a team. Co-mediation and team mediation using panels have the added advantage of being able to reflect the cultural diversity of the disputants.

Mediation is most commonly understood as an intervention into a conflict. The aims include defining the scope of the issues, and settling or managing the conflict.

Mediation is fundamentally a process that allows the parties to make their own decisions. The mediator does not have decision-making authority and cannot impose or enforce a particular decision. Indeed it is this aspect which distinguishes mediation from adjudication by a judge or arbitrator. Self-determination, which leaves ultimate decision-making authority in the hands of the disputants, is seen as one of the main attractions of mediation.⁸

Mediation, as a form of third party intervention into a dispute between people has a long history in almost all cultures. In African, Asian and Latin American cultures dispute resolution has developed in the cultural choices people make each day about how they deal with conflict.⁹ For the most part, an adversarial, adjudicatory approach was introduced through colonial administrative systems.

Mediation is often referred to as a form of Alternative Dispute Resolution, (ADR). In Western cultures it is true that mediation is an “alternative” to litigation. However, in Africa, Asia and Latin America, litigation is the alternative to traditional mediation processes. It has been pointed out that even within western cultures litigation is used in a small percentage of all disputes and is an alternative to discussions and negotiations. Thus, for a variety of reasons it has been suggested that the “A” in ADR should denote appropriate rather than alternative. This allows emphasis to be placed on the choice disputants make about how they are going to approach a particular dispute, and that there is no one process for all disputes.

2. THE PROS AND CONS OF MEDIATION

General

At the most general level, mediation can be a means of effecting social change. Mediation can, it is argued, promote equality and be a source of empowerment by strengthening communities and making them less reliant on state agencies. It can also compensate for the lesser access to justice enjoyed by disadvantaged groups.

⁷ Kressel at 384-5.

⁸ The parties right to self-determination is a value that is enshrined in the standards of conduct adopted by the Society of Professionals in Dispute Resolution (SPIDR), the American Bar Association (ABA) and the American Arbitration Association (AAA) in 1994. Model Standard No. 1 reads: “Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from the mediation at any time.” SPIDR, ABA and AAA, (1994) Model Standards of Conduct for Mediators, No. 1.

⁹ Moore at 33.

Mediation can also result in satisfaction, in the sense that a good mediation process creates a good chance that the parties involved will reach a settlement of their dispute, and will feel that their needs and interests have been satisfied and that the resulting agreement is an acceptable one. Performance on this point is measured in terms of settlement rates, levels of satisfaction and the quality of the substantive outcome.

A third broad and positive goal is transformation, which focuses on the impact of mediation on the players rather than on the outcome of the disagreement at hand. It is argued that mediation can be a source of moral growth for the participants, and that it can give them a sense of their own value and power, as well as their capacity to make decisions about life. It is also a process which allows people to acknowledge and empathise with the situations and problems of others.

Balanced against these outcomes is the possibility that mediation can function as a form of oppression. It has been argued that mediation really represents a form of second-class justice for the poor, and that it fails to provide the procedural safeguards of the legal system which can ensure that the parties' constitutional rights are respected. Traditional cultures which value harmony, and women who may place a higher value than men on the resolution or avoidance of conflict than men, are particularly vulnerable.¹⁰

At a more practical level, some of the advantages of mediation are the following:

- Mediation can result in savings on both the legal costs and the emotional costs of a protracted adversarial proceeding.
- A mediation process allows the parties to avoid the risks and uncertainties of litigation.
- Children can benefit when a mediation process minimises bitterness between the parents.
- A resolution of issues which is arrived at by the parties themselves is more likely to be satisfactory, and thus more likely to be adhered to over time. The parties are likely in this setting to feel a greater sense of ownership of the outcome, and to feel empowered rather than disempowered by the process.
- Mediation can encourage an open and full sharing of relevant information in a way which is not dictated by the requirements of the legal process.
- Mediation has been said to encourage more flexible and creative agreements.
- Because the mediation process allows for the venting of emotions, it can remove obstacles to effective problem-solving.
- It is easier through a mediation process than in a court setting for parties to consider property division, custody and maintenance as interlinked issues and to make appropriate trade-offs.

Some of the disadvantages are as follows:

- An *unsuccessful* attempt at mediation can add substantial costs and delays to the divorce process.
- Ethical problems may arise when one legal practitioner advises both parties, or 'translates' the mediated agreement into 'legal language'.
- Some people may find a face-to-face confrontation with their spouse more stressful and traumatic than it would be to let a court decide the outstanding issues.

¹⁰ R Bush and J Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (1994) at 2, 26 and 84.

- Because marriages are such complex relationships, even the most experienced mediator may be unable to identify subtle forms of pressure and coercion between the parties.
- People (particularly women) who are not experienced in expressing their needs and desires may not be able to articulate their point of view effectively in a mediation process.
- The checks and balances of the legal system are important safeguards for the parties to disputes, and it may be dangerous to shift decision-making to a mediation process which lacks these protections.
- It is necessary to beware of an unrealistic fairy-tale view of mediation as being the humane and caring answer to all of the problems surrounding divorce negotiations. There will seldom be “happy endings” in divorce cases no matter what process is invoked.¹¹

Burman and Rudolph have pointed to some specific problems of mediation in the South African context, which are equally applicable to Namibia:

- Mediation schemes operate within a paradigm based on the presumption that the parties are equal, that people operate reasonably and that all parties using the system have equal access to the court, property, housing and child-care facilities, and are equally informed of their rights. This does not accord with the facts.
- Mediation schemes usually fail to provide adequately for the fact that where the parties still have contact with each other, a certain level of negotiation takes place outside the mediation conference. This is a possibility in both South Africa and Namibia where economic constraints mean that some divorcing couples continue to share the same home while the divorce proceeds.
- The prevalence of domestic violence against women means that women may not be able to negotiate with their husbands as equals, without fear.¹²

Any workable mediation scheme in Namibia would have to take account of these concerns.

SOME ARGUMENTS IN FAVOUR OF MEDIATION

This positive view of mediation comes from a “do-it-yourself” divorce manual for the US state of Colorado:

Working together with a mediator allows you to be directly involved in the process of arriving at every decision. Sometimes if you are not in the thick of the decision-making process yourself, the results may not fit you. The agreement someone else may reach on your behalf may be the best they can envision – but they do not see with your eyes. If you want to have an agreement which is uniquely suited to you and to which you will commit with your whole heart, you will have to feel that YOU negotiated it. You are more likely to be satisfied with your agreement – and with yourself – if YOU BOTH walked through each step and negotiated each issue.

In the mediation process, many people find that they make a lot of “gentleperson’s agreements” which are important to the conduct of the divorce but which do not need to become the business of the court. Details of transfers of children and belongings, interim expenditures, and whether either spouse expects to have other romantic interests are some examples.

¹¹ Professor Martha Fineman takes an interesting look at the stereotypes surrounding both the adversarial process and the mediation process in *The Illusion of Equality* (1991) at 157-ff.

¹² Sandra Burman and Denise Rudolph, “Repression by Mediation: Mediation and Divorce in South Africa”, 107 *SALJ* 1990 at 251.

A trained, skilled mediator can help keep conflict from escalating out of control – allowing you to make good decisions in moments of stress. Working with a mediator right from the beginning increases the likelihood of your evolving a communication process which you will use long after the divorce decree has been entered.

(from M Arden Hauer and SW Whicher, *Friendly Divorce Guidebook for Colorado* (1997) at 17)

Voluntary versus mandatory mediation

One of the most cherished values of mediation is the parties' right to self-determination. Rather than allowing a private or state appointed third party to make a decision for the disputants, mediation offers the possibility of the parties making their own decisions. Some definitions reflect this as the voluntary nature of the mediation process.¹³ However, another aspect of self-determination refers to the decision of whether or not to enter into and participate in mediation.

Disputants may decide to mediate for a number of reasons including submission to social pressure. For example, a party may mediate to avoid the threat of litigation, or because litigation is too expensive, or because a judge has inquired about the possibility of mediation. In some jurisdictions, laws or rules of court require that the parties mediate before proceeding to trial. What is apparent is that the voluntary entry and participation in mediation is a question of degree.

Where laws or court rules mandate mediation, effective limitations are placed on decisions about entry and participation. Mediation may be limited to certain issues, such as custody and visitation. Where mediation is mandated the related issues of mediator reports, attorney involvement, responsibility for payment of a fee, and mediator qualifications are normally regulated. Commonly referred to as mandatory mediation, it has its proponents¹⁴ and opponents.¹⁵

The most controversial aspect of mandatory mediation is a requirement that the mediator make a report to the trial judge where mediation does not produce a settlement. When the report takes the form of a recommendation, an adjudicatory function is performed without the procedural safeguards of a court of law.¹⁶

Other criticisms of mandatory mediation focus on the erosion of choice in regard to the timing of the mediation, the fact that attorneys may be excluded from the process, and the choice of mediator. (In mandatory mediation programs the mediator is often chosen for the parties.)

Proponents of mandatory mediation see it as a way of overcoming public resistance to an effective process. Not all proponents of mandatory mediation are in favour of making reports

¹³ Moore at 19.

¹⁴ Proponents include MT Shattuck, in Folberg and Milne, eds, *Divorce Mediation* (1988) at 207 and M Duryee, "Public-Sector Mediation: A Report from the Courts", *Mediation Quarterly*, No. 8 (1985) at 47.

¹⁵ Opponents include T Grillo "The Mediation Alternative: Process Dangers for Women", 100 *Yale Law Journal* 1545 (1991); R Ingelb, "Court Sponsored Mediation: The Case against Mandatory Participation" 56 *Modern Law Review* 441 (1993).

¹⁶ In California, for example, section 1152.6 of the Evidence Code was enacted to prevent court rules from requiring mediators to make reports. However, it terms of the Family Code, county courts can choose whether or not mediators of custody and visitation disputes will make reports.

or recommendations. They argue that the parties are only mandated to enter mediation and that they are not obliged to make any decisions they do not want to. The parties should only be mandated to enter and not to participate. Savings in time and money, and high satisfaction rates are asserted in favour of mandatory mediation.

Power imbalances

The question of power and power imbalances in mediation is a vexed one. Power or influence is necessary for the negotiation process to be effective. Where there is a parity of power there is a greater likelihood of an equitable outcome. Some argue that the mediator should not intervene to influence power dynamics. However, it appears that the mediator must in some way manage the power relationship between the parties.

Where mediation takes place the question is whether power imbalances can be dealt with and if so, how. A number of feminists have argued that as long as society is patriarchal, mediation will be used as a tool for men to oppress women. While it is true that extreme power imbalances may be a reason not to mediate, the mediation process can also offer a number of unique features that allow the power relationship between the parties to be assessed and addressed.

It has been asserted that power relations can be assessed through the mediation process, the role of the mediator and the role of the divorce crisis. Firstly, the process is a short-term one which usually encourages collaborative or problem-solving approaches rather than competitive ones. This requires the active participation of the parties as equals, at least for the duration of the mediation sessions. Secondly, a good mediator will have the skills to identify power imbalances and to address them. The mediator normally has more power than either of the parties and can exert influence over the dynamics between the parties in a number of ways, from the modification of the physical setting (seating arrangements, separate meeting areas, etc) to the management of communication behaviour (ground rules about who speaks, when and for how long) and the negotiation process, (collaborative negotiations, issue framing, interest exploration, option generation, and proposal presentation). Thirdly, divorce mediation takes place in a crisis which is centred around a change in the relationship between the parties. This may change their expectations and assumptions, and make them more open to interventions by the mediator.¹⁷

An awareness of power is essential to the mediation process. In divorce mediation the challenge is to assess and address any power imbalances based on gender, stereotyping, unequal access to resources and the other factors that raise concerns about a women's ability to negotiate from a position of inequality. The goal is to create a relatively level playing field for the duration of the mediation.

3. COMPARATIVE LAW ON DIVORCE MEDIATION

South Africa

South Africa has a law which is entitled the Mediation in Certain Divorce Matters Act, but this is a misnomer. This act provides for the involvement of a Family Advocate in divorce cases involving minor children, as described in Chapter 3.¹⁸ This act is in some respects a

¹⁷ D Neumann, "How Mediation can Effectively Address the Male-Female Power Imbalance in Divorce" (1988), in *Mediation Quarterly*, Vol.9, No. 3 (Spring 1992) at 229-237.

¹⁸ JG Mowatt, "Divorce Mediation: The Mediation in Certain Divorce Matters Act' 1 TSAR 1987 at 47; Brigitte Clark, "No Holy cow – Some Caveats on Family Mediation" 56 THRHR (1993) at 454.

form of mandatory or compulsory mediation, in the sense that it involves the intervention of a third party in a dispute with the aim of assisting the parties to reach agreement, but if an impasse is reached the Family Advocate plays more of an adjudicatory role by making recommendations to the court. At this point, the process ceases to be mediation.

Apart from the Family Advocate there are no state or court structures requiring or providing for mediation in divorce matters. In 1995 the government and a number of non-governmental organisations established the West Rand Family Mediation Project, to research and explore family mediation, in particular the suitability of a co-mediation model for South African circumstances. The model being investigated by this pilot project uses a team of two mediators: one a family lawyer and the other a person qualified in marital and family work.

In all major centres, private mediation is available for a fee. Mediation as part of a modern movement was introduced into South Africa by the Independent Mediation Services of South Africa, (IMSSA), initially in the labour field. Mediation expanded into the family law arena in the mid 1980's, and the Family and Marriage Society, a private association, has taken a special interest in the mediation of family disputes. Private mediation services are offered by a large number of individuals who have been trained as mediators. A professional fee is charged that is beyond the reach of the majority of South Africans and as such is unlikely to play a significant role in providing access to mediation.¹⁹

In 1983, the Hoexter Commission recommended the establishment of a family court with two components: a social component and a court component. One of the functions of the social component was to provide mediation services, while the court would play a more inquisitorial role. The hope was that such a system would address the acrimonious and costly aspects of adversarial divorce cases that persisted despite South Africa's move to a no-fault system in 1979.²⁰ But these recommendations have not yet been implemented, with family courts starting up only recently as pilot projects in a few locations.

United States

With the rise of the insular nuclear family as the dominant feature of family relations in the USA, family conflicts have increasingly been directed to external sources for resolution. The traditional forum is the court, however in the last thirty years divorce mediation has emerged as a viable alternative. Divorce mediation as a general feature in the USA will be considered before focusing on the experience in the state of California. California has been the leader in substantive and procedural reforms. It was the first state to introduce no-fault divorce and mandatory mediation for custody and access cases.

As noted in the previous chapter of this report, substantive reform of marriage laws has taken place to a greater or lesser degree in all US states. All have some form of no-fault divorce, some provide presumptions in favour of joint custody, and "need" and "fairness" have by and large replaced fault as a criteria for property division and spousal support. The procedural aspects of divorce law have not enjoyed the same attention.

For the most part the drive to deal with divorce outside the adversarial court system came from the mental health services. Together with a handful of attorneys who met with both spouses to help settle divorce issues, and who risked bar-association sanction, divorce

¹⁹ South African Law Commission, *Alternative Dispute Resolution, Issue Paper 8* (1997) at paragraph 3.37.

²⁰ Hoexter Commission, *Fifth and Final Report of the Commission of Inquiry into the Structure and Functioning of the Courts*, RP 78/1983.

emerged from the 1970's "as a multidimensional process involving both legal and psychological matters."²¹

Coolger was a central figure in the popularisation of divorce mediation in the USA. He developed a structured model of divorce mediation in which a comprehensive set of rules comprised the agreement to mediate. The rules call for the active participation and personal responsibility of the spouses in settling the four main areas of a divorce dispute: custody, property, child support, and spousal support.

Although each issue was dealt with in turn and in order, the interrelationship between the issues was recognised. An advisory attorney was an integral part of Coolger's model. Fashioned on the role of the attorney who aids partners in dissolving a partnership, the attorney is a representative of both parties and provides legal knowledge rather than advocacy services. The advisory attorney is only brought into the process once substantial agreement has been reached, to provide legal counsel and draft a settlement agreement.

Aspects of the model have been criticised. For one, couples are not advised of their legal rights before mediation. It has also been suggested that the role of the advisory attorney violates the conflict of interest provisions for attorneys. Notwithstanding these concerns, structured mediation has and continues to have a significant influence on divorce mediation practice in the USA.

Despite its multidisciplinary roots, divorce mediation has developed in the USA as a distinct professional process²² that emphasises the participant's responsibility for making decisions about custody, property division and support. It assumes that the spouses have authority and responsibility to determine what is best for themselves, their children and the entire family. Rather than seeing divorce as a terminal process, practitioners of divorce mediation see it as a means to restructure relationships for the future.

Folberg and Milne suggest that divorce mediation is typically provided in one of three settings: court, private and agency.²³ Court based mediation is either voluntary (Florida, Michigan and New Hampshire), or mandatory (California, Oregon, Washington, Kansas, and Maine), and save for a couple of notable exceptions (Maine and Connecticut), limits itself to custody and visitation issues. Local tax laws, marriage license fees, and court filing fees generate funding for court based mediation programs.

The question of mandatory court mediation is hotly debated in the USA. Some argue that mandatory mediation is a contradiction in terms and assert the importance of self-determination in all aspects of the process including the decision whether to mediate. Proponents of mandatory mediation draw a distinction between the decision to enter mediation and the possible agreements reached in the course of the mediation. They argue that state intervention is justified on the basis of the overwhelming research to the effect that heightened conflict within a divorce is detrimental to children's best interests.

²¹ J Folberg and A Milne, *Divorce Mediation: Theory and Practice* (1988) at 5.

²² According to a 1983 study by Pearson, Ring and Milne, nearly 80% of all mediators in the USA hold a graduate degree. Mental Health professionals account for 78% of the mediators in the private sector and 90% in the public sector. The figures for attorneys are 15,4% and 1%, respectively. Other professional backgrounds include accountants, clergy, educators, financial planners and guidance counsellors. Pearson, Ring and Milne, "A Portrait of Divorce Mediation Services in the Public and Private Sector", *Conciliation Courts Review*, 21 (1) (1983), at 1-24.

²³ Folberg and Milne at 11.

Where mediators have the power to make recommendations, the results of the process cannot be considered voluntary even if no recommendation is made. This is because the power to make recommendations can be used to “muscle” agreements, so eroding the parties’ freedom of choice. The confidentiality of the proceedings is not protected in these circumstances.

The rules of many trial courts provide that litigants consider a number of Alternative Dispute Resolution (ADR) procedures including mediation. These programs are referred to by a number of names including multi-option ADR programs and multi-door courthouses. Typically litigants are given a choice of procedures including early neutral evaluation, mediation, arbitration and litigation. The idea is for the disputants to choose the most appropriate procedure at an early stage in the life of the dispute. Divorce actions are often mediated in this setting, making it possible for all the relevant issues to be considered.

The second setting is of the private practitioner operating on a for-fee basis. Most common is the mental health practitioner who offers mediation services as an adjunct to counselling services. Lawyers comprise the second largest group within this category, and often co-mediate with mental health practitioners. Most private practitioners find it difficult to support themselves solely through mediation work. By contrast court appointed mediators often have heavy caseloads.²⁴

In the absence of licensing requirements, mediators in most states seek membership with the Society of Professionals in Dispute Resolution (SPIDR) and the Academy of Family Mediators (AFM), and subscribe to the standards of conduct they have established.

Where staff has received training, agencies and clinics, as the third setting, may offer mediation services for nothing or for a nominal fee. Community mediation centres that are staffed by trained volunteers offer free or low cost mediations for a range of neighbourhood disputes including divorce.

California

California has been a frontrunner in the legislative developments to both the substantive and procedural laws governing marriage and divorce. Its Family Code deals comprehensively with mediation for custody and visitation issues and is deserving of attention.

Section 3161 of the Family Code describes the purpose of mediation as being (1) the reduction of acrimony; (2) the development of an agreement that assures close and continuing contact with both parents while being in the best interests of children; and (3) to settle the issues of custody and visitation. This section dovetails with other substantive provisions on custody and visitation rights. One states that the mother and the father are equally entitled to custody, and another creates a presumption that joint custody is in the best interests of a minor child.²⁵

Section 3162 of the code requires that mediation be governed by a uniform set of practice standards which ensure that the best interests of any children are met, facilitate the transition of the family, and equalise the power relationships between the parties. The factors to be taken into account when determining a child’s best interests are set out in detail.²⁶

²⁴ Under California’s mandatory scheme, mediation services were provided to some 24 000 couples by 151 mediators in 1982, making an average caseload of 160 mediations per mediator per year. Duryee at 48.

²⁵ California Family Code, section 3080.

²⁶ Id, section 3011.

Mediation is mandated if custody or visitation is contested in any proceeding²⁷, including any dispute about modifications to an existing order. The settlement agreement is specifically limited to “parenting plans, custody, visitation, or a combination of these.”²⁸ Where there has been a history of domestic violence or a protective order has been issued, the mediator is required to meet with the parties separately and at separate times.²⁹ The mediator has the authority to exclude counsel³⁰, and may make “recommendations to the court as to the custody of or visitation with the child”.³¹

Mediators are either members of the Conciliation Court, the Probation Department, the Mental Health Services Agency, or any other designated person. They must comply with minimum qualifications, which include a master’s degree and at least forty hours training in mediation.³²

The mandatory mediation of custody and visitation disputes in California is now an accepted part of the dispute resolution process. It handles high levels of cases, provides cost effective assistance to courts and produces high levels of user satisfaction.³³

New Zealand

In 1981 New Zealand introduced family courts and a three-step approach to the resolution of family disputes: counselling, mediation and litigation.³⁴ Irretrievable breakdown of the marriage established by two years of living apart is the only ground for divorce.³⁵

Counselling is the first step and is conducted by private practitioners who attempt to reconcile the parties before exploring conciliation. Attendance can be enforced through court summons and a report is made to the court stating whether reconciliation is desired, and if not, whether an understanding has been reached.³⁶ If neither reconciliation between the parties nor conciliation of the issues in dispute is achieved, then a mediation conference is convened.

Mediation is mandatory in all cases involving custody, access and maintenance issues. The mediators are specialist family court judges whose goal is to identify issues in dispute and reach a resolution.³⁷ Although the judge who sits as mediator may hear the trial this is not common and one of the parties may request that a different judge hear the case. Mediation takes place prior to trial but may also be utilised during or after litigation.

²⁷ Id, section 3170.

²⁸ Id, section 3178(a).

²⁹ Id, section 3181(a).

³⁰ Id, section 3182.

³¹ Id, section 3183(a).

³² Id, section 3164.

³³ See Duryee.

³⁴ Family Courts Act, 1980 and Family Proceedings Act, 1980.

³⁵ Family Proceedings Act, section 39.

³⁶ Id, section 11.

³⁷ Id, section 14.

Attorneys may attend to assist rather than represent, and although a family court judge at the courthouse conducts the proceedings, the process is more relaxed and is designed to enable the parties to reach agreement on the issues in dispute. Where an agreement is reached, a non-appealable order of court is made.

4. MEDIATION AND DOMESTIC VIOLENCE

Where mediation is an option, what special steps should be taken where the existence of domestic violence is suspected or known? Firstly, as discussed above, mediators should be trained to deal with power imbalances in general, as well as the specific dynamics of domestic violence. Part of the general assessment of the power relationship between the parties should focus on the likelihood of domestic violence. One way to do this is through a screening process that allows spouses to answer direct questions on the subject privately. Secondly, a clearly defined procedure should be followed to ensure the safety of the abused spouse. Ideally this would include different steps for women and men. With women, education about the availability of protective interdicts and other safety measures including shelters and police are important. With men, services that supply treatment, training or counselling for abuse should be explained. Alcohol and substance abuse should be referred for specific treatment.

Mediation is only viable in cases involving domestic violence if boundaries established in guidelines and ground rules are honoured. Erikson and McKnight assert that mediation is inappropriate where the wife is only mediating to placate her husband; where the husband discounts everything the wife says; where there is ongoing abuse; or where a party is under the influence or carrying a weapon. It is important to note that the violence or abuse itself should not be mediated.³⁸

Some commentators assert that no safeguards can redress the unequal bargaining power between the parties where there is a background of domestic violence:

While mediation presumably requires that both parties be placed on an “equal footing” in order to negotiate a mutually acceptable agreement, the abused woman may make concessions to protect herself from further abuse. The balance of power in victim/abuser relationships is so weighted that the possibility of victim coercion during mediation is virtually unavoidable. Mediation, by nature, relies to some extent on the mutual goodwill and fairness of both parties. In some kinds of cases, trained mediators may be effective in equalising the bargaining power of the parties, but they cannot compensate for a long-term pattern in which one party has consistently controlled and manipulated the other. Indeed, the victim may even be afraid to speak up or register disagreement during a mediation session for fear of retaliation. This imbalance of power would continue after the mediation session as well, since the parties’ relationship would not be altered.³⁹

Another document on this topic makes a similar point:

The pattern of power, control and dominance by the abusive spouse which emerges over time in such relationships, leaves the victim in a position of fear, dependence and weakness... It may be impossible to overcome the power imbalance between the

³⁸ See S Erikson and M McKnight, “Mediating Spousal Abuse Divorce”, *Mediation Quarterly*, Vol.7, No.4 (Summer 1990) at 382-385 for a comprehensive list of steps and activities from which these points were distilled.

³⁹ G Godkasian, “Confronting Domestic Violence: “A Guide for Criminal Justice Agencies”, National Institute of Justice, 1986 at 61.

two such that any agreement reached will not truly have been voluntary... Mediation should never be required when there has been family violence.”⁴⁰

The US Model Code on Domestic and Family Violence of the National Council of Juvenile and Family Court Judges contemplates mediation only in respect of custody and visitation of children, but suggests that mediation of these child care issues in cases where there has been an allegation of domestic violence can take place only if:

- (a) Mediation is requested by the victim of the alleged domestic or family violence;
- (b) Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialised manner that protects the safety of the victim; and
- (c) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or an advocate.⁴¹

The US Congress passed a Resolution in 1990 stating that “There is an alarming bias against battered spouses in contemporary child custody trends such as... mandatory mediation.”⁴² There are several US states which have outlawed the use of mandatory mediation where there is a context of domestic violence, or enacted special safeguards. For example, in Oregon mediation around the specific issues of child custody and visitation may take place in cases where there is domestic violence or “other power imbalance issues” only if the mediator follows guidelines which incorporate strict standards for specialised training and safety precautions.⁴³ Ohio law forbids the court from mandating mediation around child care issues where there has been a previous conviction on a domestic violence offence, unless the court makes a specific determination, supported by written findings of fact, that mediation will still be in the best interests of the child.⁴⁴ New Hampshire has a scheme for “voluntary marital mediation”, but mediation may be disallowed when there is domestic violence: “The court shall not allow or shall suspend marital mediation proceedings when it appears to either the court or the mediator or when either party asserts that abuse... has occurred, unless the alleged victim... requests mediation and the mediator is made aware of the alleged abuse”.⁴⁵ North Dakota has an absolute prohibition on mandatory mediation of child care issues where domestic violence is involved: “The court may not order mediation if the custody, support, or visitation issue involves *or may involve* physical or sexual abuse of any party or the child of any party to the proceedings.”⁴⁶ Minnesota similarly forbids mandatory mediation of child care issues if domestic violence is suspected.⁴⁷ Other states with prohibition on mandatory

⁴⁰ National Council of Juvenile and Family Court Judges, *Family Violence: Improving Court Practice* (1990) at 28.

⁴¹ National Council of Juvenile and Family Court Judges, *US Model Code on Domestic and Family Violence* (1994), §408A and §408B.

⁴² House Concurrent Resolution 172, 1990, passed unanimously by both the House and the Senate.

⁴³ Oregon Revised Statutes, Title 11, Chapter 107, § 107.755.

⁴⁴ Ohio Revised Code §3109.052.

⁴⁵ New Hampshire Statutes, Title XLIII, §458:15-a. (Cross-references omitted.)

⁴⁶ North Dakota Century Code, Title 14, §14-09.1-02.

⁴⁷ Minnesota Statutes Annotated, Chapter 518, §518.619. “If the court determines that there is probable cause that one of the parties, or a child of a party, has been physically or sexually abused by

mediation of family issues in a context of domestic violence include Louisiana, Maine, Pennsylvania, Washington State and Wisconsin.

In the Canadian province of Nova Scotia, the Law Reform Commission has gone further, questioning even the *voluntary* use of mediation in cases involving domestic violence; the Commission recommended that “No court-ordered *or sanctioned* mediation of family law issues should be permitted where domestic violence is suspected”.⁴⁸

There appears to be a need for the use of extreme caution in respect of this issue.

5. ADDITIONAL ISSUES

Confidentiality

Mediation is not necessarily a private process. However confidentiality and the protection of communications associated with mediation is viewed as an integral and crucial component of the mediation process. Confidentiality is achieved either by agreement or through the operation of law. Where agreement is relied upon, its efficacy rests on the value the court places on promoting settlement negotiations rather than having access to the relevant evidence to decide a contested matter.

Effective mediation is premised on open and frank communication between the disputants. However, the mediator has no authority to compel the provision of information. Any information furnished is done so because the parties believe in the process and trust the mediator. If the parties thought the mediator could testify or talk to others about what is said or revealed in the mediation, then there would be no motivation to be candid about the situation at hand. A similar reluctance would exist if the parties did not trust one another not to be called to testify about what they revealed in a mediation session. In divorce mediation the private nature of the proceeding is a further reason why all communications should be confidential.

The issue of confidentiality may also arise within the mediation if separate meetings or caucuses are held. Whether or not the mediator will reveal to the other party information disclosed in caucus is a matter to be agreed upon by the parties and the mediator. Furthermore, where the mediator needs to communicate with other professionals, such as attorneys and mental health therapists, then it is important that specific permission is obtained from the parties prior to making the communication.⁴⁹

Where the confidentiality of communications is protected there may be limitations. For example, a duty to report child abuse may necessitate a mediator revealing information obtained in a mediation session.

Rules of evidence that protect settlement discussions are one example of how the law operates to protect the confidentiality of communications made in mediation. In terms of the

the other party, the court shall not require or refer the parties to mediation or any other process that requires parties to meet and confer without counsel, if any, present.”

⁴⁸ <http://www.chebucto.ns.ca/Law/LRC/recommendV2.html#three> (undated, appears to have been published around 1994)(emphasis added).

⁴⁹ This is in keeping with the SPIDR, ABA and AAA Model Standards of Conduct for Mediators. Standard No. 5 provides that the mediator should maintain the reasonable expectations of the parties with regard to confidentiality.

applicable Roman-Dutch common law, the without prejudice privilege prohibits the disclosure in evidence of admissions made to reach a settlement of a dispute.⁵⁰ Subject to common law requirements and limitations, the privilege arises whether or not expressly acknowledged by the parties. Boulle and Rycroft suggest that it will also apply to mediation sessions.⁵¹ The privilege applies only to the parties, and so it follows that the mediator could be subpoenaed. However, as a matter of public policy it is submitted that the privilege should be extended to cover mediators. Another limitation to the without prejudice privilege is the fact that admissions are not protected once an agreement is reached.

Uncertainties similar to these have led other jurisdictions to create specific statutes that protect the confidentiality of communications made in mediation. Again, California has been a leader in legislative developments. Since 1985 communications made in mediation were protected from admission and disclosure in subsequent proceedings.⁵² In 1993 the Evidence Code was again amended, this time to make mediators incompetent to testify in subsequent civil proceedings.⁵³ In response to local court rules permitting a mediator to make a report to the court, section 1152.6 of the California Evidence Code was passed. It prevented a mediator making a report, other than that the parties had or had not agreed. This was to prevent parties from being coerced to settle because the mediator threatened to make a negative report to the trial judge about the merits of the case or the reasonableness of their stance.

These ad hoc developments have now been consolidated in a new chapter in the Evidence Code that came into effect on 1 January 1998. The new provisions also define mediation⁵⁴ and determine with greater clarity the scope of the privilege⁵⁵ and the period during which the privilege is in operation.⁵⁶ Uncertainty about the admissibility of agreements reached in mediation has also been resolved.⁵⁷ It should be noted that the confidentiality provisions in the Evidence Code do not apply to custody or access proceeding under the California Family Code.⁵⁸ However they do cover all other matrimonial issues which are mediated.

Standards of conduct

Various organisations have developed standards of conduct for their mediators. Some are of a general nature and cover mediation in a variety of fields, and others are more specific and deal with a particular field of practice. The standards of conduct set by SPIDR in 1986 are general, and cover the largest number of mediators. They have since been superseded by a new set agreed upon by SPIDR, AAA, and ABA in 1994.

⁵⁰ LH Hoffman & D Zefferett, *The South African Law of Evidence* (4th edition, 1988) at 196.

⁵¹ Boulle and Rycroft at 241.

⁵² California Evidence Code, section 1152.5.

⁵³ Id, section 703.5.

⁵⁴ Id, section 1115(a).

⁵⁵ Id, sections 1120 and 1121.

⁵⁶ Id., section 1125.

⁵⁷ Id, section 1124.

⁵⁸ Id, section 1116(a).

Within the family mediation profession, two standards of conduct are available to guide mediators in this specialised field. The ABA has proposed ethical guidelines for attorneys who conduct divorce and family mediation. The AFM has also established detailed standards of conduct for their members. The AFM is an international association of more than 3500 family mediators. Its purpose is to advance the practice of family mediation.

Statutory mediation programs will often establish applicable standards of conduct in addition to qualification requirements.

The adoption of standards of conduct is seen by some as an inappropriate attempt to formalise an emerging profession. Others point to the benefits of making the purpose and scope of mediation more clearly known to the public. In addition, an educational function brings a degree of realism to the practice of mediation, and can temper inflated claims about what mediation can and cannot do.

The standards of conduct address appropriate conduct before, during and after the mediation. Some of the issues addressed include neutrality and impartiality, confidentiality, conflicts of interest, self-determination, costs and fees, and advertising.

Qualifications and training

What qualifies a person to be a mediator? Training, formal education and apprenticeship are three common approaches taken to establish the ability to mediate. Divorce mediation is generally considered a specialised area of mediation practice.

In North America, there is no standard course for mediators to obtain training, whether in regard to the content, duration or testing. However, the most common way in which mediators are trained is through attendance of a forty-hour training program, provided by associations, community mediation centres or professional mediation trainers. Colleges and universities also offer training with a greater emphasis on the theory of mediation. Successful participants receive a "certificate". A few tertiary institutions offer formal graduate degrees in conflict resolution. The Federal Mediation and Conciliation Service in the USA has an apprenticeship program that allows suitable candidates to develop skills through practical supervision.

The question of certification is often raised in the context of training and qualifications. Should some bureaucratic control body certify mediators to practice? Certification would denote the minimum educational and experiential qualifications for the lawful practice of mediation. Certification and testing are complex areas. A certified mediator must be able to put theory into practice. The concern has been expressed that testing would have the effect of excluding persons with good mediation skills, while admitting mediators with poor practical skills. Observation of prospective mediators during role-plays has been suggested as a possible way for mediators to demonstrate their proficiency.

In California mediators who conduct mandatory custody and access mediation must have a master's degree and in addition take a mediation-training course of at least forty hours. However, a Society of Professionals in Dispute Resolution commission on qualifications has found that in general there is no direct relationship between formal academic degrees and competency. They were of the opinion that "individuals lacking such credentials make excellent dispute resolvers and well designed training programs are of critical importance in attaining competence."⁵⁹

⁵⁹ Society of Professionals in Dispute Resolution (SPIDR), *Qualifying Neutrals: The Basic principles. Report of the SPIDR Commission on Qualification.* (1989).

Community mediation centres set their own minimum qualifications. Some court annexed mediation programs require that mediators are practising attorneys. In the private sector, professional groups often set minimum experience requirements for full membership.

6. ATTITUDES ABOUT MEDIATION IN NAMIBIA

Interviews

In order to assess public attitudes about the introduction of family law mediation in Namibia, interviews were conducted during June and July 1999 with 35 individuals in the Windhoek area who were identified as interested parties or key informants.

Table 44A: Persons interviewed on family mediation

Person	Organisation or occupation
Pastor Witbooi	Deputy Prime-Minister
Chief Rirauko	Traditional Leader, Member of Parliament
Ms Othillie Abrahams	Namibia Women's Association
Ms Pamela Leipoldt	Namibia Women's Association
Ms Elizabeth Khaxas	Sister Namibia
Ms Gisela !Haoses	Women's Solidarity
Ms Rianne Selle	Multi-Media Campaign on Violence
Ms Petronella Coetzee-Masabane	Deputy-Director, Division of Social Welfare Services, Ministry of Health and Social Services
Mr Jacques De Witt	Church Benevolence Society
Ms Petra Fourie	Church Benevolence Society
Rev Kathindi	Secretary-General, Council of Churches in Namibia
Rev Nakamela	previous Secretary-General, Council of Churches in Namibia
Ms Hetty Rose-Junius	University of Namibia
Mr Tousey Namiseb	Human Rights and Documentation Centre, University of Namibia
Chief Justice Strydom	Supreme Court
Judge President Teek	High Court
Mr Uutoni Njoma	Chairperson, Law Reform & Development Commission
Mr Jan Joubert	Registrar, High Court
Magistrate Rina Horn	Chief Commissioner of Child Welfare
Adv Susan Vivier-Turck	Society of Advocates
Mr Joos Agenbach	Namibia Law Society
Mr Billy Dicks	Legal Practitioner
Ms Elize Angula	Lorentz & Bone
Mr Ndjoze	Director, Legal Aid
Ms Patience Darengo	Legal Aid
Mr Clinton Light	Legal Assistance Centre
Ms Rosa Namises	Legal Assistance Centre
Mr Norman Tjombe	Legal Assistance Centre
Ms Laura Tjihero	Legal Assistance Centre
Ms Yvonne Dausen	Legal Assistance Centre
Mr Delme Cupido	Legal Assistance Centre
Ms Eva Weitz	Legal Assistance Centre, formerly Senior Control Social Worker at Ministry of Health and Social Services

Warrant Officer Shatilwe	Woman and Child Protection Unit
Ms Lindi Kazombaue	Consultant
Ms Doufi Namalambo	Consultant
Total	35 (20 women, 15 men)

In general, the response to the idea of divorce mediation was overwhelmingly positive. Interviewees felt that family disputes are not presently dealt with in a satisfactory manner.

Extended family members currently play an important role in dealing with family disputes, but negotiations in this context can become adversarial and accusatory. There is also always the danger that family members will side with their own children, regardless of the merits of the dispute. Concerns about trust and confidentiality were also raised.

In some communities, specific persons are viewed as having responsibility to assist with marital disputes. For example, in some communities, the witness who signed at the wedding can be approached to intervene if there is a problem. (At the wedding, the husband generally brings one witness and the wife another.). In some communities, a particular in-law assumes responsibility for a new spouse, but this person may not be able to view disputes impartially.

One problem with such approaches is that members of the extended family or the community may not really appreciate the dynamics of the marital relationship in question. They may also be influenced by narrow expectations about appropriate sex roles, or operate under the assumption that wives must accept the authority of their husbands. Attitudes such as these can push a dispute underground rather than helping to resolve it.

Intervention by the extended family is less common in white communities, where spouses may struggle to resolve disputes on their own. They may also turn, eventually, to a pastor, a good friend, a parent or a professional, although there is a stigma attached to admitting that there is a problem. Where members of the extended family do become involved, they may be too far removed from the relationship to have any insight into it, or they may be biased and unhelpful.

When churches are approached for help with marital problems, their perspective is sometimes influenced by particular ideas about the respective roles of husbands and wives. For example, a church leader who operates from the assumption that wives should be submissive to their husbands may unwittingly add to the problems the wife is experiencing.

Social workers are sometimes approached for help with marital difficulties, but this route can also be problematic. The social workers themselves are hampered by the strains of a heavy case load, husbands are often reluctant to come for counselling sessions with the social worker, and social workers sometimes give advice in such a way that the clients feel obliged to follow it, but then later resent the intervention.

The civil divorce process received a high level of criticism as a forum for dealing with marital disputes. The following were among the long list of shortcomings which were cited:

- Divorce cases are too long, too expensive and inaccessible to most, as well as being based on an outdated system of fault.
- The court case does not make allowances for dealing with the strong emotions aroused by divorce.
- The spouses often do not attend the pre-trial conferences which can lead to settlements, leaving the negotiations to the lawyers.
- Court orders do not always deal with the specifics of how marital property will be divided, leaving this as a potential point of dispute to be resolved by the parties after the court case.
- Enforcement of court orders on divorce is difficult and cumbersome.

One interviewee stated that “Divorce is like a declaration of war with the children used as cannon fodder.” It was also observed that nobody except the lawyers wins in a divorce action, with the real question being only how to contain their losses.

Maintenance courts were also viewed as inadequate for dealing with disputes about maintenance. Interviewees cited attitude problems on the part of maintenance officers, ineffective enforcement techniques, parties feeling that they are under duress to sign a consent order, a lack of adequate time and privacy to deal with relevant matters, and feelings of dissatisfaction on both sides with case outcomes (which does not encourage voluntary compliance with the maintenance orders).

There was a general conviction that there is a need for change in the manner in which families deal with their disputes, and a high level of enthusiasm for the introduction of mediation on family issues. Many noted that this approach could be particularly positive where children are involved. Two particular advantages of using mediation which were cited were:

- (a) to move away from stereotypes and assumptions about family problems to face the real facts of the particular situation; and
- (b) to address the emotional aspects of divorce along with the practical ones and bring a human face to the process.

The wide use of dialogue by extended family to resolve differences in accordance with African tradition indicates a cultural norm which is supportive to the introduction of divorce mediation. Of course, the flip side of the tradition of family involvement is the extent to which oppressive values are used as reference points for the settlement of cases, particularly around the issue of gender roles. The challenge lies in introducing a mediation programme which can build on the positive values of family involvement and retain sensitivity to the cultural backdrop, while still respecting the constitutional rights of all parties.

The main concern expressed by interviewees was how mediation services would be financed. Many felt that only a state-financed service could be accessible to all persons in Namibia. One suggestion was for a pilot project of 3-5 years, to be financed by donors, which could thereafter be taken over by government. Another option suggested was a fee-based service, with a means test being applied to exempt from payment those who cannot afford the fee. Interviewees were sceptical about relying on volunteers, because of concerns that mediation should be handled professionally. One realistic proposal envisaged supporting a mediation system through a combination of state funds, donor funds and fees paid by the disputants.

If the issue of finances can be addressed, it appears that there is a pool of suitable Namibians who could be trained to provide mediation services throughout the country. Specific groups which were identified included priests and pastors, social workers, lawyers, paralegals, traditional leaders, members of counselling organisations or NGOs, and school principals and teachers – although some persons thought that members of some of these groups would *not* be suitable as mediators. When describing the qualities which would be important in a mediator, interviewees felt that while familiarity with the relevant law was important, a legal background or a law degree was not. Both specific training in mediation skills and sensitivity to the cultural norms of the participants and would be essential, and the ideal mediator would balance these two qualities.

Some other potential problems which were cited involved gender issues. The existing power imbalances between men and women might be an obstacle to effective mediation. Some thought that men might be resistant to mediation, or they might view the process as being biased towards women if it departs from traditional assumptions about sex roles. The gender of the mediator might be cause for concern by both men and women if a single mediator is used.

Interviewees were divided on whether mediation should take place when there is domestic violence, because the power imbalances in such a situation might make meaningful negotiation impossible. Most felt that the domestic violence itself was not an appropriate topic for mediation, but some felt that other issues could still be subject to mediation after a screening process or with the addition of special safeguards. It was emphasised that the criminal aspect of domestic violence should not be ignored just because mediation is to take place.

The position of divorce mediation in the divorce process would have to be clarified. Mediation would not replace the formal legal procedure for divorce, but a number of different options were suggested for how it might fit into that process. Some interviewees favoured mandatory mediation, while others thought it should be a voluntary option. Other suggestions were to make mediation mandatory where there are children involved, but otherwise optional, or to begin with voluntary mediation and consider making it mandatory after the idea gains acceptance. It was suggested that mediation could be available before a divorce action is filed, after a notice of opposition to the divorce is filed, or even requested as an alternative to a notice of opposition.

Consultative workshop

Further input on the idea of family mediation was gathered at a workshop held in Windhoek in July 1999 and attended by 21 persons.

Table 44B: Persons who attended family mediation workshop

Person	Organisation or occupation
Ms Ottilie Abrahams	Namibia Women's Association
Ms RJ Andrew	Ministry of Health and Social Services– Okahandja
Ms Elize Angula	Lorentz & Bone
Mr HL Awaseb	Law Reform & Development Commission
Dr Heike Becker	Consultant specialising in customary law issues
Adv Willem Bekker	Law Reform & Development Commission
Ms Patience Darengo	Legal Aid
Ms Yvonne Dausab	Legal Assistance Centre, Katutura Advice Office
Ms P Fourie	Church Benevolence Board
Ms Gisela !Haoses	Women Solidarity
Ms Rina Horn	Ministry of Justice
Ms E Labuschagne	Church Benevolence Board
Judge Mainga	Judiciary
Mr SV Mbahuma	Ministry of Prisons
Ms Rosa Namises	Legal Assistance Centre
Ms M Oliphant	Ministry of Health and Social Services
Ms LN Shapwa	Ministry of Justice
Ms Rosalia Shatilweh	Woman & Child Protection Unit, Windhoek
Ms Laura Tjihero	Legal Assistance Centre
Ms S Weber	Ministry of Health and Social Services
Ms Eva Weitz	Legal Assistance Centre
Mr John Ford	<i>Convenor</i>
Total	21 participants (19 women, 4 men)

The workshop built on the information collected through the interview process. The vision for family mediation developed at the workshop reads:

“To provide a family mediation service throughout Namibia which is expedient, accessible and affordable to the parties by means of a mediator and with the view of reaching a mutually acceptable settlement.”

Although the vision focused on family mediation rather than divorce mediation, the participants at the workshop suggested that a pilot project should focus on divorce mediation.

The workshop agreed on a recommendation for a private pilot divorce mediation project that would run for a period of 3 years, with the following goals:

- establishing a legal foundation to operate within the context of the formal legal system;
- establishing an urban operating center in Windhoek within the first three months and a rural operating center in an area to be identified within the first year;
- recruiting, training and managing a panel of mediators who provide the mediation services;
- educating and involving the community and key stakeholders about the use of divorce mediation for the duration of the project;
- providing spouses with an accessible forum to reach a mutually acceptable settlement to the issues arising on divorce in an expedient, and affordable manner; and
- experimenting with the viability of divorce mediation in Namibia and developing a divorce mediation model that is appropriate to Namibia.

7. MEDIATION AND DIVORCE LAW REFORM

The consultations carried out for this paper indicate that divorce mediation will be viable in Namibia. The information collected in this research project shows that the current divorce system is clearly not serving many members of the public well. New approaches are needed to make the law more responsive to the needs of the communities it serves.

Namibia already has a history of certain forms of mediation in the customary law context, although these processes are currently clouded by assumptions about sex roles in marriage and in dispute resolution which can unfairly disadvantage women. Ideally, mediation could take the strengths of the historical approach and apply them in a new context of equality.

One Namibian model which should *not* be followed is the kind of agreement which take place around maintenance in the Namibia's maintenance courts. A study of the operation of these courts found that 93% of all maintenance cases were resolved through agreements between the parties facilitated by the intervention of the maintenance officer as "mediator". And yet satisfaction with the maintenance process is low and compliance remains a serious practical problem. Furthermore, observation of negotiations that take place in this forum revealed bias and pressure to settle ranging from subtle to not so subtle.⁶⁰

The existing civil divorce process is built around negotiation, since the key issues in most cases are dealt with by an agreement between the parties (sooner or later), but with the drawback that these agreements are usually handled in an adversarial setting which does not allow space for the expression or resolution of emotions which are invariably tied up with a divorce. This backdrop too could be constructively built upon to popularise mediation.

The present study shows that some 40% of divorce cases already include a detailed agreement between the parties which resolves key issues, with many of these agreements being facilitated by legal representatives. The introduction of mediation could provide settings that would encourage and facilitate such settlements by more parties, without entailing the expense of employing a legal practitioner or the inconvenience of applying for legal aid.

⁶⁰ See Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts* (Legal Assistance Centre, 1995).

It is sometimes assumed that the legal profession will be opposed to the introduction of mediation on the grounds that it could reduce income from divorce cases, but no such resistance was encountered in the consultations carried out for this project. On the contrary, there seems to be a high level of enthusiasm for the idea from many quarters.

While mediation might be appropriate for a broad range of family law issues, divorce mediation would be a good starting point because the issues which must be resolved in a divorce – division of property, child custody and access, and maintenance -- are clear, consistent and inter-related.

We suggest that divorce mediation should be tried in a pilot project where mediation is made available to parties on a completely voluntary basis, rather than being mandated in any way by the court. Ideally, such a pilot project would introduce divorce mediation in both an urban and a rural area. The experience of such a project would hopefully provide more information about the best way forward for family mediation in Namibia.⁶¹

⁶¹ This chapter is based in part on a more detailed background paper published by the Legal Assistance Centre: John Ford, "The Viability of Divorce Mediation in Namibia: An Analysis with Recommendations" (1998).

CHAPTER 5

RECOMMENDATIONS

1. GENERAL

This section of the paper makes recommendations on the basis of local opinion and the experiences of other countries.

It is generally suggested that the divorce procedure should be simplified, so that parties who have no real dispute about their divorce or the terms of the divorce can easily approach the court on their own without the need for legal representation. Couples with points of dispute should also be able to negotiate the court process on their own if they wish. This would make the divorce procedure more accessible, thus encouraging couples to obtain formal divorces rather than informal separations when a marriage has broken down. It would also reduce the current burden on legal aid in respect of divorce cases.

The recommendations here draw a distinction between the divorce itself and the *terms* of the divorce. The research conducted makes it clear that the parties in “opposed divorces” seldom oppose the divorce itself, but rather details such as the division of property, the custody of minor children or the amount of maintenance payments. Divorce cases can be simplified if these two concepts of the fact of divorce and the terms of the divorce are kept separate.

This separation of concepts will also be helpful to clarify the role of divorce mediation, which is intended to help divorcing spouses agree upon the details of the divorce. Divorce mediation should not be confused with marriage counselling, which is an attempt to save the marriage which takes place outside the legal system and prior to divorce proceedings. Mediation should be facilitated and encouraged, as a more suitable forum than a court for dealing with the emotions and the small practical details which may be standing in the way of an amicable resolution.

These recommendations are based on the theory that if both of the parties to the marriage are agreed (in the absence of coercion) that the marriage has irretrievably broken down, then the court should not be expected to enquire into the details of the breakdown. The premise is that it serves no legitimate social purpose for a court to try to force parties to maintain a dead marriage, and that such an enquiry unnecessarily forces parties to reveal intimate details of their lives, as well as encouraging informal separation or cohabitation outside the protection of the law. It is proposed that evidence of the breakdown of the marriage should be required *only* in circumstances where one spouse wants to dissolve the marriage and the other wants to continue it. Otherwise, the court should accept as common cause the fact that the marriage has broken down.

It is suggested that all legal provisions dealing with divorce, currently scattered amongst several separate pieces of legislation, should be consolidated in one new divorce law.

2. TERMINOLOGY

We propose that a new divorce law use the terms applicant and respondent, as a signal of a move away from the emphasis on guilt and innocence. There no longer needs to be a “defendant” who is “defending” himself or herself against allegations of wrongdoing.

It might be advisable to move away from the terms “custody” and “access”, in favour of more child-centred terms such as “residence” or “parenting”, and “contact” or “visitation”. In

recent years, there has been an international move towards the concept of parental responsibilities rather than parental rights. One recent study characterises this approach as an effort “to move parents away from proprietorial attitudes to children and from regarding children as prizes in win-lose litigation”.¹ However, the present recommendations and draft act adhere to the existing terminology of “custody” and “access” for purposes of clarity. This terminology should be re-considered at the technical drafting stage.

3. JURISDICTION

What court?

It is clear that the current system of allowing divorces only in the High Court in Windhoek is expensive and inconvenient for the vast majority of Namibians. The inaccessibility of the forum may well be a contributing factor to the prevalence of informal “divorces” in hybrid marriages.

There are several possibilities for divorce jurisdiction. The pros and cons of each will be summarised below.

(a) High Court

One option is to retain the existing system of allowing divorces only in the High Court in Windhoek (and eventually in the second planned High Court in Oshakati). The main argument advanced in favour of this option by members of the legal profession is that divorce cases are matters of status, and therefore require attention from a court at a high level. Also, divorces often involve the welfare of minor children, making it appropriate for the High Court as the upper guardian of all children to be involved.

Some persons interviewed felt that the seriousness of divorce and the complexity of some divorce cases warranted retaining High Court jurisdiction. It was suggested that even High Court judges do not have sufficient expertise in marriage and family law issues at present, and that divorces should be handled in future only by specially-trained judges.

Several judges pointed out that the question of High Court jurisdiction must be considered in conjunction with potential procedural reforms. If there is a move to affidavit evidence rather than personal appearances by parties, then High Court procedures will become cheaper and less inconvenient. By the same token, if the grounds for divorce are substantially altered, then divorce will be a different matter altogether.

(b) Circuit High Court

A number of persons who were interviewed thought that handling divorce cases in the circuit court would be a compromise between increased accessibility and the advantages of keeping jurisdiction in the High Court. At present, divorces are done in circuit court only where there are special circumstances. (For example, during the study period, one divorce case was heard by the High Court on circuit in Oshakati because the plaintiff was disabled.)

¹ Australian Law Reform Commission, Report No. 73 (Internet version) at para. 6.1. Feminist legal scholars have pointed out that legal concepts about the rights and duties of parenthood have been strongly influenced by patriarchal models based on property concepts such as ownership, custody and control. These ideas are rooted in patriarchal systems of family law, where inheritance was the key concern, and fathers had a duty to provide for women and children coupled with a right of absolute control. See, for example, Dr Selma Sevenhuijsen, “Justice, Moral Reasoning and the Politics of Child Custody”, *Warwick Working Papers: Feminism and the Law* (1990) at 19

Some people expressed concerns about delays in circuit courts, noting that circuit courts do not sit often enough as it is because of budgetary constraints. If a divorce case had to be postponed, it could not continue until the court's next visit to the location in question. It was suggested that one approach to this problem would be to give parties the option of suing for divorce in either the High Court or the circuit court, so that they could choose for themselves between convenience and speed. Another possibility would be to deal with postponed cases in Windhoek, since it might not be necessary for the parties themselves to appear. It was noted that Botswana successfully handles civil and criminal cases on a circuit court basis.

It was also noted that there is no legal impediment to the use of circuit courts for divorces at present, but only a custom of not doing so.

(c) Magistrates' courts

Some members of the public asked: if magistrates have the authority to perform marriages, why should they not have the corresponding authority to grant divorces? One response to this question is that divorces are more complicated than marriages. Another point is that both parties freely enter into a marriage, while one spouse may apply for a divorce against the other spouse's will.

The main argument in favour of giving divorce jurisdiction to magistrates' courts, at least over unopposed divorces, is increased accessibility and reduced costs for members of the public.

Several persons interviewed felt that magistrates should not deal with status matters, while others found this less of a concern, pointing out that magistrates already handle important family matters such as adoption, removal of children from the family in cases of abuse and neglect, placement of children in foster care, and maintenance. Generally, there were few objections *in theory* to the idea of giving at least some divorce jurisdiction to magistrate's courts, but many people expressed concerns about how this would work out in practice.

Practical arguments against giving magistrates any divorce jurisdiction were the following:

- Magistrates do not have the appropriate academic qualifications and background in marriage and family law issues to handle divorce cases.
- Magistrates have little experience with civil matters, since most magistrates' court cases are criminal cases. Additional training could be provided, but this does not compensate for practical experience.
- Review by the High Court could be utilised as a safeguard against mistakes from inexperience, but the High Court is already overwhelmed with existing review cases. Furthermore, review procedures are designed to deal only with clear irregularities, and will not normally interfere with the exercise of discretion by a lower court.
- Magistrate's courts are already overcrowded and chaotic, with long delays. There are not enough magistrates to handle current caseloads.
- In many parts of Namibia, there are no legal practitioners with divorce experience. This might make it difficult for parties to get effective legal representation in magistrates' courts.
- The procedure in magistrate's courts is too informal to be appropriate for the seriousness of a divorce.
- There is a need to move towards a higher degree of specialisation rather than a lesser one, such as using only specially trained family court judges.
- Divorce cases may involve very large amounts of assets, or they may involve small marital estates which are just as crucial to the parties involved. Thus, it is not feasible to apply a cutoff for magistrates' courts jurisdiction on the basis of the value of the marital property involved.

One possibility which has been raised is limiting magistrates' court jurisdiction to cases where there are no minor children, but this does not seem logical in light of the fact that magistrates already handle other kinds of cases which concern child custody and welfare under the Children's Act.

(d) Regional magistrates' courts

This is another intermediate approach which could provide a compromise between accessibility and concerns about the drawbacks of giving divorce jurisdiction to magistrate's courts. However, most legal practitioners who were interviewed felt that this option had all the same disadvantages as the magistrate's court option. Like magistrates in most parts of the country, regional magistrates normally handle mostly criminal cases and would therefore be lacking in relevant experience.

(e) Community courts/traditional tribunals

If the same divorce grounds and procedures are adopted for customary marriage as for civil marriage, or if there is a legal requirement that both customary marriages and divorces must at least be formally registered, then perhaps community courts and/or traditional tribunals should play a role. This is a question which must be given further consideration as ideas about community courts and the formal recognition of customary marriages are further developed.

Recommendation: While there appears to be no persuasive reason in theory why magistrates' court should not handle divorces – or at least unopposed divorces – the practical concerns cited are troubling. Therefore, we recommend that divorce cases continue to be handled by the High Court, including the High Court circuit court (at the option of the applicant) – but with a move to greater use of affidavit evidence and fewer personal appearances by parties, especially in unopposed divorces.

Alternative option: If magistrates' courts are given jurisdiction over divorce cases, this should initially be limited to divorces where both parties seek a divorce and there is no disagreement on the terms of the divorce. Magistrates' court jurisdiction over divorces might be adopted or expanded later on, as some of the general practical problems relating to the operation of magistrates' courts are addressed. A switch to magistrates' court jurisdiction should in any even be preceded by specialised training for all magistrates in this area of law.

Jurisdiction over parties and applicable law

The jurisdictional provision in the Matrimonial Causes Jurisdiction Act (section 1) was recently substituted by section 17 of the Married Persons Equality Act. The amended section gives the court jurisdiction in divorce actions in two situations: (a) where either of the parties is domiciled in the court's area of jurisdiction at the time of the divorce action; and (b) where either party is ordinarily resident in Namibia at the time and has been ordinarily resident in Namibia for the past year. It also requires the court to deal with all divorces heard in Namibia in terms of the law which would apply to parties who are domiciled in Namibia. The amended South African Divorce Act takes an identical approach.

Recommendation: The existing approach to jurisdiction over parties seems sound and should simply be re-enacted in the new Divorce Act.

4. GROUNDS FOR DIVORCE

The pros and cons of “guilt” and “innocence”

South African commentators Hahlo and Sinclair list a number of criticisms of the former fault-based system in South Africa which are equally applicable to the current situation in Namibia²:

- Marriages are complex relationships and the distinction between “guilt” and “innocence” is unrealistically simplistic. In reality, both spouses may be at fault, or they may simply be incompatible without fault on either side.
- Where a couple wants a divorce, they will almost always manage to make their case fit the law. This makes the fault system a legal fiction. Very few divorces in Namibia are opposed, and the disputes which do arise are usually about the terms of the divorce rather than the desire to obtain a divorce. This means that most divorces, while ostensibly based on fault, are actually divorces by mutual consent.
- There is no point in trying to preserve a marriage in law if it has become a dead husk in reality. Even if only one of the parties wants the divorce, the law cannot revive the relationship simply by making divorce difficult to obtain. To keep parties tied to each other when their marriage has broken down might actually encourage immorality.

It may also be argued that it is inappropriate in a secular state like Namibia to maintain a set of grounds for divorce which is rooted in the doctrine of a particular religion.

Part of the international trend towards moving away from fault-based grounds stems from a new conception of marriage. Early legal rules regulating civil marriage and divorce, including those which still exist in Namibia, are premised on the idea that marriage is a “status”, as well as a basic social institution in which the state has a strong interest. Under this view, a marriage relationship can be dissolved only for state-defined reasons -- acts which constitute “fault” in the eyes of the state. But modern civil marriage has come to be seen more as a voluntary “contract” between individuals which can be terminated at the will of either party. The role of the law has come to be seen as a protective one, to ensure that accumulated assets and liabilities are shared equitably upon divorce and to protect the interests of the children of the marriage.³

Making it “easy” or “hard” to get a divorce

The influence of the law on keeping marriages together should not be overrated. One South African commentator, Cronjé, puts it this way:

*One must clearly keep in mind that no divorce law can solve the problems resulting from broken and disrupted marriages, simply because the law of divorce never caused such problems in the first place. Likewise, a sound divorce law does not aim at making divorce either easier or more difficult, but has as its prime consideration the more realistic regulation of divorce itself.*⁴

Multiple studies show that “there is no clear and simple relationship between strict divorce law and marriage stability in a given society, nor between lenient divorce law and marriage instability”.⁵ As Professor Glendon points out, “legal norms, to be sure, often may have

² Hahlo & Sinclair at 3-ff.

³ See Fineman at 18-19.

⁴ Cronjé at 253.

⁵ Glendon, *Transformation* at 16 (referring to research by Max Rheinstein and others). For example, it was estimated in 1958, when divorce was illegal in Italy, that about 600 000 couples were

some effect on the way people think, feel and act, but it is striking how stubbornly the forms of behavior involved in family life seem to follow their own patterns independently of the legal system”.⁶

Hahlo asserts that “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”.⁷

Trying to make divorces “difficult” to obtain will most likely have the result of encouraging informal separations which may leave the economically weaker parties – who are usually women – unprotected.

The comment of one Namibian interviewee can be usefully reiterated here: “Couples staying together despite the fact that they have lost interest in one another just end up more unhappy with life and themselves...”.

Irretrievable breakdown

The international move towards irretrievable breakdown seems to be a response to social realities. Virtually all of the members of the legal profession who were consulted were in favour of law reform which moves in this direction.

A move away from fault-based grounds is likely to reduce the bitterness of divorce proceedings, which will be a particularly positive development where there are children. Furthermore, even where one or more of the traditional fault-based grounds is present, both parties may still have contributed to what went wrong. A court is not well-placed to apportion blame in an intimate relationship, regardless of what kind of enquiry is instituted. For these reasons, we recommend a move away from fault-based grounds entirely.

The suggested approach is based on that followed in the Nordic countries. It is also used in some US jurisdictions, such as Washington State.

The possibility of joint applications for divorce in a no-fault system

At present the structure of the divorce law encourages collusion. Even if both parties agree that the marriage has broken down and want to end it, they must go through the fiction of asserting that one of them is “guilty” and one of them is “innocent”. They are allowed to agree about the terms of the divorce, and to make their agreement an order of court, but one of them must still go through the motions of suing the other for divorce.

A reformed divorce law should approach the topic more honestly. If both spouses are in agreement that the marriage is beyond hope, then they should be able to approach the court together. Allowing them to present a united front may encourage co-operative discussions of the terms of divorce, as well as eliminating the costs of service of process. In amicable divorces, it is surely also beneficial for other family members and members of the community to perceive the divorce as a mutual decision rather than something one party has imposed on

still technically married even though the marriage had in reality ended, and about 1 million men and women were living with someone other than their spouses even though they were still legally married. Id at 18.

This assertion conflicts with that of the South African Law Commission, which stated in 1978 that the divorce rate is higher in countries which allow consensual divorce. SALC at 9.

⁶ Id at 16.

⁷ Hahlo, 4th edition, at 362.

the other. The law should respect such mutual decisions, rather than forcing otherwise agreeable parties to act out a confrontational role.

Recommendation: We propose two grounds for divorce: (a) irretrievable breakdown of the marriage; and (b) mental illness or continued unconsciousness of one spouse. While some countries consider the second ground to be a form of the first, we believe that it is helpful to follow South Africa's footsteps by separating the two so that special protections can be applied for the protection of incapacitated parties.

It is submitted that the court need not enquire into the details of the marital breakdown where neither spouse denies that irretrievable breakdown has occurred. Even under the present fault-based system, affidavits are often formulaic and oral evidence in motion court extremely cursory in the majority of cases. Surely there is no legitimate social purpose to be served for a court to enquire into the intimate circumstances of a marriage which neither party wants to preserve.

However, where one spouse seeks a divorce over the objections of the other, we propose either a brief waiting period to allow for possible reconciliation, or else specific evidence of irretrievable breakdown.

Orders for restitution of conjugal rights and waiting periods

The South African Law Commission in 1978 described reconciliation orders as “farcical”, and little more than “a mere formality”: “The restitution of conjugal rights is the last thing the plaintiff wants. Yet the law requires him or her to sue for this first, and only failing this for divorce”.⁸

The Namibian case of *James v James* 1990 NR 112 (HC) shows how the restitution procedure can be abused in practice, when the defendant in a divorce proceedings tries to halt the divorce by making an offer to restore conjugal rights, not in good faith but merely as an attempt to gain leverage in divorce negotiations.

Some persons interviewed thought the present procedure of requiring an order for restitution of conjugal rights before a final divorce order can be granted offered a useful last chance for reconciliation. Others did not believe that they served any useful purpose, pointing out that when a party has gone so far as to approach a court to request a divorce, there is little hope of saving the marriage. One interviewee from an NGO which regularly assist women, and sometimes men, with the divorce process stated that “people don’t want the order, they want the divorce.”

The statistical evidence supports the second view. If the High Court Registers which record all divorce actions instituted are compared with statistics compiled from court records on final divorce orders, this shows that *out of a total of 4257 divorce actions instituted in the last 11 years, 4245 resulted in divorce. This indicates that there were only 12 cases in 11 years where the parties reconciled*, or perhaps where the divorce was denied because of insufficient grounds. This may be a slight undercount, because accurate statistics for some months are missing and because of slightly different time frames (the final divorce order may be granted in the calendar year following the one when the action was commenced). But further evidence of a small number of reconciliations comes from the present research, which found only 26 instances of reconciliation among a sample of 434 cases spanning five years (only 6%). Clearly there are few couples who change their minds once divorce proceedings have begun.

⁸ SALC at 6, paragraph 6.3.

This data indicates that there is no real need for the continued use of orders for restitution of conjugal rights, or for a uniform waiting period such as England's "period of consideration and reflection". The divorce rate in Namibia is not high, and people contemplating divorce often discuss this move with family members or church leaders long before taking any legal action. It does not seem necessary to try to legislate for a reflection period in all cases. In fact, a lengthy divorce process may simply add more trauma for minor children and prevent all parties concerned from getting on with their lives.

However, where there is a difference of opinion between the spouses about whether or not the marriage has in fact reached the point of no return, we propose that the court have two options: (a) to make a finding of irretrievable breakdown on the basis of specific evidence placed before it (by affidavit, supplemented by oral evidence if the court deems this necessary); or (b) to impose a brief waiting period to allow for reflection and possible reconciliation. Two options are proposed in these circumstances to ensure that one spouse does not oppose a divorce simply to harass or to control the other. For example, if domestic violence is present, it would be extremely unwise and possibly even dangerous to drag out the divorce proceeding. Factors which would constitute proof of irretrievable breakdown could be listed for this purpose as a guide to the court and to the parties.

The possibility of postponement to encourage reconciliation could be made somewhat broader, as in South Africa, where "if it appears to the court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings in order that the parties may attempt a reconciliation." However, this option is not recommended where there is no disagreement between the parties on the viability of the marriage, as it seems too paternalistic in this context. Avoiding unnecessary delays is particularly important where there is a history of domestic violence, as the period when the relationship is breaking up can be the most dangerous. Delays may also leave minor children unsettled for longer time periods, adding unnecessarily to their trauma.

Recommendation: The procedure of issuing an order for the restitution of conjugal rights prior to the divorce decree should be abandoned. A waiting period should be imposed only where there is a difference of opinion between the spouses on whether or not the marriage has reached the point of irretrievable breakdown, and there is no evidence which would enable the court to find that irretrievable breakdown has in fact occurred.

Mental illness or unconsciousness

It is suggested that the South African model be followed on this point, but with somewhat less stringent standards for finding mental illness. Because of Namibia's shortage of mental health facilities, it does not seem reasonable to make institutionalisation an absolute requirement. It seems unfair to shackle any person to a spouse who may no longer be in any meaningful sense recognisable as the person who was married because of mental illness, even if the mentally ill spouse is not totally incapacitated.

While it is of course not desirable to encourage any spouse to shirk the promise to care for the other "in sickness and in health", it seems equally unfair to impose a legal responsibility on a person who is not willing or able to take on the moral responsibility of standing by a spouse who is suffering from a serious and permanent mental illness or who is unlikely ever to regain consciousness.

As noted above, this ground for divorce could be subsumed under the notion of irretrievable breakdown, and the court could appoint a *curator ad litem* to represent the incapacitated

party. However, it seems more appropriate to treat this ground separately for the purpose of applying special protections to all cases in this category, including a requirement that the applicant cover the costs of legal representation for the incapacitated spouse, and offer security or other assurances in respect of that spouse's share of the marital property if the court deems it necessary.

Recommendation: We recommend following the basic outline of the South African Divorce Act on mental illness or continuous unconsciousness as a ground for divorce, and particularly the provision of procedural safeguards for the incapacitated party.

5. CONSEQUENCES OF DIVORCE

The following issues are those which we have referred to as the “terms of the divorce”. In the majority of cases, these issues are resolved by agreement between the parties even if there is initial disagreement. Legal practitioners often play a mediating role in practice, and these are the areas where divorce mediation would be appropriate.

Division of property

Judicial discretion

Currently judicial discretion in respect of the division of marital property takes place in the form of orders for forfeiture of benefits – which cannot be refused if requested by the “innocent” party.

In other countries, divorce law reforms which have liberalised the grounds for divorce have been accompanied by greater state intervention in property division. There are many arguments in favour of giving courts discretion to adjust the division of marital property, regardless of the marital property regime which applies to the marriage and regardless of the terms of any antenuptial contract. In the words of South African Justice van den Heever, it would be a mistake to treat a marriage as “a business transaction instead of what it is supposed to be: a lifelong relationship between two adults to support each other and for the sake of their children’s education and the good of the community”.⁹ A South African legal practitioner similarly noted that “a marriage contract should not be treated as having been entered into on the same basis as a commercial contract”, because of the starry-eyed frame of mind of the intending spouses.¹⁰

Professor Glendon makes the point that the two parties to a marriage will often not be in an equal bargaining position at the time the antenuptial contract is made. Such contracts are more likely to be used by the economically stronger party to restrict property division and future maintenance in case of divorce.¹¹

Interviews in Namibia show that the parties to a marriage may not clearly understand implications of the default marital property system, or the alternative system they may

⁹ South African Law Commission, *Project 12, Report on the review of the law of divorce: Amendment of section 7(3) of the Divorce Act, 1979, July 1990* at 10 (in support of the view that the redistribution of assets should be possible at divorce in all marriages out of community of property that exclude the accrual system, when and wherever solemnised).

¹⁰ Id at 11, quoting practitioner KG Mustard.

¹¹ Id, quoting *The New Family and the New Property* at 66.

choose, at the time of the marriage. Another Namibian problem is that a woman who owns or leases a home sometimes transfers it into the name of her husband upon marriage, which can cause her to lose out unfairly later on if the marriage is out of community of property.

These considerations argue in favour of allowing some degree of judicial discretion to adjust property division equitably, in light of the circumstances of the marriage and the divorce.

The following counterarguments can be asserted:

- the need to preserve and protect freedom of contract and freedom of choice
- the paternalism of interfering with parties' choices
- the possibility that judicial discretion would create legal uncertainty
- the existence of other remedies if coercion took place at the time of the marriage or in connection with the antenuptial contract
- the fear that such discretion could lead to more protracted and complicated divorce litigation
- concern about prejudice to creditors of the spouse with the greater assets if court can redistribute these assets
- concern that redistribution might be contrary to a party's legitimate wishes, such as a desire on the part of a widow or widower to keep his or her estate separate for the benefit of children from the first marriage.

But some legal practitioners who were interviewed called attention to cases in which manifest unfairness has resulted in respect of marriages which exclude community of property, community profit and loss and any form of accrual sharing. We submit that the need to apply principles of equity to protect economically weaker parties who have invested substantial portions of their lives in a marriage outweighs the arguments against judicial intervention. For example, a woman in a marriage which is strictly out of community may have spent years managing the home and caring for the children as well as contributing an income, yet have little or no property in her own name.¹² It would be unfair to ignore such contributions totally upon divorce. Furthermore, the possibility of judicial adjustment on the issue of division of property may inspire spouses to make reasonable agreements between themselves before approaching the court.

Forfeiture of benefits

The South African Divorce Act allows for an order for the forfeiture of benefits by either party in a divorce based on the irretrievable breakdown of the marriage. The court must consider three factors: (a) the duration of the marriage; (b) the circumstances which gave rise to the breakdown; and (c) any substantial misconduct on the part of either of the parties. This provision is a punitive measure which essentially brings fault back in through the backdoor. On the one hand, one spouse might argue that the other spouse should not get the benefits of the one's labour if the other spouse has been adulterous or abusive. On the other hand, if the goal is to adopt a no-fault system which will reduce recriminations and bitterness, a misconduct provision might well defeat the purpose. The concept of forfeiture could be abandoned altogether in favour of simply allowing the court some discretion to redistribute marital assets so that no party is unduly benefited or disadvantaged.

We propose that the rather narrow and punitive concept of forfeiture of benefits which is part of the present fault-based system of divorce be replaced by a broader authorisation for judicial intervention in the division of marital property, on the basis of specified factors (which would

¹² It must be remembered that full-time housewives are a small and elite group. Women typically work at low-paying jobs, or in the informal sector, while also performing the tasks of raising children and maintaining a home. But this double contribution is seldom recognised. See Fineman at 47.

still allow the court to consider the respective role of the parties to the breakdown of the marriage, without encouraging this).

Custody and equality in the division of property

It has been suggested that the division of marital property should be looked at in conjunction with custody. Taking sole responsibility for custody affects a parent's life options. Some kinds of jobs or careers are incompatible with full-time responsibility for children, such as those which involve long hours, shift work or excessive travelling – particularly for a single parent. The custodial parent also contributes the value of his or her services in taking care of the child's daily needs, perhaps single-handedly. Thus, where one parent has custody of the children of the marriage, an "equal" division of property may not actually place the parties in an equal position.

The "lost opportunity costs" associated with responsibility for small children should not be confused with the categories of expenses which are designed to be covered by maintenance. However, even so, the custodial parent who relies on maintenance always has to absorb the risk that there will be extra, unforeseen expenses, or the risk that child care expenses will have to be met even when maintenance payments are not forthcoming.

There are several possibilities for adjusting property dispensations to take into account the custodial parent's lost options and risks. These can be used jointly or individually, but none of them should affect consideration of maintenance payments:

- Allow generally for judicial discretion to adjust the division of property based on the circumstances of the individual case, particularly in marriages which are strictly out of community of property.
- Place a "tax" on the joint estate of a specified percentage to be to the custodial parent to offset the "lost opportunity costs" and financial risks associated with sole custody, such as dividing community property 60/40 in favour of the custodial parent instead of 50/50 between the two ex-spouses. A formula could be established which need not vary with the number of children, since what is being compensated is not specific expenses which increase with the number of children, but the more abstract risks and constraints which must inevitably accompany custodial responsibilities.
- Require that the matrimonial home follow the children, regardless of who holds title to the deed or the lease, by means of compensating for the value of the home through the division of other property, or by a deferred transfer or division of the value of the matrimonial home.
- Issue guidelines for maintenance awards, on the basis of income and number of dependants, and provide as a matter of urgency for more efficient enforcement and collection systems through the enactment of a revised Maintenance Act;
- List the issue of custody among the factors which guide determinations of whether or not to award spousal maintenance.¹³

All of these possibilities have been incorporated into this set of recommendations.

It has been noted that any connection between custody and property division must be accompanied by clear guidelines about the factors which will determine custody, to ensure that neither spouse seeks custody for imagined financial benefits. The idea in any event is *not* to "benefit" the custodial parent, but to place the two spouses on an equal footing given their differing responsibilities.

¹³

See Fineman at 178-79.

Recommendation: We envisage three routes to the division of property:

(1) an agreement between the parties, provided that the court finds that there has been no coercion of either spouse and that the agreement is not manifestly unfair;

(2) a simple order for the division of joint property in 50/50 shares where there are no minor children or in 60/40 shares where minor children are placed in the custody of one spouse, with the larger share going to the custodial parent; or

(3) the exercise of judicial discretion to order a just and equitable disposition of the assets and liabilities of the parties, whether community property or separate property and without regard to which spouse holds title to any immovable property or leasehold rights, on the basis of the following factors:

(a) the duration of the marriage;

(b) the property regime of the marriage and the provisions of any antenuptial contract;

(c) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home, caring for the family or performing other domestic duties;

(d) the unwarranted dissipation of the marital property by either spouse;

(e) the economic circumstances of each spouse at the time of the divorce, taking into account the income, earning capacity, assets and other financial resources, and the financial obligations and responsibilities, including maintenance payments ordered at the time of the divorce, which each spouse is likely to have in the foreseeable future;

(f) which parent is to have custody of any children of the marriage, including the desirability of awarding the family home or the right to live in the family home for a reasonable period of time to the custodial parent;

(g) the value to either of the spouses or to a child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage; or

(h) any other factor which the court deems relevant.

The last-mentioned factor would make it possible for the court to consider the respective roles of the parties in the breakdown of the marriage, without emphasising fault issues. The idea is that in a no-fault system, the conduct of the parties in respect of the marital breakdown would be relevant to the distribution of property only in cases involving particularly egregious behaviour – such as, for example, a case where one spouse had been contributing virtually all of his or her income to a third party in the context of an extramarital affair, or a case where a marriage in community of property ends as a result of long-standing violent behaviour on the part of a spouse who contributed virtually nothing to the couple's joint property.

Custody and access issues

The recommendations and the accompanying draft act envisage that a court considering a divorce decree will accept an agreement between the spouses in the absence of evidence of coercion or manifest unfairness, but will always examine any agreement between the spouses

concerning children of the marriage to see if it is in the best interests of the child and overrule it if necessary.

Best interests

Statutes in many countries state that no court should be able to grant a decree of divorce until it is satisfied that the best possible arrangements have been made for the minor children of the marriage. The theory is that this approach gives the court leverage to push the parties to agree upon suitable arrangements for the children.¹⁴ This seems a reasonable way to make sure that the children's interests are put first, and to avoid delays which can be traumatic for children, especially young children. However, it was suggested by one interviewee that it should be possible for the court to separate orders on the divorce itself and orders on the terms of the divorce, on the grounds that parties may be able to negotiate more calmly and sensibly once the divorce itself has been finalised. This could be considered as an alternative to the proposal below.

A group of US experts argues that the term "best interests" is too hopeful, since a divorce will almost always be detrimental to a child, so that the best which can be hoped for is the "least detrimental alternative".¹⁵ However, the concept of "best interests" is one which is internationally familiar and useful, and we see no reason to abandon it.

Nevertheless, the concept of "best interests" is very broad. A long shopping list of competing criteria cannot really give a court much meaningful guidance. Therefore, as discussed in more detail below, we recommend that "best interests" be given content in a new divorce law by means of assuming in the absence of evidence to the contrary that it is likely to be in the child's best interests to give preference to the parent who is the child's primary caretaker.

The common law on what constitutes "best interests" should continue to guide courts in their decision-making, but we suggest that a new divorce law should highlight three key factors to be considered -- each of which is discussed in detail below: (1) which parent has been the child's primary caretaker; (2) the child's preference; and (3) the need to protect the child against domestic violence.

Highlighting particular key factors would also have the effect of making affidavits submitted on this point less complicated.

Recommendation: No divorce decree should be issued until the court is satisfied that all arrangements in respect of minor children are in their best interests. A court may overrule any agreement between the spouses on issues relating to the children of the marriage if this is necessary in the best interests of the children.

While many factors may be considered in determining a child's "best interests", a new divorce law should highlight three key factors: (1) which parent has been the child's primary caretaker; (2) the child's preference; and (3) the need to protect the child against domestic violence.

¹⁴ Hahlo and Sinclair at 39.

¹⁵ Joseph Goldstein, Albert J Solnit, Sonja Goldstein and Anna Freud, *The Best Interests of the Child: The Least Detrimental Alternative*, 1996 at 50-ff.

The primary caretaker approach

As the statistics from the divorce files indicate, custody of children usually goes to the mother. However, it is questionable whether a court can, as a matter of principle, give preference to a mother in terms of child care without contradicting the Constitutional guarantee of sexual equality. For example, the recent South African case of *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O) held that the assumption that a mother is of necessity in a better position to care for a child than the father belongs to an era from the past. (However, the court in this case awarded custody of the young daughter in this case to the mother, on the basis of her suitability as a role model.)

The South African case of *Ex Parte Critchfield and Another* 1999 (3) SA 132 (WLD), after considering the issue of “maternal preference”, suggested a balancing approach (143B-D): “In my view, given the fact of pregnancy or more particularly, the facts of the dynamics of pregnancy, it would not amount to unfair discrimination (ie it would not be unconstitutional) for a court to have regard to maternity as a fact in making a determination as to the custody of young children. On the other hand, it would amount to unfair discrimination (and, correspondingly, be unconstitutional) if a court were to place undue (and unfair) weight upon this factor when balancing it against other relevant factors. Put simply, it seems to me that the only significant consequence of the Constitution when it comes to custody disputes is that the Court must be astute to remind itself that maternity can never be, willy-nilly, the only consideration of any importance in determining the custody of young children.” (In this case, custody was in fact awarded to the father.)

Commentators in other countries (most notably Columbia Law Professor Martha Fineman) have pointed out that formal sexual equality in a world where men and women are not in fact equal can have the effect of unfairly disadvantaging women. An approach which makes no assumptions about the suitability of one parent over another lends itself to unpredictability, which opens the door to bargaining and negotiation that may not have the best interests of the child at heart. It is a fact, in Namibia and in other countries, that men who have no real interest in daily responsibility for child care seek custody as a bargaining chip to avoid having to make high maintenance payments, or to convince the mother to settle for a less advantageous property settlement. The lack of certainty can at the very least encourage opposed divorces, which prolong the process and have the potential to increase bitterness between the parties.¹⁶

One approach that has been taken to this problem in other countries -- such as through Canadian case law and by means of statute in some US jurisdictions -- is to adopt a standard giving preference for custody to the “primary caretaker”. This means the parent, regardless of sex, who has prior to the divorce been principally responsible for the day-to-day care of the child. Proponents of this approach say that it gives reasonable guidance to judicial discretion without unfairly disadvantaging either fathers or mothers, reduces uncertainty, and keeps the focus on facts which are clearly related to the child’s best interests. This approach has also been commended for relying on demonstrable evidence of the past rather than guesses about the future -- “evidence of commitment and competence already exhibited by the primary caretaker” rather than more unreliable predictions about future capacity.¹⁷ Kaganas emphasises the fair and gender-neutral aspects of the approach:

Although at present the primary caretaker standard favours mothers, it can operate in a gender-neutral fashion. It allows space for fathers who have been either primary caretakers or partners in child care to maintain these

¹⁶ See generally, Fineman at 79-ff.

¹⁷ Felicity Kaganas, “Joint custody and equality in South Africa”, *Acta Juridica* 169 (1994) at 184.

*roles. As a primary caretaker, a father could take advantage of a legal preference in the same way as a mother could.*¹⁸

Critics of the notion of giving preference to the primary caregiver have made the following arguments:

- Some men argue that joint custody is a better way to increase the parenting role of the father after a divorce, to the ultimate advantage of the child.
- Men have argued that the primary caretaker standard undervalues the role of earning income to support the family.
- The standard has been criticised for ignoring the *quality* of the relationship between the child and the respective parents.

There are two basic approaches to the primary caretaker standard which have been taken in other jurisdictions: One is to establish a presumption in favour of awarding custody to the primary caretaker. The other is to require consideration of which parent has been the primary caretaker as a weighty factor in a custody determination. The use of a presumption would seem to give more clarity and certainty, while citing this point as a key factor would give the court more discretion to examine the unique circumstances of each case. Where both parents have in the past been equally involved in child care, other factors would come into play as determinants of the child's best interests.

The Supreme Court of West Virginia established the following criteria for determining which parent has taken primary responsibility for the child, by asking which parent carried out the following duties:

- (1) preparing and planning of meals;
- (2) bathing, grooming and dressing;
- (3) purchasing, cleaning and care of clothes;
- (4) medical care, including nursing and trips to physicians;
- (5) arranging for social interaction among peers after school;
- (6) arranging alternative care, such as day care;
- (7) putting the child to bed at night, attending to the child in the middle of the night, waking the child in the morning;
- (8) disciplining the child, such as teaching general manners and toilet training;
- (9) educating the child in the religious, cultural and social spheres;
- (10) teaching elementary skills, such as reading, writing and arithmetic.¹⁹

The Canadian Advisory Council on the Status of Women suggests that the following reasons should clearly *not* be grounds for rebutting a primary caregiver presumption:

¹⁸ Ibid.

¹⁹ *Garska v McCoy* 278 S.E. 2d 357, 363 (W Va 1981), also adopted in Minnesota in *Pikula v Pikula* 374 N. W. 2d 705 (Minn. 1985). See Goldstein et al, *The Best Interests of the Child* at 188-ff; Susan B. Boyd, "Potentialities and Perils of the Primary Caregiver Presumption" 7 *Canadian Family Law Quarterly* 1 (1991).

Because of differing societal expectations about the role of men and women, child care efforts by fathers are sometimes rated as being more important than the more expected roles played by mothers. Including factors for identifying the primary caretaker would help to counter that potential problem.

The question of which parents worked outside the home would not necessarily be decisive. For example, in a Canadian case involving two parents who both worked and participated in child care, the judge found that the mother had been more involved in the physical care of the child and in organising the details of the child's life, while the father had "little conception of the magnitude of the responsibility for day-to-day care of a young child". *Grills v Grills* (1982), 30 R.F.L. (3d) 299 (NSTD), discussed in Boyd at 16.

- sexual preference
- having more than one sexual partner
- full-time employment
- relying on an extended family member or support network for assistance with parenting
- having less financial stability than the other spouse
- having a physical disability
- having received psychiatric care.²⁰

It is likely that mothers would continue to get custody most often under a primary caretaker standard, but this would not be a function of sex discrimination but a result of the fact that mothers by and large take responsibility for child care in our society. The standard would not disadvantage caring and involved fathers.²¹ For the child, the advantage would be continuity of care.

Recommendation: A new divorce law should give preference for custody to the parent who is the primary caretaker, to give concrete guidance to the concept of the child's best interests. This would ensure that courts do not operate on gender-based assumptions which may not be fair or correct. It would also provide more certainty on custody issues, and provide continuity of care for the children in question.

The child's opinion

Another key factor in making decisions about the best interests of children should be the child's own opinion, in cases where the child is sufficiently mature to give a meaningful preference. This is consistent with the UN Convention on the Rights of the Child, and a principle which has been incorporated into many statutes, such as the English Children Act 1989.

A long line of South African divorce cases have taken the view that if a court is satisfied that a child has the necessary emotional and intellectual maturity to state a preference which is a genuine and accurate reflection of the child's feelings towards the respective parents, then the court should give weight to this preference.²²

The children of a marriage should not be treated like objects to be fought over when a marriage comes to an end. A new divorce law should make it clear that any child with

²⁰ Canadian Advisory Council on the Status of Women, "Child Custody and Access Policy: A Brief to the Federal/Provincial/Territorial Family Law Committee" (1994) at 15. It should be noted that in December 1998, a Canadian "Special Joint Committee on Child Custody and Access" recommended against a presumption that custody should be given to the primary caretaker, but put at the top of a list of recommended criteria for determining best interests "the relative strength, nature and stability of the relationship between the child and each person entitled to or claiming a parenting order in relations to the child". "For the Sake of the Children", Report of the Special Joint Committee on Child Custody and Access (1998) at 41-45

²¹ The fact that a preference for the primary caregiver would at present favour mothers because of the social realities of child care would probably not raise questions of unfair discrimination. See *President of the Republic of South Africa v Hugo*, Constitutional Court of South Africa, 11/96 (18 April 1997).

²² See, for example, *McCall v McCall* 1994 (3) SA 201 (CPD) at 207H-I, and the precedents cited therein.

sufficient maturity will be given an opportunity to state his or her views, and that that those views will be given appropriate consideration in determining the child's "best interests".

Recommendation: In deciding questions of custody, the court should have regard to the ascertainable wishes and feelings of the child concerned, in light of the child's age and understanding.

Protecting children against domestic violence

Children can be harmed by violent behaviour even when it is not directed at them. They may be attacked themselves if they try to intervene to protect the battered parent. They may become excessively anxious, or live in constant fear of repeated violent episodes. They may feel responsible for the violence, or guilty because they do not know how to prevent it. The presence of violence can affect children's health, self-esteem and behaviour.²³

For this reason, abusive parents should not ordinarily have custody or unsupervised access to children, even if the violence has never been directed at the children themselves. Some courts still view allegations of violence against a spouse as being irrelevant to that parent's character as a parent.²⁴

Possibilities for law reform around this issue include (1) a rebuttable presumption that custody should not be given to perpetrators of domestic violence (even if they are primary caretakers) or (2) listing the presence of domestic violence directed at the child or any other person in the family as a factor in determining the best interests of the child.²⁵ The first approach, as the more decisive one, sends out a stronger message about violence.

Recommendation: There should be a rebuttable presumption that custody should 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.

The law should also require that access by a parent who has been abusive to anyone in the family should be considered very carefully. The possibility of special access arrangements should be considered to ensure the safety of the custodial parent and the child. Such special arrangements could be an order (a) that access must be supervised by a reliable party, such as a trusted member of the extended family; (b) that the child must be transferred from one parent to the other only at specified locations; or (c) that visits may take place only at a specified venue.

*Joint custody should be approached with extreme caution, or ruled out altogether, if there is a history of domestic violence.*²⁶

²³ See Bonthuys at 312-ff.

²⁴ See, for example, *B v S* 1995 (3) SA 571 (A) 586D-H.

²⁵ Bonthuys at 324.

²⁶ See Bonthuys at 325.

Joint custody

Some Namibian judges have in recent years been willing to consider awards of joint custody in well-motivated cases, while other judges are convinced that such arrangements are unworkable in practice. This suggests that there is a need for a new divorce statute to clarify whether or not joint custody is a valid option, and under what circumstances.

Joint custody is also a new concept in South Africa, with courts and judges manifesting wide differences in their attitudes. For example, joint custody was granted in the case of *V v V* 1998 (4) SA 169 (CPD) where the court issued detailed instructions about major parental decisions as a safeguard against future disputes, in the case of *Corris v Corris* 1997 (2) SA 930 (WLD) where the arrangement had already been working for over a year before the court case, and in *Kasten v Kasten* 1985 (3) SA 235 (C), where the court noted (at 236) that “both parties are willing to accept this arrangement, and what, of course, is more important, are determined to make it work because they both recognise that it is in their children’s interest”.

On the other hand, joint custody was refused in *Schlebusch v Schlebusch* 1998 (4) SA 548 (E), where the court worried (at 551) that requiring joint decision-making by divorced parents “could be courting disaster, particularly where the divorce has been preceded by acrimony and disharmony between the parties”. There were similar outcomes in *Venton v Venton* 1993 (1) SA 763 (D) and *Pinion v Pinion* 1994 (2) SA 725 (D). Joint custody in South African cases has taken two forms – joint physical custody, where physical care is divided between the parents, and joint legal custody, where both parents retain equal rights to participate in decisions regarding the child’s upbringing (on issues such as education, religion and health care) regardless of who has physical custody.²⁷

Members of the legal profession interviewed in Namibia expressed similar differences of opinion as those manifested in South Africa. Some thought the concept was unworkable in principle or too disruptive for the children. Others thought that in well-motivated cases it could help all of the family members feel positive and satisfied about the case outcome. It was noted by one interviewee that divorced parents who are on good terms co-operate with each other on parenting issues almost as if there were joint custody, even if this is not technically the case.

In the United States, most states have made joint custody in some form an option upon divorce. Canadian courts have become increasingly willing to make awards of joint custody, and in the UK the 1989 Children Act encourages joint custody.²⁸

Proponents of joint custody as an option in appropriate cases assert that this arrangement encourages greater ongoing involvement by both parents (particularly fathers who often fail to get sole custody) and minimises detrimental conflict which could otherwise emerge in a “winner-take-all” battle for custody. It has also been asserted that joint custody helps to combat the stereotype of mother as sole nurturer, avoids saddling either parent with overburdening arrangements and benefits children by preventing a sense of abandonment by one parent.

The key argument against joint custody is that it is unrealistic to expect effective co-operation and communication between parents who were in conflict during their marriage. Other critics

²⁷ Kaganas at 174. For further discussion of the South African position, see Brigitte Clarke and Belinda van Heerdan, “Joint Custody: Perspectives and Permutations” 112 *SALJ* 315 (1995); Felicity Kaganas, “Joint custody and equality in South Africa”, *Acta Juridica* 169 (1994); ID Schäfer, “Joint Custody”, 104 *SALJ* 149 (1987).

²⁸ Kaganas at 176.

say that day-to-day parental responsibility cannot realistically be divided between two parents living in separate households. It is possible that joint custody arrangements may in practice result in one parent (probably the mother) taking the lion's share of the responsibility for the daily care of the child, while still being obliged to consult the father who is only minimally involved. This may become an avenue whereby one ex-spouse can continue to exercise power over the other, which can be particularly problematic if there is a history of domestic violence.²⁹ This problem is most likely to arise if one parent is given primary physical custody while both share legal power to make decisions relating to custody: "Caretaking parents are ... 'punished' by joint custody orders because they are compelled to co-operate with their ex-spouses in making decisions about their children's upbringing. Their ex-spouses are 'rewarded' in the sense that they are legally empowered to make decisions without having to carry them into effect."³⁰

The following criteria have been suggested as requirements for joint custody:

- (a) both parents are fit to care for the child;
- (b) both desire continuous involvement with the child;
- (c) both parents are perceived by the child as sources of security and love;
- (d) both parents are able to communicate and co-operate in promoting the child's best interests; and
- (e) the parents live in sufficiently close physical proximity to make joint custody feasible.³¹

Joint physical custody may be workable in certain circumstances, but joint legal custody may be problematic. There are two possible solutions. (1) The statute could specify that any disputes stemming from joint legal custody should be resolved in favour of the parent who is primary caretaker, unless a competent court rules otherwise. This would be a safeguard against the situation where a parent who takes little actual responsibility for child care tries to use custodial powers to control or limit the parent who is more involved with the daily lives of the children. (2) The statute could specify that where joint physical custody is awarded, both parents shall have equal powers of legal custody, analogous to the equal powers of guardianship contained in the Married Persons Equality Act. This would give both parents the right to make custody decisions about children in their physical care without necessarily having to consult the other parent, although nothing would prevent consultation where the lines of communication and the intentions of both parents are good.

The second option is more straightforward, since the court might not otherwise need to make a finding on who is the primary caretaker if joint custody is approved. Identifying a primary caretaker might also undermine the concept of joint custody. Another argument in favour of the second option is that practical problems may arise under the first option if the child is in the physical custody of one parent while ultimate custodial authority rests with the other parent.

Recommendation: Joint custody is probably appropriate only in rare cases, but it should be available as an option. The criteria for joint custody should be set forth, to achieve a degree of uniformity on this issue. Joint physical custody should be accompanied by equal powers of

²⁹ Carol Smart drawn a distinction between "caring about" a child in the abstract and the practical work of "caring for" the child. Quoted in Kaganas at 182.

³⁰ Kaganas at 182.

³¹ Clarke and van Heerden at 319, drawing in part on *In re Wesley J. K.* 299 Pa Super 504, 445 A 2d 1243 (1982).

legal custody, to ensure that the less-involved parent does not have manipulative power over the other parent. Joint legal custody should not be an option in any circumstances.

Child maintenance

The experience of other countries shows that strong state involvement in child maintenance is crucial. Maintenance has been more reliable where (a) it is calculated with reference to formulas or guidelines based on the parents' income and the number of children; and (b) where the state takes responsibility for enforcement or at least implements strong enforcement measures.

The present situation which allows for amendment, variation, substitution and enforcement of maintenance orders made in divorce cases in maintenance courts should be continued.

In Canada, a divorcing spouse may be ordered to pay child maintenance even if he or she is not the child's biological parent, if he or she stands "in the place of a parent." This accords with the idea expressed by many interviewees that step-parents should take more responsibility for the children of their spouses.

Recommendation: It is absolutely urgent that a new Maintenance Act with more effective enforcement procedures be enacted in advance of, or alongside, divorce law reform.

The Legal Assistance Centre is in the process of preparing draft tables which could serve as guidelines for orders of child maintenance. Such tables could be promulgated in the form of regulations under the Maintenance Act and made applicable to child maintenance in all contexts.

A step-parent should be liable for maintenance of a minor child or his or her spouse upon divorce if he or she maintained the child during the course of the marriage.

Spousal maintenance

Spousal maintenance is seldom ordered in Namibia at present. However, legal practitioners say that there are still cases in which such maintenance is necessary to enable an ex-spouse to get back on his or her feet. Both men and women have requested spousal maintenance.

It must be noted that Zimbabwe, unlike South Africa and the current law in Namibia, allows spousal maintenance to be sought at any time and not just at the time the divorce decree is granted. Similarly, in England it is possible for spousal maintenance to be ordered after the divorce.³² Such a rule would obviate the need for awards of token maintenance at the time of the divorce to keep the door open for the future, but are inconsistent with the idea that the spouses' mutual duty of support comes to an end with the end of the marriage as well as the idea that it is advisable to encourage a "clean break" between the spouses unless there are special factors of need. Therefore, we recommend retaining the existing approach to timing. (However, child maintenance should be available at any point, since the responsibility of the parents to their children does not end at divorce.)

³² Section 22A, Matrimonial Causes Act, 1973, as amended by Schedule 2 of the Family Law Act 1996. .

In a no-fault system, spousal maintenance should be based primarily on considerations of need. However, the proposed factors set forth below would allow a court to consider the behaviour of the parties in respect of the marital breakdown in connection with questions of spousal maintenance, but without requiring or encouraging considerations of fault “through the back door”. The possibility is there to ensure fairness in extreme cases – as one person interviewed for this paper asked rhetorically, should a person who tries to kill his or her spouse be allowed to claim maintenance from that very spouse?

Recommendation: Spousal maintenance should be based on need rather than “fault”. A new divorce law should make spousal maintenance available in any divorce case on the basis of a consideration of listed factors:

- (a) the duration of the marriage and the age of the spouses;*
- (c) the standard of living of the parties immediately prior to the divorce;*
- (b) the economic circumstances of each spouse at the time of the divorce, including their respective income, earning capacity, assets and other financial resources, and their respective financial obligations and responsibilities;*
- (c) any impairment of the present or future earning capacity of the party seeking maintenance due to the fact that party devoting time to domestic duties, or having foregone or delayed education, training, employment or career opportunities due to the marriage;*
- (d) contributions and services by the party seeking maintenance to the education, training, employment, career or career potential of the other spouse;*
- (e) which parent is to have custody of any children of the marriage, taking into account any financial consequences arising from the daily responsibility for child care;*
- (f) any economic hardship arising from the marriage breakdown;*
- (g) the goal of promoting, as far as practicable, the economic self-sufficiency of each spouse within a reasonable period of time; and*
- (h) any other factor which the court deems relevant.*

As in the case of division of property, the final factor would make it possible for the court to consider the respective roles of the parties in the breakdown of the marriage, without emphasising or encouraging the consideration of fault issues.

6. PROCEDURE

Joint application

As noted above, under a system which is not premised on fault, parties can apply jointly for a divorce where they are in agreement that the marriage has broken down. This would in many cases eliminate the need for legal representation, especially if the parties had reached complete agreement on the terms of the divorce on their own or through a mediation process. As discussed above, this approach is also a positive one because it favours honesty and co-operation. It may also save on the costs of service of process, which can be substantial.

Affidavit evidence

Court appearances are required in divorces at present because a divorce is a status matter. Members of the legal profession who were interviewed were asked about their attitude towards granting divorces on the basis of affidavit evidence, rather than requiring a personal appearance in every case – especially since the examination of many of the plaintiffs in court is very cursory.

Those who opposed the affidavit approach cited these considerations:

- No status matter should be dealt with without a personal appearance because of the gravity of such matters.
- A personal appearance provides an important opportunity to correct errors and omissions in the court papers.
- The use of more detailed affidavits might add costs for those who have legal representation, since the drafting would be a lengthier process.
- “Paper is patient”, meaning that parties might find it easier to make false allegations on paper if they knew that they were unlikely to be cross-examined in open court. Parties sometimes make false allegations in divorce papers in order to embarrass the other spouse, as a form of leverage for a better settlement, and these are more likely to be exposed if there is a personal appearance.

Those who were in favour of proceeding on the basis of affidavit evidence cited the following factors:

- Other even more complex matters are decided on papers alone.
- An affidavit system would be faster and more convenient for the parties.
- If affidavit evidence were relied upon, people would take more care to ensure that the papers were accurate.
- It is the standard requirement of personal appearance which adds costs and inconvenience for those living outside Windhoek (if divorce jurisdiction remains in the High Court). Costs are multiplied if a party has to travel a long distance and then perhaps fails to bring along an essential item such as the couple’s marriage certificate.
- The court appearance is frightening and traumatic for some people who are not familiar with courts. Some people, women in particular, are ashamed to speak about the failure of their marriages in public.
- Questioning in motion court has generally grown less probing over the years, becoming more standardised. In practice, some personal appearances in motion court last less than one minute.
- Under the present system, the defendant virtually never attends motion court, meaning that there is no opportunity to hear both sides of the story.
- The use of affidavits would not encourage false evidence. It is already the case at present that some of the evidence given in motion court is not strictly true. Furthermore, the affidavit of the person applying for the divorce would be sent along with the summons to the other party, giving him or her a chance to give the other side of the story. A comparison of affidavits from the opposing parties would draw the court’s attention to areas where a personal appearance might be necessary to get clarity on the facts.
- The court could insist on more details in the papers concerning the welfare of minor children, and could always require the parties to appear to answer questions in chambers or in court in specific cases, especially those involving children. The court would also still be able to ask for social worker reports if there was any doubt about matters relating to the children.
- The use of affidavit evidence may be particularly appropriate under a reformed system which moves away from fault, thus removing the need for parties to make allegations against each other.

We find the arguments in favour of the use of affidavit evidence to be more persuasive. Greater use of affidavit evidence without personal appearances by the parties would also be one way to increase the accessibility of the divorce process even while retaining High Court jurisdiction.

Simplified procedure

There were many appeals from members of the public for a simplified divorce procedure which is less intimidating and confusing to members of the public. A simplified procedure would make it easier for persons to represent themselves, and easier for NGOs to assist persons who cannot afford legal representation.

In many US states, “do-it-yourself” divorce manuals have been developed to guide unrepresented parties through the legal process. This would be a feasible option in Namibia if the divorce process were simplified.

The use of standard affidavit forms, also used in many US states for divorces, is another way to simplify the process and is particularly helpful for illiterate parties. Community volunteers and members of NGOs could be trained in how to help parties seeking a divorce to fill in such forms. (Examples of simplified forms from the US state of Colorado are contained in an appendix to this report.)

Recommendation: All divorces should be dealt with on the basis of affidavit evidence, with the parties summoned to appear before a judge in chambers or in court whenever 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.

Parties who are in agreement that the marriage has broken down could apply jointly for a divorce. Where the parties are not applying jointly for the divorce, the applicant’s affidavit should be served on the respondent, to allow him or her to respond to specific facts or allegations.

The procedure for obtaining a divorce should be simplified. Summonses should be worded in clear and simple language, and standard forms for affidavits could be supplied at all magistrates’ courts. Clerks at magistrates’ courts could be trained to assist parties who cannot afford legal representation with the completion of these affidavits, even if the High Court retains divorce jurisdiction. Simplification of the divorce procedure would make it more feasible for parties to represent themselves, and would thus reduce the demands on the state legal aid system.

Family Advocate and social worker reports

The idea of having a Family Advocate who can monitor all divorce cases involving minor children in order to represent and protect the child’s interests is appealing, but it would require significant resources to do this in every divorce case involving children. For example, in South Africa where a Family Advocate system has been in place for some years, human resources continue to be a problem.

We recommend a compromise approach for Namibia. The courts already request social worker reports in cases where there is any doubt about the welfare of the children. A Family Advocate could be asked to become involved in these cases only, to ensure that the interests of the child were put before the court in a neutral manner instead of only from the perspective of the parties. Either spouse could request investigation by a Family Advocate where there is

conflict about child-related issues, but the decision as to whether or not this would be necessary would rest with the court. The court should also have the authority to request an investigation even if the parties are in agreement about custody and access issues, if there are reasons for concern.³³

Child development experts emphasize that a child's sense of time is different from that of an adult. A child's development process and bonding with his or her caretakers cannot be put on hold to wait for a slow judicial process.³⁴ This means that long delays in obtaining social worker reports are unacceptable. The involvement of a Family Advocate in such cases could help to address this problem. The new law should also set a strict time limit for a report-back to the court. If problems have been encountered which make it impossible to give a recommendation on this date, the Family Advocate must at least present a progress report to the court.

The introduction of a Family Advocate is another argument for retaining High Court jurisdiction. Even if circuit courts are used, court record-keeping and administration will be centralised in Windhoek. This makes it more feasible and cost-effective to introduce a Family Advocate system, as a single Family Advocate based in Windhoek could be called upon to monitor problem cases while existing social workers based throughout the country continue to handle local investigations.

Recommendation: The court should involve a Family Advocate appointed by the Minister of Justice in any case where the court is in doubt about what custody and access arrangements will be in the best interests of the child. The statute should articulate the circumstances where investigation is needed:

(a) where there is an intention to place children in the custody of someone other than the primary caretaker

(b) where there is an intention to separate siblings;

(c) where there is an intention to place children in the custody of someone other than their parents;

(d) where the parties have requested joint custody; or

(e) where the court for any other reason has special concerns about what custody or access arrangement will be in the best interests of the children.

This approach would help to protect children in problem cases, while minimising the costs to the state in terms of human resources.

Either the Family Advocate or the court should have the power to request a social worker report, and the court should receive this report and recommendations within one month, or at least a progress report which explains any obstacles to meeting this deadline.

³³ For a philosophical critique of the concept of child advocacy, see Fineman at 95-ff. However, in the Namibian context where domestic violence is rife, the potential advantages of additional investigation in problem cases seem to outweigh the potential drawbacks and shortcomings.

³⁴ See, for example, Goldstein et al, *The Best Interests of the Child* at 41-ff, 61.

Interim relief

The majority of the members of the legal profession who were interviewed felt that Rule 43 (which provides for interim applications for custody, access, maintenance and contributions to costs) works effectively and has a positive effect, although a few thought that the cost of bringing interim applications was prohibitive. The very existence of the rule apparently encourages parties to reach amicable agreements on interim matters, to avoid a court application.

We believe that Rule 43 should be retained and expanded to take care of two other common interim problems – the threat of domestic violence and prevention of unfair dealing in marital property while the divorce is pending -- as well as being simplified to increase accessibility and to allow for the possibility of self-representation in interim proceedings. Like divorces, most interim applications could be dealt with on the basis of affidavit evidence.

In some jurisdictions, orders prohibiting the dissipation of assets and violence are *automatically* invoked when one spouse files for divorce, along with a prohibition on removing any minor children of the marriage from the area of the court's jurisdiction.³⁵

The present research has not uncovered any cases where minor children were removed from Namibia, but a provision covering this potential problem could also be added to Rule 43.

Recommendation: We recommend that two other aspects be added to Rule 43 for the purpose of interim applications:

(a) a request for an order that the other party shall not damage, transfer, encumber, conceal or otherwise dispose of any joint assets, or of specified assets, while the divorce action is pending;

(b) an order that the other spouse shall not commit any act of domestic violence against the applicant spouse, which may include an order requiring the other spouse to stay away from the applicant spouse, from his or her residence, and from his or her workplace.

Both of these points are designed to address practical problems which are apparent from the interviews and case studies.

Like divorce proceedings, Rule 43 applications should be simplified as far as possible and done on the basis of affidavit evidence unless the court requests a hearing. As in the case of divorce pleadings, parties could have the option of using standard affidavit forms to make the process easier.

7. DIVORCES IN CUSTOMARY MARRIAGE

This is perhaps one of the most complex issues to decide – should Namibia follow in the footsteps of South Africa and Zimbabwe by applying the same divorce procedure to both civil marriages and customary marriages? Or should the existing procedures for divorces in respect of customary marriages be continued, but supplemented by a requirement that customary divorces (like customary marriages) should be registered?

³⁵

One example is the US state of Colorado, section 14-10-107, Colorado Revised Statutes.

One intermediate option would be to apply the same rules to civil and customary marriages regarding grounds and consequences, but to allow customary marriages to be dissolved in traditional forums (or in the forthcoming community courts).³⁶

Some arguments in favour of applying the same divorce law to both civil and customary marriage:

- Some of the existing grounds and procedures for divorce are unequal for men and women and are thus almost certainly unconstitutional.
- Uniform legal rules for divorce are best suited to protect the rights of vulnerable parties, who are usually women and children.
- If customary marriage and civil marriage are to have equal legal status, then the process for dissolution of the two types of marriage should be the same.
- One role of divorce is to determine the respective rights and obligations of the respective spouses in respect of third parties, such as creditors. This argues for a formal judicial process.

Some arguments against applying the same divorce law to both civil and customary marriages are as follows:

- It is anticipated that the forthcoming law on the recognition of customary marriages will respect the customs of different Namibian communities with respect to the contracting of the marriage. It would therefore be consistent to respect the customs of the different communities with respect of divorce.
- Because civil law forums are not well-suited for or experienced in the application of customary law, the context of customary marriage will be unfamiliar. Because of this, application of identical divorce laws and procedures for both kinds of marriage may favour civil marriage in practice – thus treating customary marriage as “a second-class citizen”. This is illustrated by the fact that most of the members of the legal profession who were asked their opinion on this point felt that they could not even make a meaningful comment.
- Because the customary law divorce procedure is so informal in many communities, it would be a huge jump from the existing position to a much more formal approach. One likely result would be that the law would simply be ignored in favour of informal separation.

Although this point was addressed in focus group discussions, the researchers feel that it has not yet been canvassed thoroughly enough to allow for a confident recommendation. Questions on this topic elicited little feedback from group discussions and personal interviews. One reason may be that it is necessary to consider the question of divorce reform in respect of customary marriage in conjunction with proposals for legal recognition and registration of such marriages in order to crystallise the issue. Therefore, instead of making an immediate recommendation on this point, a follow-up process entailing additional community consultation will be instigated.

In the meantime, it seems that, at a minimum, the registration of customary marriages must be accompanied by the registration of divorce under customary law. Otherwise, much of the purpose of having a register would be defeated.

Recommendation: Further consultation is needed on the question of whether the same rules and procedures should apply to both civil and customary marriages. In the meantime, it is

³⁶ Zambia, for example, has a separate court which deals with customary marriage and divorce issues.

suggested that any new law on the recognition of customary marriages should include a parallel procedure for registering customary divorces.

8. PRIVACY

Many of the concerns about newspaper publicity in divorce cases will be automatically solved by a move away from fault grounds to irretrievable breakdown, which will remove the need to present damning evidence against one or the other spouse in most cases.

Nevertheless, it is also possible that salacious details may still arise, particularly around custody disputes. The goal should therefore be to limit 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 -- without contradicting the Namibian Constitution.

It would not be a good policy to restrict the publication of names or the basic facts of the divorce order. The reason is that it may be relevant and necessary for creditors and other third parties to know that a divorce has taken place. The publication restrictions should apply only to the private details concerning the divorce, in which there is no argument of valid public interest.

But what about a case where both spouses are happy to publicise the divorce by giving an interview on television or in a newspaper? Short of defamation, it would seem to be an unwarranted intrusion into the freedom of speech of the parties to the marriage to prohibit this. The goal of protecting the interests of minor children would not seem to override free speech in the context of a divorce either, as there is nothing to prevent a parent from publicising intimate details about the family in respect of matters other than divorce.

The current South African Divorce Act prohibits the publication of "any particulars of a divorce action or any information which comes to light in the course of such an action", other than the names of the parties, the fact that a divorce action is pending, and the judgement or order of the court in the divorce action. The only exceptions are: (a) publication for the purposes of administration of justice; (b) publication in a bona fide law report; or (c) publication for the advancement or use in a particular profession or science.³⁷ There is no exception for publication at the behest of one or both of the parties involved in the action. It is relevant to note, however, that the South African Law Commission is currently conducting a re-examination of the South African approach to this issue, and is expected to soon publish a report which may be useful for comparative purposes.³⁸

We recommend that the restrictions on publication should follow the outline of those in South Africa, but with an additional exception for publication authorised by both spouses. It should not be possible for one spouse to authorise publication over the other's objections, as this would make it possible for one spouse to use the potential publication of intimate details as a threat in negotiations with the other spouse. The restrictions in the Combating of Rape Bill are useful as a guideline on this point in some respects.

Divorce proceedings which take place in court should be held in closed court unless both spouses request otherwise. An exception could be made to allow for observation of court proceedings for research purposes. Similarly, court records on divorces should not be

³⁷ Section 12, Divorce Act 70 of 1989.

³⁸ Project 114: Publication of Divorce Proceedings: Section 12 of the Divorce Act 70 of 1979. The relevant contact person is M Kganakga.

available to the public, except for bona fide research or statistical purposes or where there is an undertaking that the identity of the parties will not be revealed.

Recommendation: The publication of any information about a divorce -- other than the names of the parties, the court's judgement or order, or the fact that a divorce is pending -- should be prohibited in so far as this is consistent with the Namibian Constitution. There should, however, be limited exceptions for publication for administrative or research purposes, and for publication which is authorised by both spouses.

Divorce proceedings which take place in court should be closed to the public, and the general public should not have access to court records concerning divorces, other than the court's judgement or order.

9. DIVORCE MEDIATION

If the idea of divorce mediation is to be introduced in Namibia, it is important to consider this alongside discussion of more general divorce law reform. Divorce is ultimately a legal process. If mediation is undertaken voluntarily by divorcing spouses, they will expect their resulting agreement to be made part of the court order. But if potential users of a divorce mediation programme believe that the results are likely to be “overturned or undermined by the judicial system”³⁹, the efficacy of the programme will be affected.

Furthermore, the legal provisions which apply to divorce are an important part of the mediation setting. As Burman and Rudolph observe, “legal rules create bargaining endowments – that is, they dictate the outcome that would be imposed by the court if no agreement were reached, giving the parties certain bargaining chips.”⁴⁰ Parties should not resort to mediation simply to avoid court rules or processes which they believe to be unfair or intimidating.

In Namibia, we suggest the contemplation of present divorce law reforms should treat mediation as a forthcoming development to be encouraged. The Legal Assistance Centre is in the process of refining a proposal for a pilot project based on the suggestions put forward in interviews and at the consultative conference. This project proposal will be circulated to interested parties for further comment, in the hope that divorce mediation can be introduced in Namibia in the near future.

The question then becomes whether any immediate law reforms are needed to facilitate the introduction of such a pilot project. It has been suggested that a defendant in a divorce action should be given the option of either filing a notice to defend the case or a notice to request mediation. This approach would eliminate the need for filing pleadings. However, we believe that the parties should proceed to mediation only where *both* parties are willing, at least until concerns about power imbalances and the issue of domestic violence as a backdrop to mediation have been more thoroughly explored in practice. In any event, this approach should probably be reserved until a stage where mediation services are established and available. At this early stage, we suggest that the only legal change which is required in respect of divorce mediation is to make it possible for divorcing parties to request a

³⁹ S Brown, C Cervenak and D Fairman, *Alternative Dispute Resolution Practitioners Guide* (US-AID Center for Democracy and Governance, 1998) at 39.

⁴⁰ Burman and Rudolph at 254.

postponement of their divorce case to attempt mediation, without the necessity of filing pleadings, where both parties are willing to exercise this option.

More generally, a move to a divorce law which is not premised on fault should encourage a different approach to divorce. Parties can spend their energy on a resolution of outstanding issues, rather than in constructing an indictment of each other. The proposed simplification of procedure in respect of divorces where both parties are agreed that the marriage has broken down should also encourage the use of mediation, since parties who leave no outstanding points of disagreement to be settled in court will find the entire procedure streamlined and will be unlikely to have to appear before a judge at all (unless the court is not satisfied with the disposition of issues relating to minor children).

Recommendation: Introduce the idea of divorce mediation in Namibia by means of a pilot project which operates in selected urban and rural areas. As a first step towards encouraging the use of mediation, make it possible for divorcing parties to request a postponement of their divorce case to attempt mediation, without the necessity of filing pleadings, where both parties are willing to exercise this option.

10. TECHNICAL ISSUES

Documents

A practical problem which was raised during the research is the requirement that the couple's marriage certificates and the children's birth certificates must be presented to the court. Some women report that their husbands take such certificates and put them where they cannot be found, while others have experienced great inconvenience in trying to obtain duplicate copies or evidence statements from the marriage officer who performed the marriage ceremony. It was suggested that the law should set forth a clear procedure for what to do if the original certificates cannot be located, as in the case of voter registration.

Recommendation: The regulations issued under a new divorce law should take cognizance of the fact that marriage certificates and birth certificates can sometimes not be obtained and set forth a clear procedure for alternatives in such a situation.

Pensions as assets

In terms of the common law, it is debatable whether an *interest* in a pension fund can be considered part of the joint assets of an estate, to be divided upon divorce. However, an accrued *right* to a pension is clearly part of the community estate.⁴¹

This issue of pension interests was addressed in South Africa by section 7(7)(a) of the Divorce Act which explicitly provides that pension interests shall be deemed to be assets for the purpose of division of property upon divorce.

⁴¹

De Kock v Jacobson and Another 1999 (4) SA 346 (WLD).

Recommendation: We recommend a provision specifying that both accrued pension rights and pension interests shall be treated as community property, thus codifying the common law on pension rights and supplementing the common law on pension interests.

Leases as assets

In terms of the common law, a private lease or a statutory lease becomes a joint asset upon marriage in community of property and must be divided as part of the joint estate upon divorce, no matter whose name appears on the lease.⁴² It might be useful to codify this point.

Recommendation: We recommend a provision specifying in that leases shall be treated as assets which form part of community property, regardless of whose name appears on the lease.

⁴² See *Moremi v Moremi and Another* 2000 (1) SA 936 (WLD); *Toho v Diepmeadow City Council and another* 1993 (3) SA 679 (WLD) at 685J-686A..

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DRAFT DIVORCE ACT

The following draft is a “laypersons’ draft” which is intended to facilitate discussion of what policy to adopt on divorce law reform. It does not attempt to fine-tune all of the technical details, which is more appropriate once basic policy has been decided.

1. Definitions

(1) In this Act the following terms shall have the prescribed meanings unless the context indicates otherwise:

“court” means any High Court established in terms of the High Court Act 16 of 1990;

“divorce action” means an action by which a decree of divorce is sought or any proceeding seeking other relief in connection with such decree, including—

- (a) any interim application made in terms of Rule 43 of the Rules of the High Court;
- (b) an application for a contribution towards the costs of such action, or an application to institute or defend such action *in forma pauperis*;
- (c) an application for substituted service of process or the edictal citation of a party in such an action;

(2) For the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the summons is issued, or the notice of motion is filed or the notice of motion is delivered in terms of the rules of court, as the case may be.

The purpose of subsection (2) is to avoid confusion about the date of divorce given the fact that the definition of “divorce action” includes several ancillary proceedings. It re-enacts section 1(5) of the Matrimonial Causes Jurisdiction Act 22 of 1939.

2. Jurisdiction

(1) A court shall have jurisdiction if the parties are, or either of the parties is—

- (a) domiciled in the area of jurisdiction of the court on the date on which the divorce action is instituted;
- (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in Namibia for a period of not less than one year immediately prior to that date.

(2) A court which has jurisdiction in terms of subsection (1) shall also have jurisdiction in respect of a claim in reconvention or a counter-application in the divorce action concerned.

(3) A court which has jurisdiction in terms of this section in a case where the parties are or either of the parties is not domiciled in Namibia shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in Namibia on the date on which the divorce action was instituted.

(4) The provisions of this Act shall not derogate from the jurisdiction which a court has in terms of any other law or the common law.

This provision re-enacts section 1(1)-(4) of the Matrimonial Causes Jurisdiction Act 22 of 1939 and mirrors section 2 of the South African Divorce Act 70 of 1979 (as amended).

3. Grounds of divorce

A civil marriage may be dissolved by a court by a decree of divorce, and the only grounds on which such a decree shall be granted are—

- (a) the irretrievable breakdown of the marriage as contemplated in section 4; or
- (b) the mental illness or the continuous unconsciousness of a party to the marriage as contemplated in section 5.

This section follows the South African Divorce Act. The special protections enacted in South Africa for mentally ill or unconscious persons seem wise and fair, and therefore it is recommended that these unusual situations be given special treatment in Namibia as well.

4. Irretrievable breakdown

(1) For the purposes of this section, “irretrievable breakdown” occurs when a marriage relationship has reached such a stage of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship.

This subsection is modelled on the definition of “irretrievable breakdown” in the South African Divorce Act.

(2) Either or both spouses may apply for a divorce on the grounds of irretrievable breakdown

(3) If the spouses petition jointly for divorce, or if one spouse petitions for divorce and the other spouse does not deny that the marriage is irretrievably broken down, then the court shall enter a divorce decree, provided that there is no evidence that either party was coerced into agreeing to the divorce.

(4) If one spouse petitions for divorce and the other spouse denies that the marriage is irretrievably broken down, then the court shall, after consideration of opposing affidavits and such oral evidence as the court may deem necessary—

- (a) make a finding that the marriage is irretrievably broken down and enter a decree of divorce; or
- (b) if there appear to be reasonable prospects of reconciliation, postpone the matter for a period not exceeding [three months/six months] to allow time for reflection, at the expiry of which time the court shall enter a decree of divorce if either of the parties continues to allege that the marriage is irretrievably broken down.

The approach in subsections (2)-(4) is based on the Revised Code of Washington State (USA) (RCW 26.09.030) which is in turn modelled on the US Uniform Marriage and Divorce Act. It is also similar to the approach taken in Sweden and other Nordic countries.

It is premised on the idea that it should not be the role of the court to force either spouse to remain in a marriage which he or she finds objectionable. Such a marriage would not be a marriage in anything more than name, and the result might be an informal separation which fails to settle the economic affairs of the spouses and does not serve the best interests of the children of the marriage. The term “shall” is used rather than the term “may” which is used

*in the South African Divorce Act, on the theory that there is no reason why a court should have the discretion to deny a divorce where there has been an irretrievable breakdown of the marriage. Hardship to the other spouse should be addressed through provisions on the division of property and maintenance, rather than by requiring the legal persistence of a dead marriage.*¹

(5) The following factors shall be evidence of the irretrievable breakdown of a marriage, without excluding any other facts and circumstances which may indicate irretrievable breakdown:

- (a) the spouses have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date on which the divorce action is instituted;
- (b) either spouse has committed adultery;
- (c) either spouse has committed physical, sexual or psychological abuse against the other, or has otherwise made continuation of the marriage relationship intolerable.
- (d) either spouse has been sentenced to a term of imprisonment of at least [5] years.²

Where neither spouse denies that there is irretrievable breakdown, there is no need for the underlying factors to be pleaded. However, these factors should assist the court in cases where there is a difference of opinion between the spouses on the question of irretrievable breakdown. The suggested waiting period should apply only where there is a genuine possibility of reconciliation, and not in circumstances where one spouse is opposing the divorce simply to harass or control the other. In particular, where there has been any form of domestic violence, the abused spouse should face no obstacle to ending the marriage as soon as possible if he or she so wishes.

(5) Regardless of anything else contained in this section, no divorce shall be granted on the ground of irretrievable breakdown if either spouse is mentally ill or unconscious at the time of the divorce action, in which case the only acceptable ground for divorce shall be that set forth in section 5.

This subsection attempts to close the loophole in the South African Act whereby the intended protections for mentally ill or unconscious persons are circumvented.

5. Mental illness or continuous unconsciousness

(1) A court shall grant a decree of divorce on the ground of mental illness if it is satisfied that the applicant's spouse

- (a) has been admitted to an institution used for the care of mentally ill persons in terms of a reception order and is expected to be required to remain in such institution indefinitely; or

¹ See Hahlo and Sinclair at 16-21 for a critique of the South African use of the term "may" in the sections on grounds for divorce.

² Note that the current requirement in the Divorce Laws Amendment Ordinance 18 of 1955 that the imprisoned spouse must have been declared an habitual criminal is not proposed here, as this seems unnecessarily onerous, and would make this indication of irretrievable breakdown virtually irrelevant in practice.

(b) is being detained as a state patient at an institution used for the care of mentally ill persons; or

(c) is being detained as a mentally ill convicted prisoner at any institution used for this purpose; or

(d) is, on the evidence of at least two medical doctors, one of whom is a state psychiatrist, suffering from a serious mental illness which renders the continuation of a normal marriage relationship impossible, with no reasonable prospect that he or she will be cured.

(2) A court shall grant a decree of divorce on the ground of continuous unconsciousness if it is satisfied that the applicant's spouse

(a) is by reason of a physical disorder in a state of continuous unconsciousness and has been so for at least six months immediately preceding the date of the divorce action; and

(b) has, on the basis of the evidence of at least two medical doctors, one of whom is a court-appointed specialist with relevant expertise, no reasonable prospect of regaining consciousness.³

(3) The court may appoint a legal practitioner to represent the respondent at proceedings held in terms of this section and order the applicant to pay the costs of such representation.

(4) The court may make any order it deems fit with regard to the furnishing of security by the applicant in respect of any patrimonial benefits to which the respondent may be entitled by reason of the dissolution of the marriage.

(5) For the purposes of this section, the expressions "institution", "mental illness", "state patient" and "reception order" shall bear the meanings assigned to them in the Mental Health Act 18 of 1973.

This section would replace the outdated mental health provisions in the Divorce Laws Amendment Ordinance 18 of 1955.

6. Division of property

(1) In the absence of an acceptable agreement between the spouses as to the division of joint property, an extra 10% of any joint property of a marriage which would otherwise be divided in equal portions between the spouses shall be awarded to a spouse who is granted custody of any minor children of the marriage, provided that the court may exercise its discretion in terms of subsection (2) to award a greater increment to the custodial parent.

This provision is not designed to duplicate or to replace child maintenance, but to compensate for the extra labour, risk and responsibility taken on by the custodial parent, as well as for the "lost opportunity costs" entailed in respect of job or career choices. Under this theory, the percentage would not need to differ with respect to different numbers of children.

³ It is questionable whether or not the South African requirement that evidence be given by a neurologist or a neurosurgeon is practically feasible in Namibia. A broader wording is suggested for Namibia.

(2) In the absence of an acceptable agreement between the spouses concerning the division of property, the court may make such disposition of the assets and liabilities of the parties, whether community property or separate property and without regard to which spouse holds title to any immovable property or leasehold rights, as shall appear just and equitable after considering the following factors:

- (a) the duration of the marriage;
- (b) the property regime of the marriage and the provisions of any antenuptial contract;
- (c) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home, caring for the family and other domestic duties;
- (d) the unwarranted dissipation of the marital property by either spouse;
- (e) the economic circumstances of each spouse at the time of the divorce, including their respective income, earning capacity, assets and other financial resources, and their respective financial obligations and responsibilities;
- (f) which parent is to have custody of any children of the marriage, including the desirability of awarding the family home or the right to live in the family home for a reasonable period of time to the custodial parent;
- (g) the value to either of the spouses or to any child of any benefit, including a pension or gratuity which such spouse or child will lose as a result of the dissolution of the marriage;
- (h) any other factor which the court deems relevant.

This provision is based in part on the Revised Code of Washington State (USA) (RCW 26.09.080) and the Illinois Marriage and Dissolution of Marriage Act, section 503 (d), both of which are in turn modelled on the US Uniform Marriage and Divorce Act. It also draws heavily on South African, Zimbabwean and Canadian precedents.

(3) The court's power to order a disposition of property in terms of subsection (2) shall include the power to issue an order that any asset be transferred from one spouse to the other, regardless of whether the property consequences of the marriage are governed by Namibian law or foreign law.

(4) The court shall not make an order in terms of subsection (2) unless it is satisfied that the party in whose favour the order is granted has contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, by the contribution of income, the rendering of services, or the savings of expenses which would otherwise been incurred, or in any other manner.

(5) A court making an order in terms of subsection (2) may, on application of the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions as the court may deem just, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets.

Subsections (3)-(5) are based on the South African Divorce Act.

7. Best interests of children

A court may not grant a divorce decree until it is satisfied that the arrangements made or contemplated in respect of the welfare of any minor or dependant child of the marriage are satisfactory, or are the best that can be effected in the circumstances.

8. Custody

(1) A court granting a decree of divorce may make any order concerning the custody of any minor or dependent child of the marriage which it deems to be in the best interests of such child, but shall give particular regard to

- (a) the desirability of giving custody of the child to the parent who has been the child's primary caretaker prior to the divorce action, to ensure continuity of care; .and
- (b) the ascertainable wishes and feelings of the child concerned, in light of the child's age and understanding;

Provided that notwithstanding the foregoing, there shall be a rebuttable presumption that custody may not be awarded to a parent who has engaged in violent behaviour towards the other spouse or any other member of his or her own family or the other spouse's family.

(2) A primary caretaker is the person who carried out most of the following duties in respect of the child:

- (a) preparing and planning of meals;
- (b) bathing, grooming and dressing;
- (c) purchasing, cleaning and care of clothes;
- (d) medical care, including nursing and trips to physicians;
- (e) arranging for social interaction among peers after school;
- (f) arranging alternative care, such as day care;
- (g) putting the child to bed at night, attending to the child in the middle of the night, waking the child in the morning;
- (h) disciplining the child, such as teaching general manners and toilet training;
- (i) educating the child in the religious, cultural and social spheres; and
- (j) teaching the child elementary skills.

9. Access by the non-custodial parent

(1) A court granting a decree of divorce may make any order concerning access to any minor or dependent child of the marriage by the non-custodial parent which it deems to be in the best interests of such child.

(2) In any case involving a request for access by a parent who has engaged in violent behaviour towards the other spouse or any other member of his or her own family or the other spouse's family, the court shall give special consideration as to whether access in these circumstances will be in the best interests of the child and shall consider special safety measures to protect the safety of the child or children and the custodial parent, including but not limited to supervised access, access only at specified venues, or transfer of the child from one parent to the other only at specified venues.

10. Joint custody

(1) The court may approve an application made jointly by both parents for joint physical custody of any minor or dependant child or children of the marriage, if it finds that:

- (a) both parents are fit to care for the child;
- (b) both parents desire continuous involvement with the child;
- (c) both parents are perceived by the child as sources of security and love;
- (d) both parents are able to communicate and co-operate in promoting the child's best interests; and
- (e) the parents live in sufficiently close physical proximity to make joint custody feasible.

(2) If an order for joint physical custody is made, that order shall specify that both parents shall have equal powers of legal custody.

(3) Any history of domestic violence by either spouse against the other spouse, a child of the marriage or any other family member shall be treated as a factor strongly mitigating against a joint custody arrangement.

(4) Joint legal custody may not be ordered in any circumstances.

11. Guardianship

(1) A court may on application, or on its own motion, make an order giving one parent sole guardianship of any minor child or children of the marriage.

(2) If the court does not make an order granting sole guardianship to one parent, the parents shall continue to exercise equal powers of guardianship after the divorce in terms of section 14 of the Married Persons Equality Act 1 of 1996.

(3) Where a court has made an order giving sole guardianship to one parent, the consent of that parent alone shall be necessary in respect of the matters contained in section 14(2) of the Married Persons Equality Act 1 of 1996.

12. Decease of parent with sole custody or guardianship

(1) Where a court has made an order for sole custody of a child in terms of section 8 or an order for sole guardianship of a child in terms of section 11--

(a) the court may order that, upon the predecease of the parent who is the sole custodian or guardian, a person other than the surviving parent shall be the custodian or guardian of the minor, either jointly with or to the exclusion of the surviving parent; or

(b) in the absence of such an order, the parent with sole custody or guardianship may by testamentary disposition appoint any person to be the sole custodian or guardian upon his or her death.

(2) Where one parent has been awarded sole custody or guardianship, the other parent shall not be entitled to appoint any person to be the custodian or guardian of the minor upon his or her death.

These provisions are based on section 4 of the Matrimonial Affairs Ordinance 25 of 1955, as amended by section 21 of the Married Persons Equality Act 1 of 1996.

13. Child maintenance

(1) A court granting a decree of divorce may make any order it deems fit with respect to maintenance of any minor or dependent child of the marriage, based on the needs of the child and the respective financial means of the parents, and taking into account the extra financial burden which normally falls onto the custodial parent.

(2) The tables issued from time to time in terms of the regulations promulgated under the Maintenance Act shall be used by the court as guidelines for maintenance orders in terms of this section, but shall not be construed as preventing an order or an agreement for a higher amount of maintenance.

(3) Notwithstanding anything to the contrary in any other law, one spouse may be liable for the payment of maintenance for any minor or dependent child of the other spouse who is not a child of the marriage, if he or she maintained the child during the course of the marriage.

(4) A maintenance order issued in terms of this section shall be a “maintenance order” for the purposes of the Maintenance Act 23 of 1960, and may be substituted, varied, discharged or enforced by a maintenance court in terms of that act.

14. Spousal maintenance

(1) In the absence of an acceptable agreement between the spouses as to spousal maintenance, a court granting a decree of divorce may make any order it deems fit with respect to spousal maintenance after consideration of the following factors:

(a) the duration of the marriage and the age of the spouses;

(c) the standard of living of the parties immediately prior to the divorce;

(b) the economic circumstances of each spouse at the time of the divorce, including their respective income, earning capacity, assets and other financial resources, and their respective financial obligations and responsibilities;

(c) any impairment of the present or future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties, or having foregone or delayed education, training, employment or career opportunities due to the marriage;

- (d) contributions and services by the party seeking maintenance to the education, training, employment, career or career potential of the other spouse;
- (e) which parent is to have custody of any children of the marriage, taking into account any financial consequences arising from the daily responsibility for child care;
- (f) any economic hardship arising from the marriage breakdown;
- (g) the goal of promoting, as far as practicable, the economic self-sufficiency of each spouse within a reasonable period of time; and
- (h) any other factor which the court deems relevant.

These factors are drawn from South African, Canadian and American precedents. Subsection (e) does not refer to maintenance expenses, but to the fact that child custody may exclude the spouse in question from certain jobs, such as those with long hours or evening hours, or those involving extensive travel.

(2) A maintenance order issued in terms of this section shall be a “maintenance order” for the purposes of the Maintenance Act 23 of 1960, and may be substituted, varied, discharged or enforced by a maintenance court in terms of that act.

15. Agreements between spouses

A court granting a decree of divorce may make any agreement between the spouses on division of assets and liabilities, custody of minor children and access to such minor children, child maintenance, spousal maintenance or related matters an order of court provided that the court is satisfied that

- (a) there has been no coercion of either spouse;
- (b) the agreement is not manifestly unfair; and
- (c) any provisions of the agreement concerning minor children are in the best interests of the child.

16. Procedure

(1) Notwithstanding anything contained in any other law or in the Rules of the High Court, a court may grant a decree of divorce on the basis of affidavit evidence alone, but may summon one or both of the parties and any other person whom the court deems necessary to appear before a judge in chambers or in court to give further evidence.

(2) Where the application for a divorce is not made jointly, notices in the divorce action shall be in the form in Schedule A and shall be served in the prescribed manner along with a copy of the applicant’s affidavit.

(3) Affidavits may be made on the forms prescribed in Schedule A.

This procedure is similar to that used in Canada in respect of uncontested divorces. The purpose of providing special notice and affidavit forms is to simplify the procedure, to make self-representation more feasible.

17. Family Advocate

(1) The Minister of Justice shall appoint one or more Family Advocates, who shall be legal practitioners or persons with other appropriate expertise who shall have responsibility for making recommendations about issues pertaining to minor or dependant children which arise in divorce actions at the request of the court.

(2) In any case where the court is of the opinion that further information is required to determine what will be in the best interests of any minor or dependant children of the marriage, regardless of whether or not the parties are in agreement about child-related issues, the court shall request an investigation by the Family Advocate, which may include a report on the family situation from a social worker or a report from any other professional or expert.

(3) Either party to the divorce action may also request an investigation by the Family Advocate, but the final decision on whether such an investigation is warranted shall rest with the court.

(4) The court shall request such an investigation and report from the Family Advocate whenever:

- (a) there is an intention to place children in the custody of someone other than the primary caretaker
- (b) there is an intention to separate siblings;
- (c) there is an intention to place children in the custody of someone other than their parents; or
- (d) the parties have requested joint custody.

(3) Where the court requests an investigation in terms of subsection 2, the Family Advocate shall report back to the court no later than one month from the date on which the court requested the investigation, and shall present either a recommendation on issues pertaining to the welfare of the children in question or a report containing reasons why more time is needed before recommendations can be made, in which case there may be a postponement for a period not exceeding one month.

This approach is a modified version of the Family Advocate system in South Africa, designed to minimise costs and human resources by involving the Family Advocate only in cases which appear to be problematic.

18. Interim relief

(1) Subsection (1) of Rule 43 of the Rules of the High Court shall be amended by the addition of the following provisions concerning interim relief:

- (e) an order that the other spouse shall not damage, transfer, encumber, conceal or otherwise dispose of any joint assets, or of specified assets, while the divorce action is pending;

(f) an order that the other spouse shall not commit any act of domestic violence against the applicant spouse, which may include an order requiring the other spouse to stay away from the applicant spouse, from his or her residence, and from his or her workplace.

(2) The following shall be substituted for subsection (4) of Rule 43 of the Rules of the High Court:

(4) The court may decide the application on the basis of the papers before it, or it may direct the Registrar as soon as possible thereafter to bring the matter before the court for summary hearing, on 10 days' notice to the parties, unless the respondent is in default.

(3) The following subsection shall be added to Rule 43 of the Rules of the High Court:

(10) Affidavits in respect of Rule 43 applications may be made on the forms prescribed in Schedule B to this act.

The temporary restraining provisions on property are drawn from the Illinois Marriage and Dissolution Act, section 502.

19. Closed court

(1) Whenever any proceedings in a divorce action are held in court, the court shall to the extent authorised by the provisos to Article 12 (1)(2)(a) of the Namibian Constitution, direct that any person whose presence is not necessary at such proceedings, shall not be present, unless both parties to the divorce action request otherwise.

(2) Court records on divorces, other than the judgement or order of the court, shall not be available to the public, except for bona fide research or statistical purposes where there is an undertaking that no details of any divorce action will be revealed in conjunction with the identity of the parties.

(3) To the extent that the provisions of this section provide for a limitation of the fundamental right to a public hearing in the determination of civil rights and obligations referred to in paragraph (a) of subarticle (1) of Article 12 of the Namibian Constitution, in that they authorise the exclusion of the public from a civil proceeding, such limitation is enacted on authority of the proviso to said paragraph (a).

20. Restrictions on publication of particulars of divorce

(1) Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending, or the judgement or order of the court, no person shall make it known in public or publish for the information of the public or any section of the public any particulars of a divorce action or any information which comes to light in the course of such an action.

(2) The provisions of subsection (1) shall not apply with reference to the publication of particulars or information-

(a) for the purposes of the administration of justice;

(b) in a bona fide law report which does not form part of any other publication than a series of reports of the proceedings in courts of law;

(c) for bona fide research purposes or statistical purposes, provided that all details are published anonymously;

(d) where both parties to the divorce action give written permission for such publication.

(3) Any person who contravenes this section shall be guilty of an offence and liable on conviction to a fine not exceeding N\$10 000 or to imprisonment for a period not exceeding one year, or to both such fine and imprisonment.

(4) To the extent that the provisions of this section provide for a limitation of the fundamental rights contemplated in paragraph (a) of Subarticle (1) of Article 21 of the Namibian Constitution, in that they authorise interference with a person's freedom to publish information about a civil proceeding in a court of law, such limitation is enacted on authority of Subarticle (2) of the said article.

20. Recognition of certain foreign divorce orders

The validity of a divorce order or an order for the annulment of a marriage or for judicial separation granted in a court of a foreign country or territory shall be recognised by a Namibian court if, on the date on which the divorce decree was granted, either party to the marriage:

(a) was domiciled in the country or territory concerned, whether in terms of the Namibian law on domicile or the law on domicile of the country concerned;

(b) was ordinarily resident in that country or territory;

(c) was a citizen or national of that country or territory; or

(b) was domiciled in a country or territory which would recognise the decree of divorce in question.

This section is adapted from the South African Divorce Act, in light of comments by Hahlo and Sinclair.⁴ It essentially codifies the common law, but applies the concept of domicile in a gender-neutral fashion consistent with the Married Persons Equality Act 1 of 1996.

21. Abolition of orders for restitution of conjugal rights and judicial separation

It shall not be competent for a court to issue an order for the restitution of conjugal rights or for judicial separation, provided that this shall not affect the operation or validity of any such order issued before the commencement of this act.

22. Pensions and leases as marital assets

[It is recommended that the statute make clear that pensions rights and interests, as well as leases, should be treated as marital assets. This would be, in part, a codification of the common law on these points. This is a technical matter which could be dealt with at the technical drafting stage.]

⁴ Hahlo and Sinclair at 57.

22. Repeals

[It is envisaged that all existing statutory enactments on divorce would be replaced by the new law.]