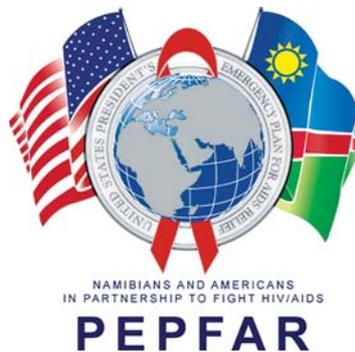


# **NAMIBIAN LAW ON CIVIL MARRIAGE**

**A Question and Answer Package**



**Legal Assistance Centre**  
2016



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# INTRODUCTION

This booklet has been designed to assist marriage counsellors to inform couples about the basic legal issues associated with marriage. It may also be useful to other people who work with engaged and married couples.

The booklet will also be helpful to couples who are thinking about getting married.

Marriage is a demonstration of love, but it is also a legally-binding agreement. Marriage is a form of contract, and it is important that couples are aware of the rights and duties that go with marriage.

When a couple plan their wedding, the last thing they want to discuss is divorce, domestic violence or death. Every couple hopes that their marriage will last forever, but this is not always the case. So couples need to know at the outset what would happen in the case of separation or divorce. Also, all marriages eventually end when one of the partners dies, and it is important to understand how death will affect the surviving spouse.

More detail about some of the issues discussed in this booklet can be found in other publications of the Legal Assistance Centre:

- Guide to the Married Persons Equality Act 1 of 1996
- Guide to the Maintenance Act 9 of 2003
- Guide to the Combating of Domestic Violence Act 4 of 2003.

This booklet is about **civil marriage**. A civil marriage is a marriage that is solemnised by a marriage officer – which includes a magistrate or a religious leader who has been certified as a marriage officer by the Ministry of Home Affairs and Immigration. This booklet does *not* discuss customary marriage.

# BASIC REQUIREMENTS FOR MARRIAGE

## Namibian Constitution, Article 14, Family

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

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“**Spouse**” is a gender-neutral word that refers to a husband or a wife.

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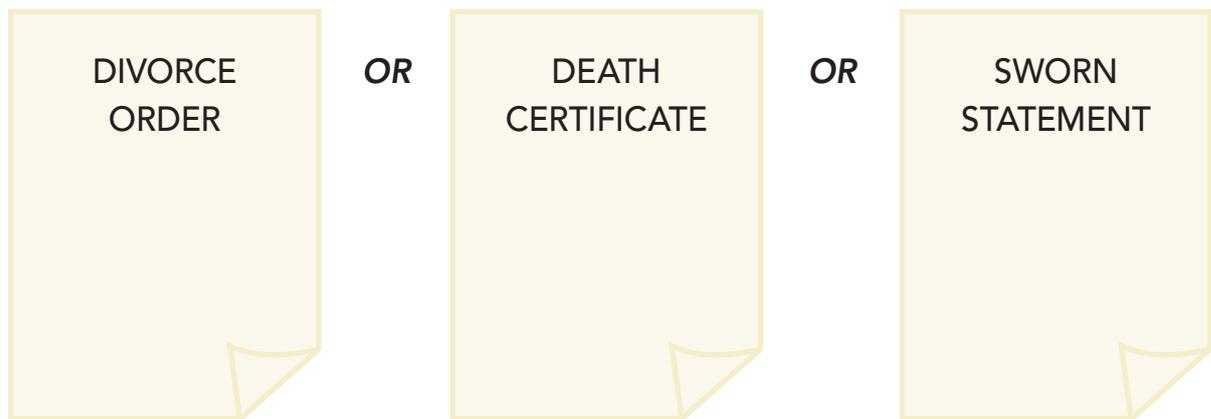
## Who can get married?

- (1) Civil marriage can take place only between persons of the **opposite sex**.
- (2) Both the man and the woman must give **free consent** to the marriage. Consent is not valid if it is given as a result of intimidation or threats. It is not possible for a person to consent to a marriage if that person does not have the mental capacity to understand the nature of marriage.

(3) **One person at a time:** Neither spouse can marry if he or she is already in a civil marriage with someone else.

- If either party is divorced, they may be asked to show the **divorce order** from the court before they can re-marry.
- If either party was married but the previous spouse has died, they may be asked to show the **death certificate** before they can re-marry.

If these papers cannot be produced, the person in question may be asked to provide a **sworn statement** instead.



## What is the minimum age for marriage?

Both the man and woman must be at least **age 18** to give independent consent to marry. If either of them is under age 18, then they must have **written permission from the Minister or a court** in order to marry, as well as **parental consent**.

A person who is **under age 21** needs **parental consent** to marry.

Where parental consent is required:

- If the parents are **married**, then **both parents** must consent.
- If the parents were **never married**, the **parent who has guardianship** must give consent.
- If the parents are **divorced**, the **parent who has guardianship** must give consent unless the divorce order says something different.

If the marriage takes place without the required consents, it could be invalid. In such a case, the consequences would be similar to those of a divorce.

## Key Rules on Consent to Marriage

- A child below age 18 cannot be engaged to marry.
- A child below age 18 cannot marry without consent from the parents and the state.
- A person below age 21 cannot marry without parental consent.
- Giving out a child under age 18 in an engagement or marriage to which the child does not consent is illegal. The penalty is a fine of up to N\$50 000 or imprisonment for up to 10 years, or both.

## Can family members marry each other?

Marriage is NOT allowed to take place between close family members.

This includes close blood relatives. For example, a person can NOT marry his or her child, parent, grandparent, brother or sister, half-brother or half-sister, aunt or uncle, or niece or nephew.

This also includes close relatives by marriage. For example, a person can NOT marry the grandparent, parent, child or grandchild of a dead or divorced husband or wife.

## POSSIBLE LAW REFORM ON PROCEDURE FOR CONSENT

As of early 2016, the Ministry of Home Affairs and Immigration is considering a new law on marriage which might have some provisions on parental consent.

This new law may include a procedure for dealing with consent where a parent is dead, presumed dead, missing, outside Namibia and impossible to contact or unable to give consent because of some medical condition or mental disability.

The new law may also allow a person who wants to marry to seek permission to marry from a court where a parent is unreasonably withholding consent.

### PROHIBITED DEGREES OF FAMILY RELATIONSHIP

A man may NOT marry his ...	A woman may NOT marry her ...
mother	father
daughter	son
adoptive daughter	adoptive son
sister	brother
half-sister	half-brother
grandmother (on his father's or mother's side)	grandfather (on her father's or mother's side)
granddaughter	grandson
great-granddaughter	great-grandson
wife's mother (his mother-in-law)	husband's father (her father-in-law)
wife's daughter (his stepdaughter)	husband's son (her stepson)
father's wife (his stepmother)	mother's husband (her stepfather)
son's wife (his daughter-in-law)	daughter's husband (her son-in-law)
father's father's wife (his great-aunt)	father's mother's husband (her great-uncle)
mother's father's wife (his great-aunt)	mother's mother's husband (her great-uncle)
wife's father's mother (his wife's grandmother)	husband's father's father (her husband's grandmother)
wife's mother's mother (his wife's grandmother)	husband's mother's father (her husband's grandmother)
wife's son's daughter (his wife's granddaughter)	husband's son's son (her husband's grandson)
wife's daughter's daughter (his wife's granddaughter)	husband's daughter's son (her husband's grandson)
son's son's wife (his grandson's wife)	son's daughter's husband (her grandson's husband)
daughter's son's wife (his grandson's wife)	daughter's daughter's husband (her grandson's husband)
father's sister (his aunt)	father's brother (her uncle)
mother's sister (his aunt)	mother's brother (her uncle)
brother's daughter (his niece)	brother's son (her nephew)
brother's daughter's daughter (his grand-niece)	brother's son's son (her grand-nephew)
brother's son's daughter (his grand-niece)	brother's daughter's daughter (her grand-nephew)
sister's daughter (his niece)	sister's son (her nephew)
sister's daughter's daughter (his grand-niece)	sister's son's son (her grand-nephew)
sister's son's daughter (his grand-niece)	sister's daughter's son (her grand-nephew)

However it is acceptable for cousins to marry. It is also acceptable for a person to marry their dead or divorced spouse's brother or sister.

### ACCEPTABLE DEGREES OF FAMILY RELATIONSHIP

A man MAY marry his...	A woman MAY marry her...
mother's sister's daughter (his first cousin)	mother's sister's son (her first cousin)
mother's brother's daughter (his first cousin)	mother's brother's son (her first cousin)
father's sister's daughter (his first cousin)	father's sister's son (her first cousin)
father's brother's daughter (his first cousin)	father's brother's son (her first cousin)
former wife's sister	former husband's brother
former wife's aunt	former husband's uncle

## What facts must be disclosed before the marriage takes place?

Both parties must disclose any physical problems that would affect their ability to engage in sexual intimacy or to have children. If these things are not disclosed, the spouse who was not informed could apply to a court to have the marriage declared invalid.

- If either person is *at the time of the marriage* permanently unable to have sexual intercourse for some physical reason (such as impotence or the results of some injury), this must be disclosed.
- If either person is *at the time of the marriage* physically unable to procreate (in other words if the man is sterile or the woman is barren), this must be disclosed.

A woman who is pregnant by another man *at the time of the marriage* must disclose this to the man she intends to marry. If this is not disclosed, the spouse who was not informed could apply to a court to have the marriage declared void.

- There is no requirement that sexual relations with other people before the marriage must be disclosed, only pregnancy.

## Does a man who is intending to marry similarly have to disclose that another woman is pregnant with his child at the time of the marriage?

The law is silent on this. The rules about disclosing pregnancy date from a time when the law on marriage included many instances of sex discrimination. In light of modern progress towards gender equality, a court might allow a wife to apply to cancel a marriage if the husband had failed to disclose that another woman was pregnant with his child.

## Is there any duty to disclose the existence of children already born to either spouse together with other partners?

The law does not address this specifically, other than to make it possible to cancel marriages if there has been some fraud by either spouse. Disclosure of the existence of any children with other partners is important, because the biological parent will continue to have a duty to contribute to the maintenance of such children until they are in a position to become self-supporting. All children are equal in the eyes of the law, whether they were born inside or outside marriage, and they have an equal right to parental maintenance in accordance with their needs. This could affect the marital finances.

## Marriage between a Namibian citizen and a non-Namibian citizen

### If a Namibia citizen marries a non-Namibian citizen, does the non-Namibian spouse have a right to live in Namibia?

If a non-Namibian enters a good faith marriage with a Namibian, the couple has a right to live in Namibia together. The non-Namibian spouse has the right to live and work in Namibia.

### Is the non-Namibian spouse eligible for Namibian citizenship?

A non-Namibian spouse is eligible for Namibian citizenship by marriage if he or she has been **living in Namibia with the Namibian spouse for at least ten years**. The marriage must be in good faith, and not a false marriage entered into only for citizenship purposes.

### What happens if the marriage ends because of death or divorce?

The non-Namibian spouse has a right to continue living in Namibia **if the Namibian spouse dies**. The non-Namibian spouse has a right to continue living in Namibia **if the marriage ends in divorce after having lasted for at least two years**. This rule ensures that a spouse does not have to stay in an unhappy or violent marriage for fear of having to leave his or her home in Namibia.

### What law applies to marital property when a Namibian citizen marries a non-Namibian citizen?

Namibian law says that the property consequences of a marriage follow the law of the country where the husband made his home at the time the marriage took place. Couples who will be affected by this rule should find out about the property consequences that will apply to them before they get married. They can make an ante-nuptial agreement which chooses a law other than that of the husband's home country to govern the property of the marriage, but this must be done *before* the marriage takes place.

*As of early 2016, the government is considering law reform on marriages between Namibian citizens and non-Namibian citizens, because of the problem of bad-faith marriages – meaning marriages that are not real marriages, but are entered into just so the non-Namibian citizen can live and work in Namibia. Sometimes the Namibian spouse may think that the marriage is real while the non-Namibian spouse is just taking advantage.*

# AUTOMATIC LEGAL CONSEQUENCES OF MARRIAGE

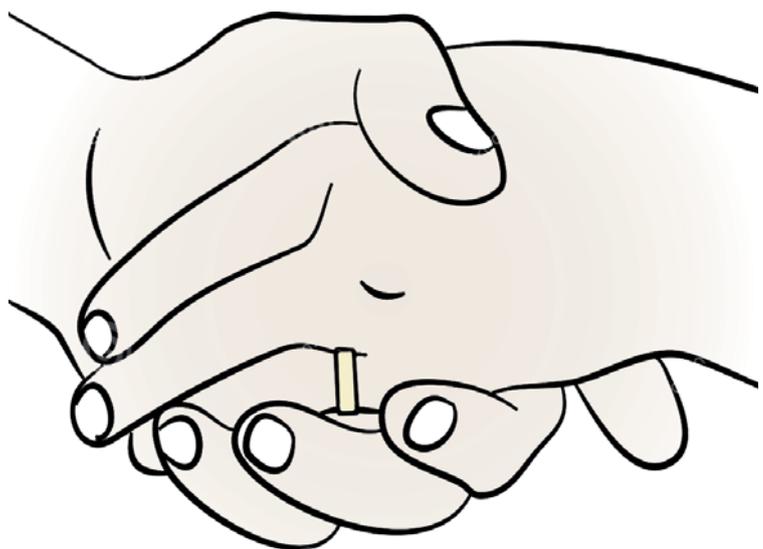
## What is the legal definition of marriage?

The legal definition of civil marriage is a voluntary union between one man and one woman for life, to the exclusion of all others.

A marriage is a legal contract between a man and a woman. A marriage creates rights and duties for each partner. When two people get married, they agree to certain things.

- They agree to live together as husband and wife.
- They agree to be faithful to each other, and not to have sexual relations with anyone else.
- They agree to support each other financially.

A marriage creates what the law refers to as a “partnership of life”. This has been described as including companionship, love, affection, comfort, mutual services and sexual relations. It has also been described as including loyalty, sympathetic care and affection, concern, physical care, financial support and services in the running of the common household.



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**MARRIAGE IS A “PARTNERSHIP OF LIFE”**

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# What are the automatic rights and duties of husband and wife?

Every civil marriage has certain rights and duties which cannot be changed.

## 1) Living together as husband and wife

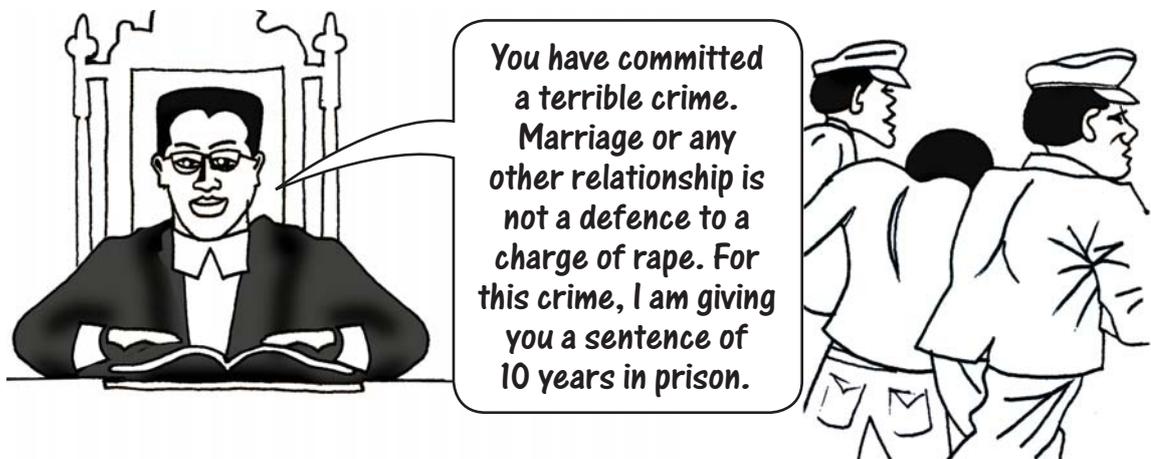
A husband and wife are expected to live together. They are expected to have a sexual relationship with each other, and not with anyone else.

The husband and wife cannot change these duties, even if they make an antenuptial contract. These duties are part of the basic concept of marriage.

If either of the spouses does not carry out these duties, this would be grounds for divorce. (If the spouses were in agreement about living apart for some time – such as where one of them wants to work or study in a different place for some time – then neither of them would seek divorce on this basis.)

### The Right to Say "NO"

The fact that marriage includes an expectation of a sexual relationship in general does NOT mean that one party can force the other to have sexual relations on any specific occasion. Where force is used, a husband or wife can be charged with rape. If there is no sexual relationship at all, **the solution is not force but divorce.**



## 2) Mutual duty of support

The husband and wife have a mutual duty of support. This means that they are both expected to make contributions to the common household. These contributions can be in money or services – such as where one spouse works outside the home and the other takes primary responsibility for housework and childcare.



The husband and wife cannot change this mutual duty of support, even if they make an ante-nuptial contract. It is part of the basic concept of marriage.

If one spouse is not contributing to the common household, the wronged spouse could seek a maintenance order. Extreme cases might even be considered domestic violence, in the form of economic abuse.

MAINTENANCE  
ORDER

## 3) Faithfulness

Marriage automatically includes a promise to be sexually faithful. This duty applies equally to both husband and wife.

The husband and wife cannot change this duty. It is part of the basic concept of marriage, even if they make an ante-nuptial contract.

If the husband or wife commits adultery, this is a ground for divorce. Namibian law also makes it possible for the wronged spouse to ask a lawyer to bring a lawsuit against the third party claiming money for damages.

**Adultery is not a crime.**  
The police cannot do anything in cases of adultery.

## What are the rules on surnames after marriage?

A wife can continue to use her own surname after marriage if she wishes. Alternatively, she may take her husband's surname without any special procedures. She must simply start using his surname consistently after the marriage. (The law does not say anything about using a hyphenated surname combining their two surnames.) In such a case, she is also allowed to resume her former surname without any special procedures if the marriage ends because of divorce or death.

A woman who changes the name she uses in practice must make the same change on her Namibian identification card. It is a criminal offence to use a name that is different to the one shown on the identification card.

If the husband wants to take his wife's surname or a hyphenated surname combining their two surnames, he must go through a formal name change procedure which involves extra effort and expense.

### Sex Discrimination in the Rules on Surnames

In 2002, the United Nations Human Rights Committee which oversees the International Covenant on Civil and Political Rights signed by Namibia said that having different rules on married surnames for men and women is unfair sex discrimination – even though most men in Namibia do not want to take their wives' surnames. The Committee said that the Namibian government must make the law on surnames gender-neutral within 90 days, but as of January 2016, that law has not yet been changed.

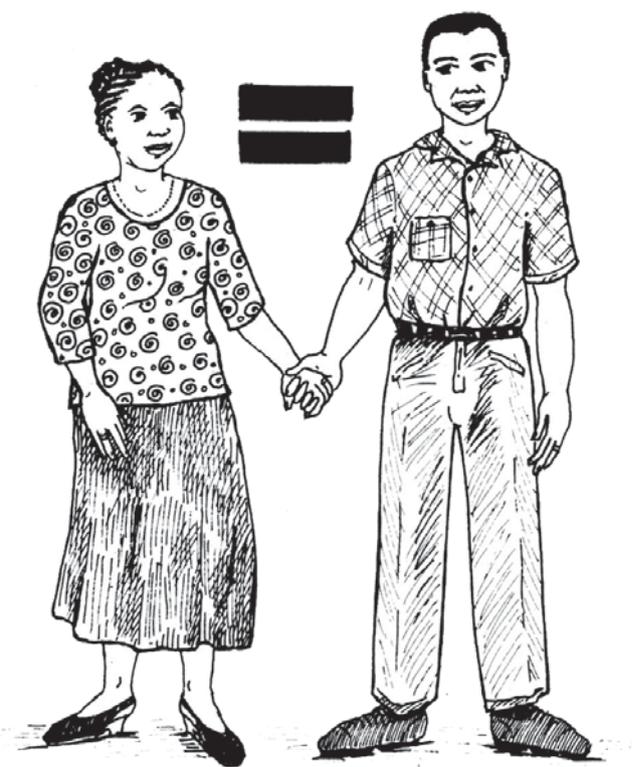
As of 2016, the Ministry of Home Affairs and Immigration is considering a new law on the registration of marriages and divorces. This law may include new rules about the surnames husbands and wives can use after marriage, and new rules about resuming former surnames when the marriage ends.

### 3

## HUSBANDS AND WIVES ARE EQUAL

### What does the law say about equality in marriage?

At Independence, Namibia inherited a concept called “marital power” which was part of the South African law on civil marriage. Marital power meant that a wife was treated like a child in the eyes of the law. It meant that she could not do many things without her husband’s permission. She could not bring a case to court. She could not buy and sell property. She could not sign a contract. She could not take out a loan. She could not be the director of a company or the trustee of a trust. But a husband could do all of these things without permission from his wife.



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

The Married Person’s Equality Act repealed marital power and brought Namibian marriage law in line with the Constitution. This Act makes it clear that husbands and wives have equal rights and powers in civil marriage. The Married Person’s Equality Act applies to all civil marriage, even marriages that took place before Independence or before the statute was passed.

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*The  
Married  
Person’s  
Equality  
Act  
repealed  
marital  
power!*

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The repeal of marital power means that husbands and wives now have equal power to do the following things independently:

- enter into contracts
- take out loans
- bring or defend court cases
- register land in their own names
- administer money and property
- be a company director or a trustee.

## If the husband and wife are equal, who is the head of the household?

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

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

The Act repealed this legal rule. This means that families are now free to decide amongst themselves how they will handle family decision-making. If the family wants to treat the husband or the wife as the head of the household, or to make decisions by consensus, this is their own private business. Couples can still turn to religion, tradition or other values for guidance on the roles of husband and wife. But the law no longer favours the husband.



# PROPERTY CONSEQUENCES OF MARRIAGE

## What happens to the property of the husband and wife when they get married?

When people marry, this has an effect on their property. In Namibia, there are three standard marital property regimes. Couples can also make other arrangements if they wish.

### 1) IN community of property

#### Three Marital Property Regimes



IN  
community  
of property



OUT of  
community  
of property



+



ACCRUAL



*IN community of property: All assets and debts are shared.*

Everything that belonged to the husband before the marriage and everything that belonged to the wife before the marriage becomes part of the joint estate.

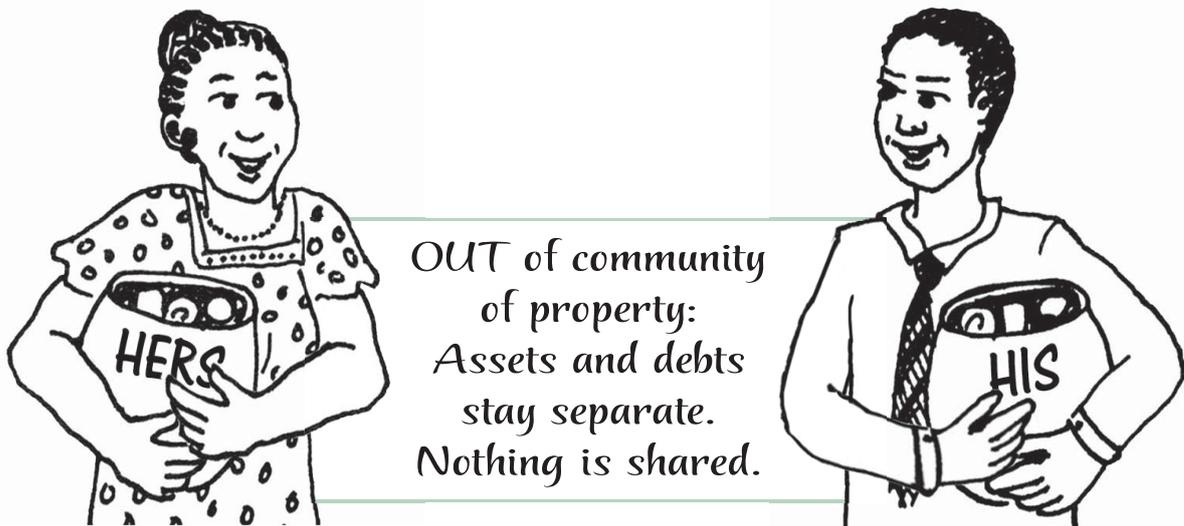
Any money earned by either of them during the marriage becomes part of the joint estate. Anything they buy during the marriage is part of the joint estate, no matter who actually paid for it. The money and property in the joint estate can be used to pay loans or debts of either spouse.

The husband and the wife are equal partners in managing the joint estate while the marriage lasts. They must agree on all major transactions which affect the joint estate – such as transactions involving land, livestock, investments, loans, hire-purchase agreements, furniture and other major household items. However, if either spouse has a business, that spouse can do normal business transactions without the other spouse's consent.

When the marriage comes to an end because of divorce or death, the joint estate is divided equally between husband and wife.

Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate. They share this estate equally, regardless of their respective financial contributions.

## 2) OUT of community of property



The husband and the wife keep their property and debts separate. Everything that belonged to the husband before the marriage remains his, and everything that belonged to the wife before the marriage remains hers.

They each keep their own earnings. Everything the husband buys during the marriage is his, and everything the wife buys during the marriage is hers. The husband and the wife are responsible for their own loans and debts. They do not need each other's consent for transactions with their own separate property.

When the marriage comes to an end, the husband and the wife each keep their own separate belongings.

### **3) Accrual (out of community of property with profit sharing)**

The husband and the wife keep their property and debts separate during the marriage, but increases in the value of their property are shared.

During the marriage, the husband and the wife each have control over their separate money and property. They do not need each other's consent for transactions.

When the marriage comes to an end, the husband and the wife will share equally in the increases to their property since the marriage began. In order to measure the increases correctly, both spouses must state the value of the property they own before the marriage takes place.



---

*ACCURAL: Assets and debts stay separate during the marriage. Increases to the assets of either spouse during the marriage are shared equally when the marriage comes to an end.*

---

## What marital property regime will apply?

As a legacy of apartheid, different property regimes apply automatically, depending on the race of the couple and where they live.

All civil marriages between blacks north of the old “Police Zone” are automatically *out of* community of property. To have a different marital property regime, a couple in this category must make a declaration before a magistrate within one month before the marriage takes place.

All other civil marriages are automatically *in* community of property. To have a different marital property regime, the couple must sign an ante-nuptial contract *before* the marriage takes place. They will need to get a lawyer to help them make this contract.

Any couple can make an agreement about how their marriage will affect their property, if they follow the proper procedures and finalise the agreement *before* the marriage takes place.

Couples do not have to choose one of the three standard marital property regimes. They can make a different arrangement about how their property will be shared. For example, they might decide to share everything EXCEPT inheritances or a specific piece of land that has been in one of their families for a long time.

## Can a marital property regime be changed after marriage?

No. It is almost impossible to make a change after the marriage, unless there has been some mistake. So it is important for a couple to consider their decision on property-sharing carefully before they get married.

## POSSIBLE LAW REFORMS ON MARITAL PROPERTY REGIMES

The Law Reform and Development Commission is considering possible reforms to the system of marital property regimes.

The race-based system now in place is almost certainly a violation of the principle of equality in the Namibian Constitution and will eventually be repealed or changed by the courts.

It is also possible that the law might be reformed to allow a couple to change their marital property regime after the marriage, if they are in agreement about this and if procedures are followed to protect their creditors.

## SPECIAL RULES ABOUT CERTAIN PROPERTY

### Are there any rules about property that apply to all marriages, regardless of the marital property regime?

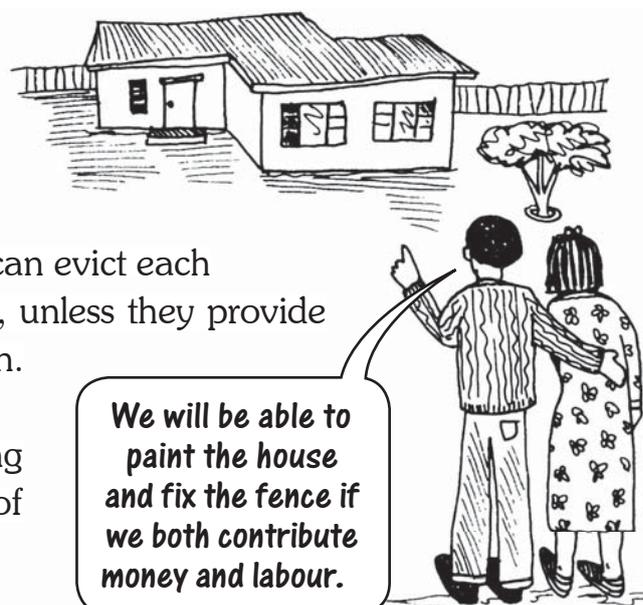
Yes. Both spouses have a right to live in the matrimonial home and to use its basic contents. Both spouses have a duty to help maintain the matrimonial home and to contribute to basic household necessities.

#### 1) Right to live in the matrimonial home

No matter what marital property regime applies to the marriage, both spouses have a right to live in the matrimonial home – no matter who owns or rents it.

Neither the husband nor the wife can evict each other from the matrimonial home, unless they provide suitable alternative accommodation.

Both spouses have a corresponding duty to contribute to the upkeep of the matrimonial home.




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*The place where a husband and wife live together is the “matrimonial home”. Both spouses have a right to live in the matrimonial home, no matter who owns it or rents it, and both have a right to use its basic contents. Both spouses also have a duty to help maintain the matrimonial home and to contribute to basic household necessities.*

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## 2) **Right to use the contents of the matrimonial home**

A similar principle applies to the basic contents of the matrimonial home, such as the furniture and appliances.

### **Losing Rights Through Violence**

The right to live in the matrimonial home and to use its basic contents can be overruled by a protection order or an order of the High Court in a case where there is domestic violence.

## 3) **Necessities for the joint household**

Both spouses have a responsibility to contribute to household necessities – such as groceries, water and electricity. If the spouses are married in community of property, the costs of household necessities should come out of the joint estate. If they are married out of community of property or under the accrual system, both must contribute a fair share to the costs of household necessities in light of their respective financial positions. If only one spouse has any income or assets, the other spouse can make contributions in the form of services or labour (such as maintenance of the common household).

# 6 CHILDREN

## How do the parents register the birth of a child?

Birth registration is often done at the hospital where the child is born. If not, it can be done at the nearest office of the Ministry of Home Affairs and Immigration.

Both the mother and the father should be named on the child's birth certificate. This can be important for future rights such as maintenance and inheritance.

## What surname does the child take?

If both parents are named on the birth certificate, the child can be given the surname of either parent. It is not possible to use a hyphenated surname which combines the surnames of both parents, although law reforms under discussion by the Ministry of Home Affairs and Immigration in early 2016 may provide for this option in future.

## Are there different rules for children born inside marriage and children born outside marriage?

There were once different rules for children born inside marriage and children born outside marriage – dating from the time when there were no scientific tests which could easily determine who was the child's father. Now the law has been changed so that the rules for children born inside marriage and outside marriage are similar in most respects. The key remaining differences relate to custody and guardianship.



Birth registration can be complicated. For more information, read the pamphlet pictured above – available on the LAC website: [www.lac.org.na](http://www.lac.org.na)

# What is the difference between custody and guardianship?

**Custody** is the responsibility for the day-to-day care of the child.

**Guardianship** is the power to make important legal decisions on behalf of a child. If custody is not mentioned, then it is understood to be included in guardianship – but the two concepts are sometimes separated.

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***Parents who are married are joint custodians and equal guardians of their children.***

The parents cannot change this on their own, even if they are in agreement. It remains the rule until there is a divorce order from the court, or some other court order which makes a different arrangement.

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## Which parent has responsibility for decisions about a child's day-to-day care?

Parents who are married are joint custodians of the children they have together. Joint custody means that they should come to agreement on day-to-day decisions. Neither parent has more power than the other in respect of these decisions in the eyes of the law.



## **Which parent has responsibility for legal decisions about a child?**

Parents who are married are equal guardians of the children they have together. Equal guardianship means that both parents have equal rights to make legal decisions about their children. Either parent can act alone.

But decisions must be made jointly in certain situations:

- consenting to the marriage of a child
- giving up a child for adoption
- taking a child out of Namibia, or allowing someone else to do so
- adding a child to the parent's passport (although most countries, including Namibia, require children to travel on their own passports)
- selling or borrowing against land belonging to a child.

The High Court can overrule a parent who is unreasonably refusing consent, if this would be in the child's best interests.

## **What if a parent is abusing a child, or acting in a way that is not in the child's best interests?**

The High Court can give one parent sole custody and/or sole guardianship of a child during the marriage or at the time of a divorce. If the parents are separated or already divorced, the children's court (which is a magistrate's court) can make such an order.

## **If children live with a grandparent or some other relative, who is the custodian?**

Parents who are married remain joint custodians until a court rules otherwise. Parents can *delegate* responsibility for the daily care of their children to someone else, but this does not change the legal powers and duties of custody. This means that the parents can change their minds at any time and take the children back if they wish. Delegating responsibility for the daily care of a child does not change the duty of both parents to contribute to the child's maintenance and to make sure that the child receives proper care.

## **What happens to a child if one parent dies?**

When a child's parents are married and one parent dies, the surviving parent is the child's custodian and guardian unless there is a court order which says something different.

## **What happens to a child if both parents die?**

Parents should name a guardian for their children in their wills in case they die. This person does not have to be a relative. The person with guardianship will automatically become the custodian of the child as well, unless the will names a separate custodian.

If both parents die without naming a guardian, anyone acting in the child's best interests can apply to a children's court (which is a magistrate's court) to appoint a guardian for the child. In these circumstances, preference is usually given to close family members or an existing primary caregiver.

## **What if the couple getting married already have a child together?**

If a child is born outside marriage and the parents then marry each other, the child is treated as though the parents were married at the time of the child's birth. That child has exactly the same rights as a child born to the couple after the marriage takes place.

## **What if the husband or the wife already has a child with another partner?**

A person has no legal liability to maintain a step-child and no legal rights of custody or guardianship over the step-child unless there is a formal adoption.

Both biological parents of a child continue to have a duty to maintain the child. This duty is not affected by the marriage of one of the parents to someone else. It ends only if the other parent agrees to allow the step-parent to adopt the child.

Step-children can be at a particular risk of abuse and mistreatment by step-parents. This is an issue that couples should discuss before the marriage takes place. It can be very emotionally damaging for a child if all the children in the household are not treated equally.

## Summary of Parental Rights and Duties

**Married parents:** Parents who are married are joint custodians and equal guardians of their children. If they divorce, the divorce order will decide on custody, guardianship and access. If one of them dies, the surviving parent automatically becomes the child's sole custodian and guardian.

**Unmarried parents:** Parents who were never married can agree on which parent will be the custodian. The parent with custody is also the guardian. If the parents cannot agree on who should take responsibility for the care of the child, they can ask the children's court (which is a magistrate's court) to decide. If they do not make any agreement and they do not approach the court, the mother will be the default custodian and guardian. The parent without custody has an automatic right of access to the child – which can be limited or removed by the children's court if this is necessary to protect the child.

The parent with custody and guardianship can name another person to be the child's custodian and guardian in a will. If there is no will, then anyone who wants to take responsibility for the care of the child must apply to the children's court to be named as the guardian – even the child's surviving parent.

**Both parents *always* have a duty to contribute to a child's maintenance in light of their respective financial positions. This is true regardless of whether the parents are unmarried, married or divorced.**

# MAINTENANCE

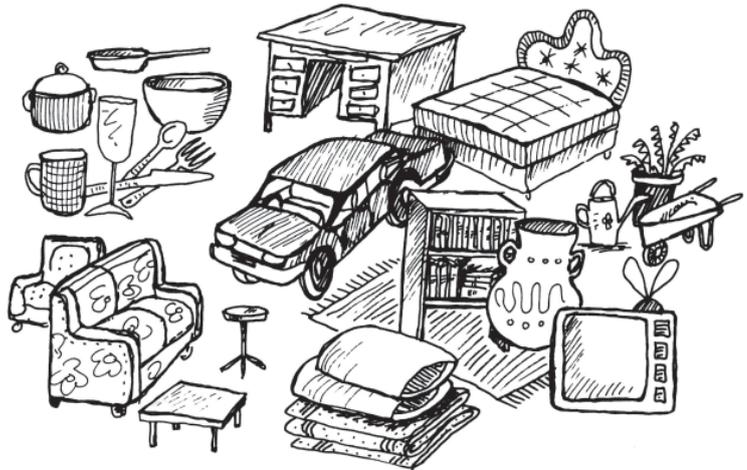
## What is maintenance?

Maintenance is goods or money that a person has a legal duty to provide for the support of his or her dependants.



## Do spouses have a duty to maintain each other?

Yes. When two people marry they have a legal obligation to be the primary source of support for each other. A marriage is a partnership. One partner may earn more than the other, particularly where one partner takes primary responsibility for child-care. But both partners are still contributing to the marriage. Husbands and wives always have a duty to support each other financially.



Husbands and wives always have a duty to support each other financially.

## If a couple is married out of community of property, does the mutual duty of support still apply?

Yes. A married couple have a mutual duty of support regardless of what marital property regime applies to the marriage. This duty cannot be changed, not even by agreement.

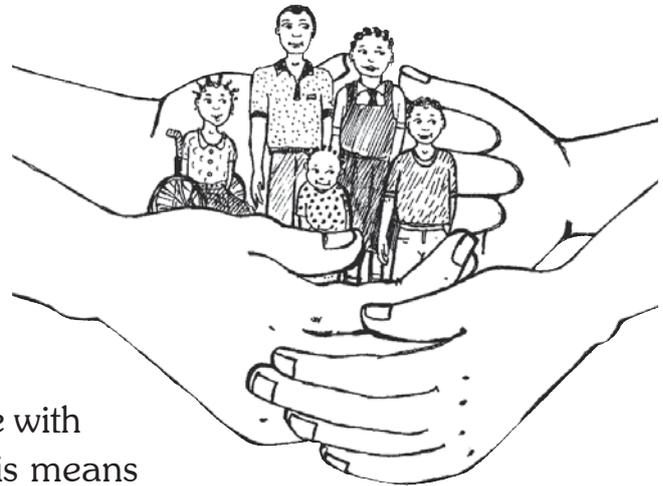
*“Children shall have ... as far as possible the right to know and be cared for by their parents.”*

– Namibian Constitution, Article 15(1)

## **Does the mutual duty to support the other spouse apply if the spouses separate but do not divorce?**

Yes. The duty applies as long as the marriage exists. (After a divorce, the duty to maintain an ex-husband or ex-wife continues only if the divorce order includes a provision on spousal maintenance.)

## **Do both spouses have a duty to maintain the children they have together?**



Yes. Both parents have a legal duty to maintain their children, in accordance with their respective financial positions. This means reasonable support to provide the children with basic necessities and includes money for food, accommodation, clothing, medical care and education. This duty applies before marriage, during marriage, and after separation or divorce.

## **Can one spouse get a maintenance order against the other spouse during the marriage?**

Yes. It is possible to get a maintenance order covering spousal maintenance or child maintenance or both, if the other spouse is not fulfilling his or her legal duty to contribute a fair share. A spouse can apply for a maintenance order at a maintenance court (which is a magistrate’s court). There is no need for a lawyer, and there is no charge.

## **Is there a duty to maintain a child a spouse had with another partner before the marriage?**

No. The duty of maintenance applies to biological and adoptive parents. There is no legal duty to maintain step-children.

## **How long does the duty to maintain a child continue?**

A maintenance order for a child ends when the child is in a position to be self-supporting. This will usually be when the child reaches age 18. The maintenance order might be extended to age 21 if the child is attending an educational institution and engaged in a course of study that will enable the child to become self-supporting. It may be extended indefinitely in special circumstances, such as where a child is disabled and unable to be self-supporting.

## **Does the duty to pay maintenance end if a child is being cared for by grandparents or some other relative or friend?**

The grandparents (or anyone else who is caring for a child) may request maintenance from one or both parents. It is the responsibility of the parents to pay maintenance for a child, no matter where that child is living. If either parent is not contributing a fair share for maintenance for a child, the grandparents (or other caretakers) could go to the maintenance court to seek a maintenance order.

# CONFLICT IN MARRIAGE: DOMESTIC VIOLENCE AND RAPE

## What is domestic violence?

Domestic violence is violent behaviour that takes place within a family, a marriage or a close relationship. Domestic violence can be physical, sexual, emotional or economic. Intimidation, harassment, trespass and threats can also be domestic violence.

## Is it domestic violence if a couple argue and say insulting things to each other?

No, trivial arguments and occasional insults are not domestic violence. Domestic violence is behaviour which causes real physical, financial, psychological or economic harm.

*I do not understand the definition of “domestic violence”. I thought it always involved doing physical harm to another person, but this definition includes things like economic abuse and emotional abuse.*



*The definition looks at all the ways that people use to hurt and control others. When you think about it that way, you can see that there are many different forms of violence, and not all of them are physical attacks.*

## What can a spouse do if he or she is suffering domestic violence?

A husband or a wife can apply for a protection order at a magistrate’s court. There is no need for a lawyer, and there is no charge. An interim protection order can be granted very quickly, usually within 24 hours. The interim protection order will remain in place for a short time period (usually one month), until the magistrate hears both sides of the story at an informal enquiry. A final protection order will normally remain in place for six months to three years, depending on the provisions it contains.

## How can a protection order help?

A protection order will demand that a spouse stops committing domestic violence. It may order the abusive spouse to leave the joint residence and to stay away from the family. Depending on the situation, it may order that the abusive spouse should provide alternative housing for the vulnerable spouse. It can also include orders about the use of household contents and other property, as well as temporary maintenance orders. If a child is at risk of harm, it can include a temporary custody order.

## If a couple is married *in community of property*, how can one spouse be asked to leave the joint household?

The abusive spouse can only be ordered to leave the matrimonial home if there has been physical violence. If physical abuse has taken place, it does not matter who owns the home or whose name is on the lease if it is a rental property. It does not matter what marital property regime applies.

Physical violence is a serious offence. The wrong of committing violence outweighs the right to remain in the matrimonial home.

It is possible for a court to order the other spouse to leave the matrimonial home *only* if physical violence has taken place. Other forms of domestic violence do not provide a basis for such an order.

A court must take into consideration the situation of any children and other people in the household before making an order that a spouse must leave the matrimonial home.

Alternatively, the court might order the abusive spouse to provide other suitable accommodation for the abused spouse. Physical violence is not a requirement for this order – it is available if the court thinks it will be appropriate, no matter what form of domestic violence took place.



I would like to leave, but I am afraid that he will hurt me or the children. And I have no job – how will we eat?

You can ask the court for a protection order that includes a temporary maintenance order. Then, when you feel safer, you can go to the maintenance court.

## If one spouse is ordered to leave the matrimonial home for a specified time period, what happens to the household contents?

The protection order may specify that the abused spouse is given possession of certain items, such as household furniture, livestock or a motor vehicle. It will depend on the situation. The protection order might also say that the abusive spouse is not allowed to sell, damage or dispose of any joint property.

***Protection orders are temporary.  
They do not affect ownership of any property.***

An interim protection order is a very short-term order (usually for only one month). A final protection order can remain in place for a longer time period (typically six months to three years), but it is also only a temporary order. No protection order has any effect on the ownership of any property. The purpose of a protection order is to protect the vulnerable spouse and any children at risk of harm while the couple finds a permanent solution – which may involve marriage counselling, treatment for alcohol or drug abuse or a divorce.

## Marriage is a private affair. Is it wrong for couples to seek outside help for marital problems?

No. Not everything about a marriage is private. Marriage must be entered into in front of witnesses, and the ceremony is usually attended by the family and friends of both husband and wife. This symbolises the fact that the marriage affects those other people. What happens in a marriage can affect the entire community. Domestic violence has a cost to the community from loss of productivity at work and increased demands on health services. Children who grow up in a violent environment are more likely to use violence in society.



## Should a spouse accept domestic violence for the sake of the children, so that they can grow up in a two-parent family?

No. Allowing a violent situation to continue puts the abused spouse and the children at serious risk. Domestic violence typically escalates over time, and there have been many cases in Namibia where an abusive partner eventually kills the other partner.

Children are also at risk of direct abuse in a violent home. And even if they are not directly abused, exposure to violence between their parents can lead to emotional and behavioural problems, or teach the children that violence is acceptable.



## Is domestic violence a crime?

Many forms of domestic violence abuse are criminal offences – such as rape, assault or attempted murder. There is no restriction on reporting a crime against a spouse. The abused spouse can ask the police to arrest the abusive spouse or to give the abusive spouse a formal warning. It is possible to report a crime to the police and to approach the magistrate's court for a protection order at the same time. It may be useful to do both, to provide extra protection of the abuser is arrested and released on bail.

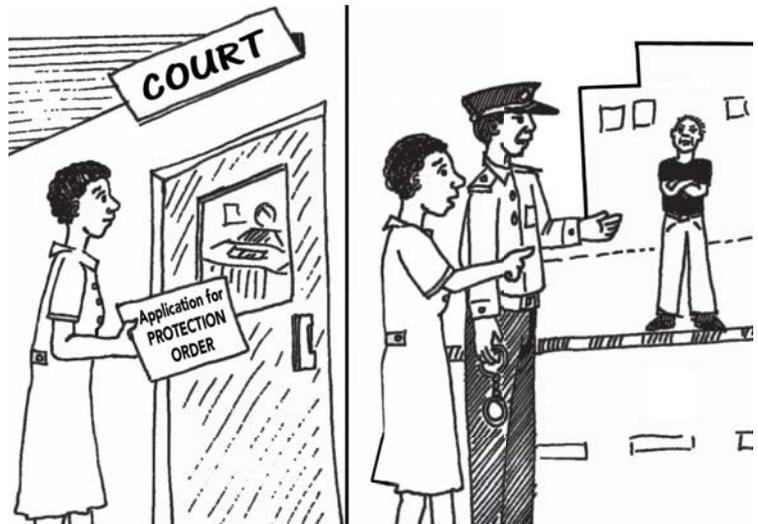
A spouse cannot be forced to testify in court against the other spouse. But a spouse can voluntarily testify in a case where the other spouse has committed a violent offence against him or her, or against the child of either spouse.

## Is it possible for a husband to be charged with raping his wife?

Yes. A spouse has the right to say 'no' to sex at any time. If a husband or wife forces his or her partner to have sex without consent, it is rape. A rape should be reported to the Gender-Based Violence Protection Unit if there is one in the area. (These were previously known as Woman and Child Protection Units.) A rape can also be reported to the nearest police station.

## How can the abused spouse's safety be protected if an abusive spouse gets out on bail?

If the spouse who was beaten or raped is afraid for his or her safety, that spouse should tell the police. Then the court can take this into consideration when it is making a decision on bail. If the abusive spouse makes threats while out on bail, this is grounds for cancelling bail and keeping that spouse in custody until the trial takes place. The abused spouse can also get a protection order which says that the abusive spouse is not allowed to return to the matrimonial home or have contact with the abused spouse while on bail.



### The Dangers of Trying to Save a Marriage

If you are counselling a couple whose marriage is in trouble, it is risky to pressure them to save the marriage at all costs. Remember that escalating violence may put a spouse or the children in the home at risk.

If the couple decide to try and make the marriage work, you may want to involve a social worker to help monitor the situation.

The period when a marriage is breaking down can be a particularly dangerous time. Make sure that the spouses know what the law says about domestic violence, and what to do if there is violence or a threat of violence.

# DIVORCE

## What are the grounds for divorce?

It is possible to ask for a divorce if the other spouse:

- has committed adultery
- is responsible for malicious desertion
- has been imprisoned for at least five years and declared to be an habitual criminal
- is suffering from incurable insanity that has lasted for at least seven years.

## What is malicious desertion?

There are four kinds of malicious desertion:

- (1) Actual 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 effectively forces the other spouse to leave - for example by making life dangerous or unbearable for him or her through alcohol abuse, domestic violence or even a complete lack of love and affection.
- (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 for a criminal offence is sometimes referred to as a form of malicious desertion.

## Who will get custody of the children if there is a divorce?

Custody is the question of which parent the children will live with. Either parent can get custody. The other parent will normally have access. This means that the other parent is allowed to spend time with the child – such as visits on weekends and holidays. The test will be the best interests of the child.

Sometimes the court will order joint custody, where the children move back and forth between the parents' houses – but only in situations where the parents are able to cooperate with each other. Joint custody is allowed only in exceptional cases where the court is convinced that the parents can really work together.

## **How can the economically-weaker spouse support himself or herself and the children after a divorce?**

### **1) Child maintenance**

The spouse who gets custody of the children can ask the other spouse to contribute to the children's maintenance. The reasons for the divorce are not relevant to child maintenance.

Should circumstances change after the divorce, either spouse can approach the maintenance court to request that the amount of child maintenance stated in the divorce order be increased or decreased. Even if the divorce order does not cover child maintenance, a divorced spouse can approach the court for a maintenance order for children of the marriage. The parental duty to maintain a child continues until the child is in a position to be self-supporting.

## **POSSIBLE LAW REFORMS ON DIVORCE**

Namibian divorce law is very outdated. A possible law reform which is under discussion in government would allow divorce on the grounds that the marriage has broken down irretrievably (in other words, broken down beyond repair). It could be the case that the husband and wife simply don't love each other anymore, or that they have realised that the marriage was a mistake.

Some may worry that such a system would make divorce too easy – but no marriage can work unless both partners remain committed to it. Forcing spouses to remain married can increase the risk of domestic violence. It may also encourage people to live apart without getting divorced, which can create confusion about responsibility for the children or the division of the marital property. It has also been suggested that making it hard for couples to divorce is a violation of the constitutional right of freedom of association – which includes the right NOT to associate with a particular person.

## 2) Spousal maintenance

The economically weaker spouse can also ask for spousal maintenance. The court will often consider this in cases where one spouse was not working, or was earning less, because of looking after the children or the home.

The court may order the “guilty spouse” to pay maintenance to the “innocent spouse” for a specified period, or until the “innocent spouse” dies or remarries. The parties can also agree on the issue of spousal maintenance, regardless of the grounds for divorce and have this agreement made into a court order.

However, it is not possible to get an order for spousal maintenance after the divorce if the divorce order did not include it. (Sometimes one divorcing spouse will request a very small amount of spousal maintenance, just to keep the door open for such maintenance if circumstances change later on.)

## What court decides divorce cases?

A divorce case must be brought before the High Court.

## How much does a divorce cost?

It is almost impossible to get a divorce without the help of a lawyer. The typical cost of an unopposed divorce with the assistance of legal practitioners is between N\$5 000 and N\$10 000. If the parties cannot agree on issues like the division of property, child custody or maintenance, the cost can be much higher.

It is sometimes possible to get help with a divorce from government legal aid if there has been domestic violence in the marriage. The government will apply a means test to determine eligibility for legal aid.

*Getting a divorce can be expensive. But it is important to have a divorce order to clarify who has responsibility for the children and how the property will be divided. Even if you live apart for many years, you are still married in the eyes of the law. A marriage ends only when the court issues a divorce order or when one spouse dies.*



## If the couple is married **OUT** of community of property, what happens to the property in the case of a divorce?

Each spouse will keep their own property.



## If the couple is married **IN** community of property, what happens to the property in the case of a divorce?

The joint estate will normally be divided equally between the spouses. If one spouse engaged in financial transactions without the other spouse's consent and there was a loss to the joint estate, the division may be adjusted to compensate the wronged spouse for his or her share of the loss. If the only asset of value is property such as a house or a car, it may have to be sold so that the proceeds can be divided between the divorcing spouses. The spouses will often reach an agreement about how to divide up the property.



In divorce cases based on adultery or malicious desertion, the “innocent spouse” may request a court order saying that the “guilty spouse” must forfeit any financial benefits from a marriage in community of property. 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. Forfeiture of benefits will be granted only where the “innocent spouse” has contributed more to the joint estate than the “guilty spouse” – but the court may take into account the value of services such as child-rearing or taking care of the house.

# 10

## INHERITANCE

### What are the rules on inheritance?

**If the deceased spouse had no will**, then the deceased spouse's property will be divided between the surviving spouse and the deceased's children – including any children born outside of the marriage with another partner. If there are many children, it is possible that major assets like the matrimonial home may have to be sold off so that their value can be divided amongst all the heirs.

If the marriage was *in* community of property, the surviving spouse's share of the joint estate will be taken into account when the property is being divided between the spouse and the children.

If the children are under the age of majority, their share will be held in the State Guardian's Fund and allocated to them as needed for their living expenses and education.

**If the deceased spouse had a written will**, then the deceased spouse's property will go to the heirs named in the will. If the marriage was *in* community of property, the joint estate must first be divided. The deceased spouse's will applies only to his or her half of the joint estate.

Many people make wills leaving everything to their surviving spouse, but there is no legal duty to do this; the will can name anyone as an heir.

Making a will can prevent the surviving spouse from having to sell off the matrimonial home or other major assets, because the will can leave all the assets to the surviving spouse or to a particular child instead of spreading them more widely.

If there is a will, children under the age of majority can inherit without involving the State Guardian's Fund. Their money and property will be administered by their guardian.

IT IS IMPORTANT TO WRITE A WILL. A will enables a couple to decide what will happen to their property, and who will care for their children if they die while the children are still minors. A written will can also help prevent family arguments and property-grabbing.

## Who will be the children's guardian?

If one spouse dies, the surviving spouse will be the guardian of any children of the marriage who are still minors. Wills usually name a guardian for minor children in the event that there is no surviving spouse. If there is no will, or if the will does not name a guardian for this situation, interested persons can apply to the children's court (which is a magistrate's court) to be named as the children's guardian.

## How does a person make a will?

Anyone who is age 16 or older can make a written will. Many people use a lawyer or a bank to help with the will. However, anyone can write a will by themselves. The person making the will, and two witnesses who will not inherit anything under the will, must sign the will *in full* on every page. It is important to keep the original signed copy somewhere safe, and to tell someone else where to find it.

## Who manages the estate when a spouse dies?

Wills usually name someone to act as the "executor" of the property of the deceased. Spouses sometimes name each other, or some other family member or friend, as their executor. (It is acceptable for the executor who is named in the will to also be one of the heirs.) If there is no will, an executor will be appointed by a magistrate or by the Master of the High Court (depending on the total value of the money and property in the estate).

The executor manages the estate. He or she will collect all the assets, pay any outstanding bills and loans, and distribute the remaining property to the heirs. If there are complicated financial issues to sort out, the executor can get help from a professional such as lawyer, a banker or an accountant. The process is supervised by a magistrate or by the Master of the High Court.

## How is the joint estate divided if the couple were married in community of property?

Half the value of the joint estate belongs to the surviving spouse. If one spouse engaged in financial transactions without the other spouse's consent and there was a loss to the joint estate, the division of the joint estate may be adjusted to compensate the wronged spouse for his or her share of the loss. The deceased's share will then go to the heirs named in the deceased's will or to the heirs set by law for people who die without leaving a will.

## Who can claim maintenance from the estate of a deceased spouse?

Children who are under the age of majority can claim maintenance from the estate of a deceased mother or father if they do not have adequate means to support themselves from other sources. Creditors (people who were owed money by the deceased) must be paid first. Claims for maintenance will be considered next, before any money or property can go to the deceased's heirs.

Children of the deceased can claim maintenance from the estate even if there was no maintenance order in place before the parent died.

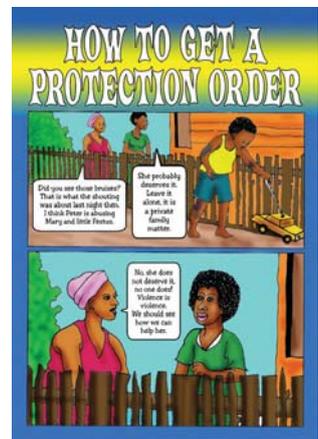
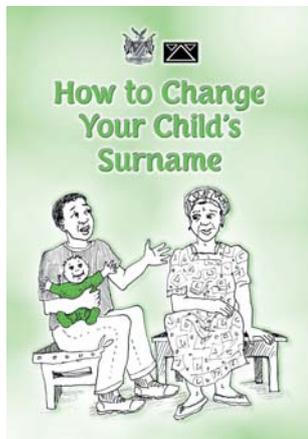
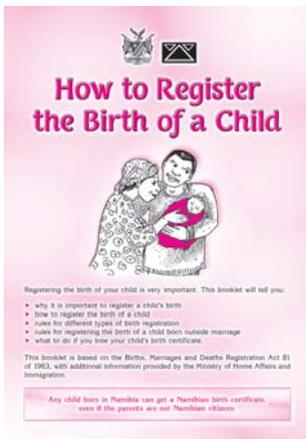
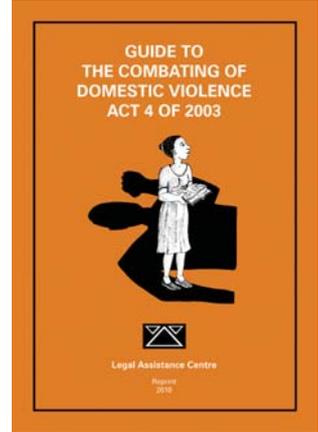
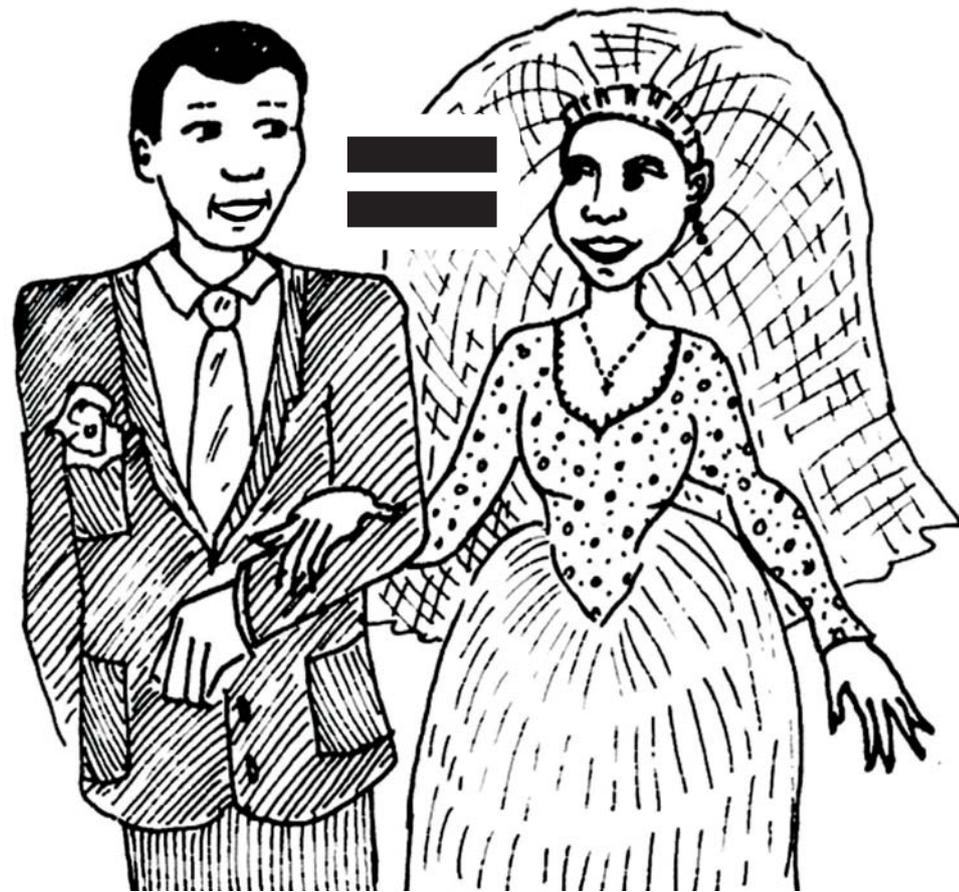
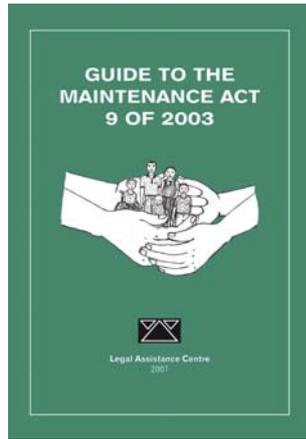
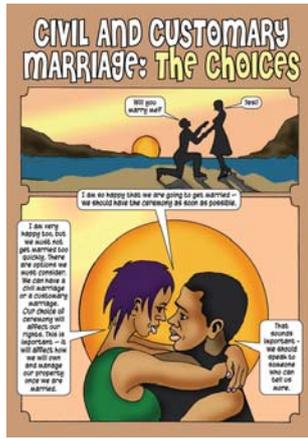
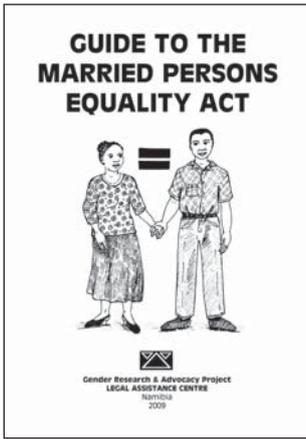
Elderly parents who cannot maintain themselves would probably have the same right to claim maintenance from the estates of any of their adult children who were deceased, although this is not common in practice.

Divorced spouses can claim maintenance from the estate of their deceased husband or wife IF they have a divorce order that provides for maintenance for them.

Spouses who were still married at the time of death do NOT have a right to claim maintenance from the estate.

### POSSIBLE LAW REFORMS ON INHERITANCE

Changes to the law on inheritance are under discussion by government. One possible change might be to allow all dependants of the deceased, whether children or adults, to seek maintenance from the deceased's estate before anyone inherits. This would probably be the case regardless of whether there is a will. Another possible change would be to add more protections against property-grabbing.



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