



LEGAL ASSISTANCE CENTRE
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INFORMATION ABOUT NAMIBIA'S LAW ON ...

MARITAL PROPERTY

When people enter into a marriage, this has an effect on their property. In Namibia there are two common marital property regimes which apply to civil marriages: “in community of property: and “out of community of property”.

“In community of property” means that all assets and debts are combined into a joint estate which is managed by both spouses acting together during the marriage and divided in half when the marriage ends by death or divorce.

“Out of community of property” means that everything is kept separate. Each spouse controls his or her own assets and debts, and nothing is shared with the marriage ends.

Couples can make other property arrangements if they wish, but the process is a bit more complicated. For example, some couples make an agreement before marriage to get the “accrual system”. In this system, the spouses’ property stays separate during the marriage, but gains in value to the property of either spouse are shared equally when the marriage ends. In other words, it works like “out of community of property” during the marriage, but with profit-sharing at the end.

For most people in Namibia, the default matrimonial property regime for civil marriages is “in community of property. This is the marital property regime that applies if the couple does not take any steps before the marriage to choose a different system.

But an old apartheid-era law called the Native Administration Proclamation 15 of 1928 makes “out of community of property the default matrimonial property regime for civil marriages between “Natives” north of the old “Police Zone”. So this law creates a different default for black couples in certain parts of Namibia.

Historical evidence suggests that the reasoning behind this law was a concern that “native” men who entered into civil marriages in these areas were likely to be parties to a customary union at the same time. The theory was that, if the civil marriage was out of community of property, this kept the husband’s property separate so that some of it could go to the customary wife or wives.

The northern border of the “Police Zone” is similar to the “Red Line”, which is a veterinary control fence aimed at preventing the spread of foot and mouth disease southwards. So civil marriages which take place north of the old “Police Zone” are sometimes referred to as “Red Line marriages”.

All civil marriages between “natives” north of the old “Police Zone” on or after 1 August 1950 are automatically “out of community of property”, *unless* a declaration was signed before a Magistrate within one month *before* the marriage took place.

All other civil marriages in Namibia are automatically “in community of property”, *unless* the couple signed an ante-nuptial contract *before* the marriage took place.

These different systems have caused confusion. Some people have ended up with a marital property regime that is not what they intended. Some people are not sure what property regime actually applies to their marriage. Some people did not make the required declaration but have a property system indicated on their marriage certificate – but because this is not the proper procedure, it is not effective for all purposes.

The rules in the Native Administration Proclamation are almost certainly unconstitutional because they apply different rules to different people on the basis of race. However, Article 140 of the Namibian Constitution says that all laws in force at Independence remain in force until they are repealed or amended by Act of Parliament, or until they are declared unconstitutional by a competent Court.

Neither of these things has happened in this case. This is how a law with race-based provisions and an offensive name can remain in force so many years after Independence.

The Law Reform and Development Commission is working on a new law which will provide the same rules on marital property in civil marriages for everyone in Namibia. This law will also provide procedures to assist people who were affected by the discriminatory law.

The Native Administration Proclamation is one of the few overtly racist laws remaining in force in independent Namibia, and hopefully it will soon be gone.