

DIVORCE LAW REFORM

A SUMMARY OF THE LAW REFORM AND DEVELOPMENT COMMISSION PROPOSALS



Legal Assistance Centre
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This is a summary of a bill proposed by the Law Reform and Development Commission (LRDC). The Legal Assistance Centre was represented on the LRDC subcommittee that worked on this bill, and we support its general principles.

The bill deals only with civil marriages. Customary marriages are dealt with in different laws.

This summary will help you understand the law reform that is being proposed. Your feedback is important. Laws are made to serve the people of Namibia.

You can state your opinion directly to the Ministry of Justice, or the MPs who represent you in Parliament. The Legal Assistance Centre will also collect feedback from different parts of the country and pass it on to the government.

Terminology

“Civil marriage” is a marriage which takes place in a church or in front of a magistrate. It is different from “customary marriage” which takes place under the customs of the community.

“In community of property” means that all the property of the husband and the wife are put together into what is called a “joint estate”.

Everything that belonged to the husband before the marriage and everything that belonged to the wife before the marriage become part of the joint estate. Any money earned by either of them during the marriage becomes part of the joint estate. Everything they buy during the marriage also goes into the joint estate, no matter who actually paid for the thing.

The money and property in the joint estate can be used to pay loans or debts, no matter which spouse is responsible for them.

The husband and the wife each own half of everything in the joint estate. They are required by the Married Person Equality Act to consult each other on major transactions which affect the joint estate.

If the marriage comes to an end, the joint estate is divided equally between husband and wife.

“Out of community of property” means that the husband and the wife each have their separate property.

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 only, and everything the wife buys during the marriage is hers only.

The husband and the wife are each responsible for their own loans and debts.

During the marriage, both husband and wife are free to deal with their own separate property in any way they wish. They are not required to consult each other about the use of separate property.

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

“Spouse” is a gender-neutral word that means either a husband or a wife.

OVERVIEW

What is the current law on divorce?

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

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

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

Overview of proposed law reform

The proposed bill would change the fault-based system of divorce. The new basis for divorce would be that the marriage itself has broken down beyond repair. This is called “irretrievable breakdown”.

The new law would give the court stronger powers to divide the property of the marriage, even if this meant not following the marital property regime strictly. For example, even if a couple agreed to a marriage which was out of community of property, the court would not allow this to operate in a way that was really unfair to either spouse.

The court would also have new powers to make sure that the arrangements made for the children of the marriage will protect the best interests of the child.

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

GROUNDINGS FOR DIVORCE

How “irretrievable breakdown” can help reduce conflict between divorcing spouses

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

The proposed law will fit better with real life. In cases where both spouses want the divorce, they can make a joint application for the divorce. Or it may be that one spouse makes the divorce application, and the other spouse then agrees that the marriage is over. In either of these cases, the couple does not have to give the court any information about why the marriage has failed.

Under the proposed law, if both spouses agree that the marriage has broken down beyond repair, then the reasons for the breakdown become irrelevant in the court process. Neither spouse has to explain why the marriage has fallen apart – it is enough for them to agree that the marriage can no longer work.

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

What if one spouse wants a divorce and the other spouse wants to save the marriage?

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

The thinking behind this approach is that the law cannot force a marriage to work. If one of the spouses is totally against remaining married, then the marriage cannot work in practice. Forcing the couple to stay married in such a situation is a recipe for continued unhappiness, and may lead to problems such

as extramarital affairs or domestic violence. Such a marriage would be nothing but a dead shell.

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

QUESTION FOR DISCUSSION:

*** Do you support the move away from “fault” to an emphasis on whether or not the marriage has broken down beyond repair?**

Would there be any other grounds for divorce?

In addition to “irretrievable breakdown”, there would be one other acceptable reason for divorce – the serious mental illness or continued unconsciousness of one spouse (after one year of unconsciousness without hope of recovery). There would be special provisions in the law to protect the ill spouse in these circumstances.

AGREEMENTS IN DIVORCE CASES

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

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

If the husband and wife cannot reach agreement on these issues, then the court will decide.

DIVISION OF PROPERTY

How will property be divided when the marriage ends?

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

- **The property regime of the marriage – such as whether it is in community of property or out of community of property.** The court will also look at any agreement which the parties made before they got married. But this will not be the only factor. The court has the power to make adjustments if following the property regime or the antenuptial agreement strictly would have unfair results.
- **How long the couple has been married.**
- **How long the couple has been separated.**
- **The contributions made by each spouse to the family** -- not just financial contributions but also time spent looking after the home, caring for children and doing other domestic duties.
- **Whether either spouse wasted or misused joint money or property.**
- **The total financial position of each spouse at the time of the divorce** – including their income, their ability to earn income, the property they each own and their financial responsibilities.
- **Which parent is going to have custody of the children** – and whether or not this parent should be given the family home, or the right to live in the family home for a while, to avoid disruption to the children.
- **The financial benefits** -- such as medical aid, pension and life insurance policy benefits -- which either spouse may lose as a result of a divorce.
- **Anything else which seems relevant.**

But the court will NOT consider who is at fault for the breakdown of the marriage when deciding how to divide the property. The proposed law will try to reduce conflict between divorcing spouses. And even marriage counsellors cannot always decide who is to blame when a marriage breaks down – courts are certainly not in a good position to decide such questions. The court will look

at financial issues when deciding how to divide the property; it will not look at emotional issues.

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

Why should the court have the power to change the property arrangements the spouses agreed to before they got married?

The Law Reform & Development Commission has given three reasons for proposing this policy:

- **It is wrong to treat a marriage as a business transaction**, when it is actually a life-long relationship between two adults who are expected to support each other and provide for their children's development, for the good of the entire community.
- **The partners who are about to be married are not always in an equal bargaining position when they are making decisions on property arrangements.** The economically stronger person may have used this strength unfairly to protect himself or herself against the consequences of a future divorce.
- **People who enter into a marriage often do not really understand the various marital property regimes and their consequences.** They may have agreed to things that they did not really intend.

QUESTION FOR DISCUSSION:

*** Do you agree that the court should be empowered to make sure that the division of property is fair, even if this means departing from the property arrangements agreed to by the spouses when they first got married?**

CUSTODY & ACCESS TO CHILDREN

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

If the spouses cannot agree on arrangements for the children, then the court will decide.

Who will get custody?

The court will consider 3 main factors in deciding on custody:

- which parent has been the child's primary caretaker
- the child's wishes (if the child is mature enough to express an opinion)
- the need to protect the child against domestic violence.

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

How will the court decide which parents has been the primary caretaker before the divorce? It will look at which parent takes care of

- meals
- bathing and dressing
- purchasing, cleaning and taking care of clothes
- medical care, including nursing a sick child and taking the child to the doctor
- arranging and monitoring the child's social activities
- arranging alternative care when necessary
- putting the child to bed at night, attending to the child in the middle of the night and waking the child in the morning
- disciplining the child
- educating the child in the religious, cultural and social spheres
- teaching the child elementary skills
- any other care taking activity.

The parent who is involved with most of these activities is likely to be in the best position to take care of the child on a daily basis.

But the question of who is the primary caretaker will not be considered on its own. The court will also take into account the child's wishes, in light of the child's age and level of understanding. And a parent who has been violent towards the child or the other parent or any other family member would almost never get custody – unless this was clearly in the best interests of the child.

Will it be possible for divorced parents to have joint custody?

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

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

The court will consider joint custody if the following factors apply:

- Both parents are fit to care for the child.
- Both parents really want to have continuous contact with the child.
- The child feels secure with both parents.
- Both parents are able to communicate and co-operate with each other to promote the child's best interests.
- The parents do not live so far apart as to make joint custody a burden for the children.

A history of domestic violence on the part of either parent will be a very strong argument AGAINST joint custody.

If the court decides to give the parents joint custody, either of them can come back to the court later to request a new arrangement if joint custody is not working out.

Will the parent without custody have access to the child?

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

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

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

QUESTION FOR DISCUSSION:

*** Do you support the new gender-neutral approach of giving preference for custody to the child's primary caretaker , regardless of whether this is the mother or the father?**

MAINTENANCE

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

Child maintenance

In deciding on maintenance for children, the court will consider

- the financial position of both parents
- the needs of the children
- the additional financial burden which always falls on the custodial parent.

As in the past, maintenance orders which are made in divorce cases can be enforced or changed at maintenance courts.

Maintenance for the ex-wife or the ex-husband

This kind of maintenance is not always given. It is intended to help an ex-spouse who is financially weaker to get on his or her feet, in light of the sacrifices that he or she might have made during marriage. For example, perhaps one spouse stayed at home to look after the children while the other spouse went out to work – the working spouse might be expected to provide maintenance for the spouse who has been at home.

The court will consider the following things:

- **The length of the marriage and the age of the spouses.**
- **The couple's standard of living before the divorce.**

- **The financial position of each spouse at the time of the divorce --** including their incomes, their ability to earn money, their assets and their financial obligations.
- **Whether either spouse has made career sacrifices because of time spent caring for the household or children.**
- **Whether either spouse has given up or postponed education, training, employment or career opportunities because of the marriage.**
- **The contributions made by the spouse who wants maintenance to the education, training, employment, career or career potential of the other spouse.** For example, suppose that the wife worked to support her husband while he got a law degree. This would be a factor in favour of maintenance for her when the marriage ends.
- **Which parent is to have custody of the children,** which may mean career sacrifices or unanticipated expenses.
- **Any economic hardship likely to result from the breakdown of the marriage.**
- **The goal of promoting the economic self-sufficiency for each spouse within a reasonable time period.** One ex-spouse should not be permanently dependent on the other if it is possible for both of them to support themselves eventually.
- **Anything else which seems relevant.**

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

QUESTION FOR DISCUSSION:

*** Do you support the proposed factors for deciding on maintenance for the financially weaker ex-spouse? Is there anything else that should be considered?**

DIVORCE PROCEDURE

Which court?

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

The possibility of moving divorces to magistrates' courts was considered. There were two main arguments against this idea:

(1) At present, the magistrates' courts are already over-burdened. Giving them new responsibilities is likely to lead to further problems with over-work and delay.

(2) Divorce is a procedure which changes the status of the spouses. It can have a profound impact on their lives and the lives of their children. These kinds of matters are usually heard in higher-level courts which have more expertise with this kind of case.

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

(1) Because many divorces are decided without any real dispute between the couple, it is not always necessary to have the husband or the wife come to court in person. The proposed law would allow the court to make decisions in divorce cases on the basis of the statements which are put on paper about the divorce application and the arrangements for property, children and maintenance.

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

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

QUESTIONS FOR DISCUSSION:

- * **Which court do you think should deal with divorces, and why?**
- * **Do you agree that it is not always necessary for a divorcing couple to appear in person at court, especially in cases where no children are involved?**

Family Advisers

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

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

The court will always ask for an investigation and report by the Family Adviser in cases where --

- there is a proposal to separate brothers and sisters
- there is a proposal to place children in the custody of someone other than a parent
- the parents have requested joint custody
- either spouse has accused the other of child abuse.

In other cases, an investigation can be requested by either parent or by the judge. To avoid unnecessary delays, the Family Adviser will have a duty to report back to the court within one month of the request for the investigation.

PRIVACY

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

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

The new law would make it a crime to publish details about divorce cases. The only information that can be published is the names of the spouses, the fact that a divorce application is underway, and the fact that the divorce has been granted.

There would be exceptions to this rule for purposes such as research and law reports (where court cases which involve important legal questions are published for the guidance of other courts). It would also be possible for both spouses to give written permission for the publication of further details about their divorce – but permission from only one spouse would not be enough.

QUESTION FOR DISCUSSION:

*** Do you agree with the proposal to restrict the publication of details about divorces?**

ISSUES TO CONSIDER

Will the proposed new law encourage divorces by making it too easy for couples to get divorced?

No. The real success or failure of marriages is not determined by the legal framework.

Namibia has one of the lowest divorce rates in the world. The 1991 census statistics suggest that about one out of every 11 marriages in Namibia ends in divorce or separation. Marriages looked slightly *more* stable in the 2001 census, which suggests that only about one out of every 12.7 marriages ends in divorce or separation. These rates include both civil and customary marriage, and they combine informal separation and divorce. Yet the overall rate of marital breakdown has remained low, despite the fact that customary divorce is accomplished in most communities by a very simple procedure while informal separation is even easier. Clearly there are factors other than the law at work.

Many studies in other countries show that there is no clear and simple relationship between divorce law and the stability of marriages. Laws certainly have some effect on the way people think, feel and act -- but when it comes to family life, people tend to find some way to do what suits them. For example, divorce was completely illegal in the mostly Catholic country of Ireland until 1997. The government estimated that there were at that stage about 80 000 people who were separated from their spouses but still legally married. Similarly, in Italy, when divorce became legal in 1958, it was estimated that about 600 000 couples were still technically married even though the marriage had in reality

ended, and about 1 million men and women were living with someone other than their spouses even though they were still legally married.

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

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

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